Electronically Filed
Supreme Court
SCOT-19-0000830
15-MAR-2023
08:06 AM
Dkt. 133 OPD

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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IN THE MATTER OF THE PETITION OF KUʻULEI HIGASHI KANAHELE AND AHIENA KANAHELE, INDIVIDUALS, FOR A DECLARATORY ORDER CONCERNING THE INVALID CLASSIFICATION OF THE DE FACTO AND IMPROPER INDUSTRIAL USE PRECINCT ON APPROXIMATELY 525 ACRES OF STATE LAND USE CONSERVATION DISTRICT LANDS LOCATED IN MAUNA KEA AND HILO, COUNTY OF HAWAIʻI, TAX MAP KEY NO.: 4-4-015:0090 (POR.)

SCOT-19-0000830

APPEAL FROM THE LAND USE COMMISSION
(DOCKET NO. DR-19-67 (Agency Appeal))

MARCH 15, 2023

DISSENTING OPINION BY WILSON, J., WITH WHOM McKENNA, J., JOINS

I. Introduction

The Majority asserts that the Kanaheles' petition to the Land Use Commission ("Commission") for a declaratory order seeks to "contravene" the Department of Land and Natural Resources' ("Department") "powers to regulate conservation district uses." I respectfully disagree. The Commission's authority to classify land is distinct from the Department's authority to regulate conservation districts. The Kanaheles'

petition requests the Commission's declaration as to whether the land uses within the Astronomy Precinct on Mauna Kea are consistent with a conservation or urban district under Hawaiʻi Revised Statutes ("HRS") § 205-2 (2018).[1] The Commission's authority to rule on the Kanaheles' petition does not impede the Department's authority to govern conservation districts.

The issuance by the Department of thirteen successive Conservation District Use Permits ("CDUPs") pursuant to HRS § 183C-6(a) (2016) for astronomy facilities on Mauna Kea only heightens the importance of the Commission's authority to determine whether reclassification of the Astronomy Precinct is necessary under HRS §§ 205-2, 205-3.1 (2005). The primary duty of the Commission is to place "all lands in the State" into one of four land use districts: urban, rural, agricultural, or

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[1] The Kanahales request a declaratory order stating that:

> 1) current industrial research facility uses in the de facto industrial use precinct are appropriate within the urban district as prescribed by HRS § 205-2(b) and not within the conservation district;
> 2) further industrial uses proposed for the de facto industrial use precinct must comply with HRS chapter 205 and Commission procedures for obtaining a district boundary amendment to reclassify conservation lands into the urban district; and,
> 3) even if a single scientific laboratory or other research facility may be appropriate within non-urban districts, the successive, individual approval of thirteen scientific laboratories, other research facilities, and associated offices, parking lots, and utilities within the de facto industrial use precinct constitutes urban uses inconsistent with conservation district uses and/or detrimental to a multiple use conservation concept for which a district boundary amendment must be obtained.

conservation. HRS § 205-2. To determine whether reclassification is appropriate, the Commission must necessarily consider the use of such land, including uses pursuant to CDUPs. The Commission's consideration of land uses permitted by the Department pursuant to CDUPs is a necessary component of the performance of its statutorily mandated duty to determine district land use boundaries.

Prohibiting the Commission from declaring whether the Astronomy Precinct should be reclassified thwarts the purpose of Hawaiʻi's land use law, which is to "protect and conserve" valuable, limited, and sacred lands, while development proceeds in an "orderly" and "intelligent" manner. H. Stand. Comm. Rep. No. 395, in 1961 House Journal, at 855-56; Curtis v. Bd. of Appeals, Cnty. of Haw., 90 Hawaiʻi 384, 396, 978 P.2d 822, 834 (1999). In order to effectuate this purpose, the Commission must be able to declare when the cumulative impact of CDUPs and associated development calls for the reclassification of a conservation district. As stated by Chairperson Scheuer: "if it's not up to this [C]ommission to ensure that the four districts' lines are respected, I don't know who it's up to[.]"

II. Background

The area at issue is approximately 525 acres of conservation district land located in Mauna Kea and Hilo (Tax Map Key No. 4-4-015:009), upon which the Department has issued

thirteen successive CDUPs for the development of astronomy facilities (the "Astronomy Precinct"). Mauna Kea has both "ecological and spiritual significance" to the Kanaheles, who are native Hawaiians descended from the peoples who inhabited the Hawaiian archipelago prior to 1778. The Kanaheles' cultural practices involve Hawaiian religion and spirituality through hula and oli. Kuʻulei Higashi Kanahele described Mauna Kea's importance to native Hawaiian spiritual practices:

> The sacredness of Maunakea does not lie only in the fact that Maunakea is descended from the gods Papa and Wakea. Maunakea's summit touches the atmosphere and stands in the wao akua (god zone) where our gods are found. Hawaiian akua (gods) are not invisible spiritual beings, Hawaiian akua are the physical elements that give life – water, snow, mist, etc. The summit of Maunakea is sacred[,] it is a wao akua where water, snow, and mist are found, far removