IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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LLOYD Y. ASATO, Petitioner/Plaintiff-Appellee/Cross-Appellant,

vs.

PROCUREMENT POLICY BOARD, STATE OF HAWAIʻI, Respondent/Defendant-Appellant/Cross-Appellee.

SCAP-12-0000789

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CAAP-12-0000789; CV. NO. 11-1-0173)

FEBRUARY 14, 2014

DISSENTING OPINION BY RECKTENWALD, C.J.,
IN WHICH NAKAYAMA, J., JOINS

I respectfully dissent from the majority's conclusion that Lloyd Asato has standing to challenge the validity of Hawaiʻi Administrative Rule (HAR) § 3-122-66 as an "interested person" under Hawaiʻi Revised Statutes (HRS) § 91-7. For more than thirty years this court has applied the injury in fact test

to determine whether a plaintiff has standing to challenge an administrative rule under HRS § 91-7. See Life of the Land v. Land Use Comm'n of State of Haw., 63 Haw. 166, 623 P.2d 431 (1981); Richard v. Metcalf, 82 Hawaiʻi 249, 921 P.2d 169 (1996). The majority abandons this well settled precedent in favor of a rule which, in effect, grants standing under HRS § 91-7 to any person who is willing to bring suit. Because the legislature did not provide for such expansive standing under HRS § 91-7, I would hold that the injury in fact test does apply, and that Asato failed to demonstrate standing under this test.

I would further hold that Asato has not satisfied the requirements of taxpayer standing because he failed to demonstrate that the use of HAR § 3-122-66 increased either his personal taxes or those of taxpayers generally. See Iuli v. Fasi, 62 Haw. 180, 184, 613 P.2d 653, 656 (1980) ("The petition must allege loss in revenues resulting in an increase in plaintiff's tax burdens or to taxpayers in general."). Moreover, damage to Asato cannot be presumed because the facts of the instant case are distinguishable from the "special situation" presented in Federal Electric Corporation v. Fasi, 56 Haw. 57, 527 P.2d 1284 (1974).

Finally, I would hold that Asato has failed to demonstrate that he has standing under HRS § 632-1. Because Asato has failed to carry his burden of demonstrating standing, I

would vacate the August 15, 2012 final judgment of the Circuit Court of the First Circuit and remand the case with instructions to dismiss the case for lack of jurisdiction.

I. Introduction

Asato filed suit against the State of Hawaiʻi Procurement Policy Board (the Board) challenging HAR § 3-122-66. That rule provides guidance to the heads of purchasing agencies for when fewer than three qualified persons have been identified to be considered for professional services contracts with the state or a county government. See HAR § 3-122-66. The circuit court granted Asato summary judgment and denied the Board's cross-motion for summary judgment, holding that Asato had standing to maintain this action, and that HAR § 3-122-66 is invalid because it conflicts with HRS § 103D-304(g). The Board and Asato filed cross-appeals and this court granted discretionary transfer pursuant to HRS § 602-58(b).[1]

A. Circuit court proceedings

In his complaint, Asato asserted two alternative bases for standing. First, he alleged that he had standing "because he has been injured and will continue[] to be injured by the state and county governments' unlawful use of HAR § 3-122-66 as a perfunctory basis to award contracts for professional services in

[1] The circuit court denied Asato's request to declare as void every contract awarded pursuant to HAR § 3-122-66. This was the basis for Asato's cross-appeal.

violation of the 'minimum of three persons' requirement [in] HRS § 103D-304(g)." Asato alleged that contracts awarded pursuant to HAR § 3-122-66 violated the policies sought to be advanced by the legislature in adopting the Procurement Code, including "'[p]roviding increased economy in procurement activities and maximizing to the fullest extent practicable the purchasing value of public funds.'" (Alteration in original) (Quoting 1993 Haw. Special Sess. Laws Act 8, § 1 at 38). Asato attached to his complaint information relating to twenty-six contracts that were purportedly awarded with fewer than three persons being considered by the head of the purchasing agency, including what Asato described as the four "largest professional services contracts to date for the City and County of Honolulu, all of which [were] for the Honolulu High Capacity Transit Corridor, the rail project . . . totaling over $144 million."

Alternatively, Asato asserted that he had standing as a taxpayer under Iuli and Federal Electric Corporation. As discussed below, in Iuli this court set forth "specific requirements which must be met before standing to taxpayers is granted." 62 Haw. at 184, 613 P.2d at 656. As relevant here, the Iuli court concluded that an individual "must allege loss in revenues resulting in an increase in plaintiff's tax burdens or to taxpayers in general." Id. The Iuli court also noted the special situation presented in Federal Electric where

"deleterious consequences to taxpayers" could be presumed because the bidding procedures used were patently improper and defective. Id. at 186, 613 P.2d at 657.

Asato and the Board then filed cross-motions for summary judgment. In his motion, Asato maintained that he had standing as an "interested person" under HRS § 91-7 "to bring a declaratory judgment action to challenge the validity of any agency rule." Asato asserted that the purpose of a declaratory judgment proceeding is to "'remove uncertainty from legal relations and clarify, quiet, and stabilize them before irretrievable acts have been undertaken, to enable an issue of questioned status or fact, on which a whole complex of rights may depend, to be expeditiously determined[.]'" (Quoting Citizens Against Reckless Dev. v. Zoning Bd. of Appeals of City & County of Honolulu, 114 Hawaiʻi 184, 196 n.13, 159 P.3d 143, 155 n.13 (2007)).

Asato further maintained that he had standing as a taxpayer because "he has been injured in fact and will continue to be injured by the unlawful use by state and county governments of HAR § 3-122-66 as a presumptive, lawful basis to award non-emergency contracts for professional services under HRS § 103D-304 in spite of this administrative rule clearly violating [] the 'minimum of three persons' requirement in HRS § 103D-304(g)[.]"

In its cross-motion for summary judgment, the Board argued that Asato did not have standing as an "interested person" under HRS § 91-7 because he failed to establish any actual or threatened injury. Citing Life of the Land and Richard, the Board argued that Asato failed to show "such a personal stake in the outcome of a determination of the validity of HAR § 3-122-66 to justify judicial intervention on his behalf."

The Board further argued that injury to Asato could not be presumed for purposes of taxpayer standing. The Board explained that Federal Electric was decided prior to the enactment of the Procurement Code, and that the facts in this case were not analogous to the special circumstance recognized by the Federal Electric court.

In his response to the Board's motion, Asato maintained that he was an "'interested person' as a taxpayer" because HRS § 103D-304(g) "is part of a legislatively mandated, established government contract procurement process in Hawaii that is intended to prudently, fairly, and economically expend taxpayer funds for all public works projects" that require professional services. Asato argued that if he did not have standing to challenge HAR § 3-122-66, "then no one will ever have standing to challenge this type of administrative rule."

The circuit court concluded that Asato had standing under HRS § 91-7. The circuit court explained that "[t]he

standing requirement for HRS § 91-7 is encapsulated by the phrase 'any interested person.' Here, the court finds that, that has indeed been brought. An interested person seeks to obtain a judicial declaration." The circuit court explained that it also "would have found" that Asato satisfied the long established three-part injury in fact test. Specifically, the circuit court explained that Asato demonstrated an actual or threatened injury by alleging that HAR § 3-122-66 is inconsistent with HRS § 103D-304. The circuit court also concluded that Asato's actual or threatened injury was directly traceable to HAR § 3-122-66, "especially in concerning integrity of contracts using taxpayer funds." Finally, the circuit court concluded that a decision in Asato's favor would render HAR § 3-122-66 invalid, "which is the direct object of [] Asato's lawsuit." The circuit court did not specifically address taxpayer standing.

II. Discussion

On appeal, the Board argues that the circuit court erred in concluding that Asato had standing under HRS § 91-7, that Asato failed to demonstrate taxpayer standing, and that he does not have standing under HRS § 632-1. For the reasons set forth below, I agree with the Board that Asato has failed to demonstrate standing under any one of his three alternative theories.

A. Prudential rule of judicial power: standing

The courts of Hawaiʻi are not subject to a "cases or controversies" limitation like that imposed on the federal judiciary by Article III, Section 2 of the United States Constitution. Trs. of Office of Hawaiian Affairs v. Yamasaki, 69 Haw. 154, 170, 737 P.2d 446, 455-56 (1987). Like the federal government, however, "ours is one in which the sovereign power is divided and allocated among three co-equal branches." Id. at 170-71, 737 P.2d at 456. Thus, even in the absence of constitutional restrictions, courts must still "carefully weigh the wisdom, efficacy, and timeliness of an exercise of their power before acting, especially where there may be an intrusion into areas committed to other branches of government." Sierra Club v. Dep't of Transp., 115 Hawaiʻi 299, 319, 167 P.3d 292, 312 (2007) (quoting Life of the Land, 63 Haw. at 172, 623 P.2d at 438).

This court has therefore long recognized that judicial power should be limited to those questions capable of judicial resolution and presented in an adversary context. Sierra Club, 115 Hawaiʻi at 319, 167 P.3d at 312 (quoting Life of the Land, 63 Haw. at 171-72, 623 P.2d at 438). Thus, "prudential rules of judicial self-governance founded in concern about the proper — and properly limited — role of courts in a democratic society are always of relevant concern." State v. Fields, 67 Haw. 268, 274,

686 P.2d 1379, 1385 (1984) (quoting Life of the Land, 63 Haw. at 172, 623 P.2d at 438) (quotation marks omitted). "In short, judicial intervention in a dispute is normally contingent upon the presence of a 'justiciable' controversy." Sierra Club, 115 Hawaiʻi at 319, 167 P.3d at 312 (quoting Life of the Land, 63 Haw. at 172, 623 P.2d at 438).

"Standing is that aspect of justiciability focusing on the party seeking a forum rather than on the issues he wants adjudicated." Life of the Land, 63 Haw. at 172, 623 P.2d at 438. In other words, standing is concerned with whether a particular party is an appropriate plaintiff. County of Haw. v. Ala Loop Homeowners, 123 Hawaiʻi 391, 406 n.20, 235 P.3d 1103, 1118 n.20 (2010); Pele Defense Fund v. Puna Geothermal Venture, 77 Hawaiʻi 64, 67, 881 P.2d 1210, 1213 (1994). The plaintiff bears the burden of establishing that he or she has standing. Hawaiʻi Med. Ass'n v. Hawaiʻi Med. Ass'n, Inc., 113 Hawaiʻi 77, 95, 148 P.3d 1179, 1197 (2006). "A plaintiff without standing is not entitled to invoke a court's jurisdiction." Mottl v. Miyahara, 95 Hawaiʻi 381, 388, 23 P.3d 716, 723 (2001).

"[T]he crucial inquiry with regard to standing is whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his or her invocation of the court's jurisdiction and to justify exercise of the court's remedial powers on his or her behalf." Sierra Club, 115 Hawaiʻi

at 318, 167 P.3d at 311 (quoting In re Application of Matson Navigation Co. v. Fed. Deposit Ins. Corp., 81 Hawaiʻi 270, 275, 916 P.2d 680, 685 (1996)) (internal quotation marks omitted). In deciding whether the plaintiff has the requisite interest in the outcome of the litigation, this court employs a three-part injury in fact test: (1) has the plaintiff suffered an actual or threatened injury as a result of the defendant's wrongful conduct; (2) is the injury fairly traceable to the defendant's actions; and (3) would a favorable decision likely provide relief for plaintiff's injury. Akinaka v. Disciplinary Bd. of Haw. Supreme Court, 91 Hawaiʻi 51, 55, 979 P.2d 1077, 1081 (1999) (citing Bush v. Watson, 81 Hawaiʻi 474, 479, 918 P.2d 1130, 1135 (1996)).

Because the injury in fact elements "are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." Sierra Club v. Haw. Tourism Auth., 100 Hawaiʻi 242, 250, 59 P.3d 877, 885 (2002) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992)). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss [the court] presume[s] that general

allegations embrace those specific facts that are necessary to support the claim." Lujan, 504 U.S. at 561 (internal quotation marks, brackets, and citation omitted). "In response to a summary judgment motion, however, the plaintiff can no longer rest on such mere allegations, but must set forth by affidavit or other evidence specific facts, which for purposes of the summary judgment motion will be taken to be true."[2] Id. (internal quotation marks and citation omitted).

B. Asato failed to demonstrate standing under HRS § 91-7

1. Standing under HRS chapter 91

Chapter 91 identifies two circumstances in which a plaintiff may seek judicial review of an administrative agency's action. First, HRS § 91-14 provides that "[a]ny person aggrieved by a final decision and order in a contested case or by a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief is entitled to judicial review thereof under this chapter[.]" This court has long held that in order to have standing under this section, a plaintiff must demonstrate both injury in fact and that he or she was involved in the administrative proceeding that culminated in the unfavorable decision. Pele Def. Fund, 77 Hawaiʻi at 69, 881 P.2d at 1215

[2] The instant case was decided on cross-motions for summary judgment. Asato was therefore required to set forth by affidavit or other evidence specific facts demonstrating standing.

(citing Mahuiki v. Planning Comm'n, 65 Haw. 506, 514-15, 654 P.2d 874, 879-80 (1982)).

Second, HRS § 91-7 provides that "[a]ny interested person may obtain a judicial declaration as to the validity of an agency rule . . . by bringing an action against the agency in the circuit court of the county in which petitioner resides or has its principal place of business." For more than thirty years, this court has applied the injury in fact test in determining whether a plaintiff has standing under HRS § 91-7. See Life of the Land, 63 Haw. at 171-78, 623 P.2d at 437-442; Richard, 82 Hawaiʻi at 252-55, 921 P.2d at 171-75.

In Life of the Land, a non-profit environmental organization and several of its members sought a judicial declaration that the Land Use Commission (LUC) violated state statutory law, as well as state and federal constitutional provisions, in conducting a periodic review of the district boundary classifications of all lands throughout the state of Hawaiʻi. 63 Haw. at 168-70, 623 P.2d at 436-37; see also Life of the Land v. Land Use Commission, 61 Haw. 3, 4, 594 P.2d 1079, 1080 (1979). Life of the Land and its members were neither owners of reclassified land nor owners of land adjoining reclassified land. Life of the Land, 63, Haw. at 169, 623 P.2d at 436. The LUC argued that the plaintiffs failed to adequately allege standing because they did not "aver [LUC] actions have

resulted in injury to legally-recognized rights or interests which are personally and peculiarly theirs." Id. at 171, 623 P.2d at 437-38.

This court observed that the LUC's argument was "reminiscent of a view, formerly espoused, that standing depended upon the presence of a 'legal right, one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege.'" Id. at 172-73, 623 P.2d at 438 (quoting Tenn. Elec. Power Co. v. Tenn. Valley Auth., 306 U.S. 118, 137-38 (1939)). The court explained that this view had been expressly rejected by the United States Supreme Court, which concluded that the relevant inquiry in determining standing to contest a governmental action was whether the plaintiff alleged the challenged action caused injury in fact and whether the interest for which protection was sought lay within the zone of interest protected or regulated by the statute or constitutional guarantee in question. Life of the Land, 63 Haw. at 173, 623 P.2d at 438-39 (citing Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153-54 (1970)). The Life of the Land court therefore reaffirmed that an injury to aesthetic and environmental interests could be invoked for purposes of demonstrating standing. Life of the Land, 63 Haw. at 176, 623 P.2d at 440-41 (citing Life of the Land, 61 Haw. at 8, 594 P.2d at 1082).

This court further concluded that the plaintiffs had standing under HRS § 91-7 because they were "endowed with interests that may have been adversely affected." Life of the Land, 63 Haw. at 177-78, 623 P.2d at 441. In reaching this conclusion, the court noted that it had concluded in an earlier decision involving the same boundary review, that Life of the Land was a "person aggrieved" for purposes of HRS § 91-14. Id. at 175-76, 623 P.2d at 440 (citing Life of the Land, 61 Haw. at 6-8, 594 P.2d at 1081-82). In other words, in an earlier case the plaintiffs had alleged both an injury in fact and involvement with or participation in an administrative proceeding. See Life of the Land, 61 Haw. at 6-10, 594 P.2d at 1081-83; Pele Def. Fund, 77 Hawaiʻi at 69, 881 P.2d at 1215 (stating that in order to have standing under HRS § 91-14 a plaintiff "must demonstrate that their interests were injured and that they were involved in the administrative proceeding that culminated in the unfavorable decision" (internal quotation marks, brackets, and emphases omitted)).

With regard to alleging an injury in fact, Life of the Land made substantially similar allegations in both cases. Specifically, Life of the Land alleged that individual members of the organization used the land at issue for diving, swimming, hiking, camping, sightseeing, horseback riding, exploring and hunting and for aesthetic, conservational, occupational,

professional and academic pursuits, and that future urbanization would destroy beaches and open space enjoyed by the members and decrease agricultural land used for the production of needed food supplies. Life of the Land, 63 Haw. at 176 n.9, 623 P.2d at 440 n.9. The plaintiffs further alleged that construction would have an adverse effect on its members and on the environment, and that pursuits presently enjoyed would be irrevocably lost. Id. Because this court had concluded that Life of the Land had standing in the prior case under HRS § 91-14, it "undoubtedly" had standing under HRS § 91-7. Id. at 177-78, 623 P.2d at 441.

In Richard, this court considered whether a plaintiff had standing to challenge an administrative rule pursuant to which an insurance company was denying the plaintiff needed surgery. 82 Hawaiʻi at 250-51, 921 P.2d at 170-71. This court stated that "[w]hen a claimant seeks to do no more than vindicate its own value preferences through the judicial process, and therefore fails to show any actual or threatened injury, that person does not have standing to bring HRS § 91-7 actions in the circuit court." Id. at 253, 921 P.2d at 173 (internal quotation marks, brackets, and citations omitted). This court explained that although an additional requirement must be satisfied in order to bring suit under HRS § 91-14 (i.e., involvement with or participation in an administrative proceeding), the "standard

rule governing standing to sue applies to actions brought under HRS § 91-7." Id. at 254, 921 P.2d at 174.

Thus, until today, it has been well settled that a plaintiff must satisfy the three-part injury in fact test in order to have standing under HRS § 91-7. As this court has recognized, "a court should not 'depart from the doctrine of stare decisis without some compelling justification.'" State v. Garcia, 96 Hawaiʻi 200, 206, 29 P.3d 919, 925 (2001) (quoting Hilton v. S.C. Pub. Rys. Comm'n, 502 U.S. 197, 202 (1991)). Moreover, considerations of stare decisis "have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and [the legislative branch] remains free to alter what we have done." Garcia, 96 Hawaiʻi at 206, 29 P.3d at 925 (brackets in original) (citing Hilton, 502 U.S. at 202). Here, this court's decision in Richard has stood for more than seventeen years, and the legislature has not amended HRS § 91-7 during that time. Asato has never argued that the rule set forth in Richard should be overruled, and there is no compelling justification to do so.

The majority nevertheless abandons this long standing precedent in concluding that "Asato is not required to satisfy the three-part injury in fact test in order to obtain standing" under HRS § 91-7. Majority opinion at 16. In support of this

position, the majority cites Life of the Land's statement that there has been an "expansive trend in defining injury for standing purposes." Majority opinion at 16 (citing Life of the Land, 63 Haw. at 175, 623 P.2d at 440). Respectfully, the majority reads this statement out of context.

The expansion noted by the majority was from the formerly espoused view that standing depended on the presence of a particular type of interest (e.g., legal or property interests), to the requirement that the plaintiff need only allege an injury in fact. Life of the Land, 63 Haw. at 172-73, 623 P.2d at 438-39. The majority implies that standing under Life of the Land is so expansive that the injury in fact requirement no longer applies under HRS § 91-7. However, applying the injury in fact test was itself the expansion to the standing doctrine.

The majority overrules Richard because it "seemingly adopted a more stringent standing requirement" than that applied in Life of the Land. Majority opinion at 18. Specifically, the majority relies on a statement from Life of the Land where this court noted that the plaintiffs were "endowed with interests that may have been adversely affected." Majority opinion at 17-18 (citing Life of the Land, 63 Haw. at 177-78, 623 P.2d at 441). This statement, however, is not at odds with the application of the injury in fact test.

Under the first prong of the injury in fact test, the plaintiff may allege either an actual or threatened injury. Mottl, 95 Hawaiʻi at 389, 23 P.3d at 724. In Life of the Land, standing was evaluated based on the allegations set forth in the plaintiffs' complaint, because the defendants had filed a motion to dismiss. See 63 Haw. at 170, 623 P.2d at 437. Thus, all that was required for the plaintiffs to demonstrate standing in Life of the Land were allegations of injury. See Kahoʻohanohano v. State, 114 Hawaiʻi 302, 318, 162 P.3d 696, 712 (2007) (noting that at the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice). As noted above, Life of the Land alleged in its complaint that its members used the land at issue for various recreational, aesthetic, conservational, occupational, professional and academic pursuits, and that future urbanization would destroy beaches and open space enjoyed by the members and decrease agricultural land used for the production of needed food supplies. Life of the Land, 63 Haw. at 176 n.9, 623 P.2d at 440 n.9. Life of the Land further alleged that construction would have an adverse effect on its members and on the environment, and that pursuits presently enjoyed would be irrevocably lost. Id. Given these allegations, it is plain that Life of the Land adequately alleged an injury sufficient to satisfy the injury in fact test. In short, nothing in Life of the Land suggests that a plaintiff need not have

suffered injury in fact in order to have standing under HRS § 91-7. In my view, therefore, courts should continue to apply the injury in fact test in evaluating standing under HRS § 91-7.

2. Asato failed to demonstrate that HAR § 3-122-66 caused him to personally suffer either an actual or threatened injury

As noted above, under the fist prong of the injury in fact test, the plaintiff must allege an actual or threatened injury. Mottl, 95 Hawaiʻi at 389, 23 P.3d at 724. This actual or threatened injury must be a distinct and palpable injury to the plaintiff. Hanabusa v. Lingle, 119 Hawaiʻi 341, 347, 198 P.3d 604, 610 (2008) (citing Mottl, 95 Hawaiʻi at 389, 23 P.3d at 724). The injury must not be abstract, conjectural, or merely hypothetical. Mottl, 95 Hawaiʻi at 389, 23 P.3d at 724.

In his complaint, Asato alleged that "he has been injured and will continue[] to be injured by the state and county governments' unlawful use of HAR § 3-122-66 as a perfunctory basis to award contracts for professional services in violation of the 'minimum of three persons' requirement [in] HRS § 103D-304(g)." Specifically, Asato alleged that contracts awarded pursuant to HAR § 3-122-66 violate the public policies sought to be advanced by the legislature in adopting the Procurement Code. In support of these assertions, Asato attached information relating to twenty-six professional services contracts, including what Asato described as "the four . . . largest professional

services contracts to date for the City and County of Honolulu, all of which [were] for the Honolulu High Capacity Transit corridor, the rail project . . . totaling more over $144 million." Asato raised similar claims in his motion for summary judgment and in opposition to the Board's cross-motion for summary judgment.

These bare allegations, without more, fail to demonstrate that Asato personally suffered either an actual or threatened injury. Asato repeatedly asserts that HAR § 3-122-66 is at odds with the policy goals of the legislature in adopting the Procurement Code. As this court has recognized, a member of the public may have standing to enforce the rights of the public even though the individual's injury is not different in kind from the public's generally, if that person has suffered an injury in fact. Pele Def. Fund, 77 Hawaiʻi at 70, 881 P.2d at 1216 (citing Hawaii's Thousand Friends v. Anderson, 70 Haw. 276, 283, 768 P.2d 1293, 1299 (1989)). Here, however, Asato failed to demonstrate that he personally suffered either an actual or threatened injury because of HAR § 3-122-66. Asato's "sincere, vigorous interest in the action challenged, or in the provisions of law allegedly violated, will not do to establish standing if [his] interest is purely ideological, uncoupled from any injury in fact, or tied only to an undifferentiated injury common to all members of the public." Capital Legal Found. v. Commodity Credit Corp., 711

F.2d 253, 258 (D.C. Cir. 1983); see Akau v. Olohana Corp., 65 Haw. 383, 390, 652 P.2d 1130, 1135 (1982) ("Thus a plaintiff has standing if he can demonstrate some injury to a recognized interest such as economic or aesthetic, and is himself among the injured and not merely airing a political or intellectual grievance."). As this court has repeatedly stated, "[w]e abhor the use of courtrooms as political forums to vindicate individual value preferences." Hawaii's Thousand Friends, 70 Haw. at 284, 768 P.2d at 1299. "The proper forum for the vindication of a value preference is in the legislature, the executive, or administrative agencies, and not the judiciary." Id. at 283, 768 P.2d at 1299.

The majority, having rejected this court's long standing application of the injury in fact test, states that a plaintiff must be "affected" or "involved" with an administrative rule in order to bring suit under HRS § 91-7. Majority opinion at 19-20. The facts of this case, however, reveal that this purported requirement lacks substance. Asato has made no showing that he was either personally "affected" by or "involved" with HAR § 3-122-66. The majority nevertheless concludes that "as a taxpayer challenging a specific public bidding procedure, he is affected by the validity of a regulation that allegedly allowed an illegal expenditure of public funds." Majority opinion at 20. In reaching this conclusion the majority fails to

point to any affidavit or other evidence offered by Asato showing that he was personally affected by or involved with HAR § 3-122-66. In effect, the majority holds that a plaintiff satisfies all the requirements of standing under HRS § 91-7 merely by filing suit. Respectfully, HRS § 91-7 does not reflect such an expansive view of standing.

Of course, this court has recognized that the requirements of standing may "be tempered, or even prescribed, by legislative and constitutional declarations of policy." Mottl, 95 Hawaiʻi at 389, 23 P.3d at 724 (quoting Life of the Land, 63 Haw. at 172, 623 P.2d at 438). For example, HRS § 92-12(c) provides that "[a]ny person may commence a suit in the circuit court of the circuit in which a prohibited act occurs for the purpose of requiring compliance with or preventing violations of" Hawaii's Sunshine Law. (Emphasis added). The legislature's expansive view of standing under HRS § 92-12(c) is further evidenced by the fact that "[t]he court may order payment of reasonable attorney's fees and costs to the prevailing party in a suit brought under this section." HRS § 92-12(c).

This court has recognized that the plain language of HRS § 92-12 expressly authorizes "any person" to initiate a lawsuit upon the allegation that a "prohibited act" has occurred in violation of HRS §§ 92-1 through 92-13. Kaapu v. Aloha Tower Dev. Corp., 74 Haw. 365, 381, 846 P.2d 882, 889 (1993); see also

Right to Know Comm. v. City Council, City & County of Honolulu, 117 Hawaiʻi 1, 10, 175 P.3d 111, 120 (App. 2007). In effect, HRS § 92-12 gives any person standing to initiate a lawsuit as a "private attorney general" inasmuch as he or she is a "person upon whom the legislature has conferred the right to seek judicial review of agency action." Kaapu, 74 Haw. at 380-81, 846 P.2d at 889 (internal quotation marks, brackets, and citation omitted). The injury in fact test therefore does not apply to suits brought pursuant to HRS § 92-12. Richard, 82 Hawaiʻi at 254, 921 P.2d at 174.

In contrast, HRS § 91-7 does not allow "any person" to file suit. Instead, HRS § 91-7 provides that only an "interested person" may obtain a judicial declaration as to the validity of an agency rule. The legislature could have extended standing to challenge agency rules to any person, but it has not done so. See, e.g., Kellas v. Dep't of Corr., 145 P.3d 139, 142 (Or. 2006) (interpreting state statute which provides that the "validity of any rule may be determined upon a petition by any person to the Court of Appeals" (emphasis added)). In the absence of such explicit language from the legislature, this court has no reason to depart from the well established injury in fact test. Richard, 82 Hawaiʻi at 254, 921 P.2d at 174.

Finally, the majority notes that in adopting HRS § 91-7, the legislature departed from the Model State Administrative

Procedure Act of 1961, § 7 (superceded 1981) (MSAPA). Majority opinion at 21-22. Under the 1961 MSAPA, the validity of a rule could be determined in an action for declaratory judgment if it was "alleged that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff." Id. In removing this language, the House Judiciary Committee stated that HRS § 91-7 "will allow an interested person to seek judicial review on the validity of a rule for the reasons enumerated [in HRS § 91-7(b)] regardless of whether there is an actual case or controversy." H. Stand. Comm. Rep. 8, 1961 House Journal, at 658. Relying on this language, the majority concludes that "the legislature obviously intended to liberalize standing requirements." Majority opinion at 22.

Respectfully, this passage cannot support the conclusion that the legislature intended to afford standing to anyone who brings suit, irrespective of whether he or she has shown an injury in fact. To begin with, as noted above, the plain language of the statute does not support such an interpretation, since it refers to suit being brought by an "interested person" rather than "any person." See Keliipuleole v. Wilson, 85 Hawaiʻi 217, 221, 941 P.2d 300, 304 ("Courts are bound to give effect to all parts of a statute, and . . . no clause, sentence, or word shall be construed as superfluous,

void, or insignificant if a construction can be legitimately found which will give force to and preserve all words of the statute." (internal quotation marks and brackets omitted)).

Moreover, it is important to consider how the legislature deviated from the MSAPA when it adopted the Hawaiʻi Administrative Procedure Act in 1961. Specifically, the legislature deleted the requirement that the challenged rule must interfere with or impair the "legal rights or privileges of the plaintiff." As this court explained in Life of the Land, formulations of standing that are dependent on "legally recognized interests" are "[i]n some respects . . . reminiscent of a view, formerly espoused, that standing depended upon the presence of a 'legal right, one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege.'" 63 Haw. at 172-73, 623 P.2d at 438 (citation omitted). We expressly rejected that restrictive view of standing, and instead held that plaintiffs who seek to bring suit under HRS § 91-7 only need to allege that they have suffered an injury in fact. Id. at 173-77, 623 P.2d at 439-41. That holding was completely consistent with the intention of the legislature in rejecting the "legal rights or privileges" language in the MSAPA, and there is no reason to abandon it now.

C. Asato failed to demonstrate taxpayer standing

In Iuli, 62 Haw. at 184, 613 P.2d at 656, this court set forth "specific requirements which must be met before standing to taxpayers [may be] granted." In order to satisfy the requirements of taxpayer standing: (1) the act complained of must be more than "mere irregularity," and "[i]n addition to an illegal act, the act must be such as to imperil the public interest or work public injury"; (2) the plaintiff must allege "loss in revenues resulting in an increase in plaintiff's tax burdens or to taxpayers in general"; and (3) in the absence of a statute governing such suits, the plaintiff must demand upon the proper public officer to take appropriate action, unless the facts alleged sufficiently show that demand to bring suit would be useless.[3] Id., 62 Haw. at 184, 613 P.3d at 656.

Asato failed to satisfy the second element of this test, i.e., he failed to demonstrate that HAR § 3-122-66 has increased his personal tax burden or the burden on taxpayers generally. To the extent Asato alleged that the City and County of Honolulu has awarded at least twenty six professional services

[3] This court articulated a slightly different test in Hawaii's Thousand Friends, 70 Haw. at 282, 768 P.2d at 1298, applicable when a taxpayer seeks to challenge illegal expenditures by a public agency. In Hawaii's Thousand Friends, this court stated that, under those circumstances, two requirements must be met for taxpayer standing: (1) the plaintiff must be a taxpayer who contributes to the particular fund from which illegal expenditures are made; and (2) plaintiff must suffer a pecuniary loss, which, in cases of fraud, are presumed. Id. Here, Asato failed to demonstrate standing under this test as well because he has not shown a pecuniary loss, nor has he alleged fraud.

contracts pursuant to HAR § 3-122-66, he offered no evidence that those contracts increased either his personal tax burden or the burden of taxpayers generally. And, nothing in the record suggests that those contracts in fact increased the burden on taxpayers generally.

In Iuli, this court also noted two "special situations" in which damage to a taxpayer may be presumed. Id. at 185-186; 613 P.3d at 657. Specifically, the Iuli court noted Bulgo v. County of Maui, 50 Haw. 51, 54-56, 430 P.2d 321, 324-25 (1967), in which this court held that a taxpayer had standing to challenge the constitutionality of a special election, and Federal Electric, 56 Haw. at 64-65, 527 P.2d at 1290, in which this court concluded that a disappointed bidder had standing as a taxpayer to challenge a contract awarded to a higher bidder. Citing Federal Electric, Asato argues that damage may be presumed based on the allegations in his complaint.

In Federal Electric, this court was confronted with a "unique" situation in which the City's "conventional bidding method was not employed, and an innovative procedure without benefit of definitive guidelines was instead utilized" in seeking to upgrade the police department's communication system. 56 Haw. at 66, 527 P.2d at 1291. As a result of this innovative procedure, the City awarded the communication system contract to

the higher bidder, whose bid exceeded that of Federal Electric by more than $90,000. Id. at 59, 527 P.2d at 1287.

No analogous circumstances are presented in this case. Asato seeks to challenge HAR § 3-122-66, which is not an "innovative procedure without benefit of definitive guidelines." Id. at 66, 527 P.2d at 1291. The rule at issue here was promulgated in 1995, and provides detailed guidance to agency heads who are confronted with a narrow situation not expressly addressed in HRS § 103D-304(g) (i.e., when fewer than three qualified persons have been identified to be considered for a professional services contract). Moreover, on the facts of Federal Electric, it is apparent why damage to taxpayers could be presumed in that case. Specifically, the bidding procedure employed by the City in that case resulted in the higher of two submitted bids being accepted by the City. See Fed. Elec. Corp., 56 Haw. at 59; 527 P.2d at 1287. Asato has failed to demonstrate or even allege that any similar circumstances are present here.

Federal Electric is further distinguishable because that case was decided at a time when there was no express provision allowing for a judicial action by disappointed bidders. Compare HRS chapter 103 (1968) with HRS § 103D-710 (2012). The current procurement code, however, explicitly provides for judicial review of a disappointed bidder's claim following administrative review. See HRS § 103D-710. In most instances,

the persons involved in the procurement process will be best positioned to enforce the provisions of the Procurement Code and can do so through the process the Procurement Code sets out. Asato therefore failed to demonstrate taxpayer standing.

D. Asato failed to demonstrate standing under HRS § 632-1

In his complaint, Asato also asserted that this was an action for declaratory relief under HRS § 632-1. Section 632-1 provides:

> In cases of actual controversy, courts of record, within the scope of their respective jurisdictions, shall have power to make binding adjudications of right, whether or not consequential relief is, or at the time could be, claimed, and no action or proceeding shall be open to objection on the ground that a judgment or order merely declaratory of right is prayed for; provided that declaratory relief may not be obtained in any district court, or in any controversy with respect to taxes, or in any case where a divorce or annulment of marriage is sought. Controversies involving the interpretation of deeds, wills, other instruments of writing, statutes, municipal ordinances, and other governmental regulations, may be so determined, and this enumeration does not exclude other instances of actual antagonistic assertion and denial of right.
>
> Relief by declaratory judgment may be granted in civil cases where an actual controversy exists between contending parties, or where the court is satisfied that antagonistic claims are present between the parties involved which indicate imminent and inevitable litigation, or 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, and the court is satisfied also that a declaratory judgment will serve to terminate the uncertainty or controversy giving rise to the proceeding. Where, however, a statute provides a special form of remedy for a specific type of case, that statutory remedy shall be followed; but the mere fact that an actual or threatened controversy is susceptible of relief through a general common law remedy, a remedy

> equitable in nature, or an extraordinary legal remedy, whether such remedy is recognized or regulated by statute or not, shall not debar a party from the privilege of obtaining a declaratory judgment in any case where the other essentials to such relief are present.

HRS § 632-1.

This court has not considered whether a declaratory action may be brought under this section to challenge the validity of an agency rule. See Costa v. Sunn, 5 Haw. App. 419, 424 n.9, 697 P.2d 43, 47 n.9 (1985) ("Query whether a declaratory action regarding the validity of an agency's regulations may be brought under either HRS §§ 91-7 or 632-1."). Assuming arguendo that such an action could be brought, Asato nevertheless failed to demonstrate standing under this section as well.

As the court explained in Bremner v. City & County of Honolulu, 96 Hawaiʻi 134, 143, 28 P.3d 350, 359 (App. 2001), although HRS chapter 632 is to be "liberally interpreted and administered, with a view to making the courts more serviceable to the people," HRS § 632-6, "nowhere does the law suggest that this admonition trumps the standing requirement of a 'personal stake' or an 'injury in fact.'" Indeed, the "specific harm which our standing doctrine requires . . . by no means interposes an excessive burden upon plaintiffs who seek the services of the courts." Id. at 143, 28 P.3d at 359. "Rather, the requirement ensures that judicial intervention will be within the particular capabilities of the courts, and not be constitutional folly."

Id. (citing Life of the Land, 63 Haw. at 171-72, 623 P.2d at 438). For the reasons set forth above, Asato failed to demonstrate such a personal stake as to warrant his invocation of the court's jurisdiction and to justify the exercise of the court's remedial powers on his behalf. Life of the Land, 63 Haw. at 172, 623 P.2d at 438.

For the foregoing reasons, in my view the majority's position unnecessarily abandons long established precedent applying the injury in fact test to suits brought under § 91-7. Asato has failed to carry his burden of demonstrating standing under HRS § 91-7, taxpayer standing, and HRS § 632-1. Accordingly, I respectfully dissent.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama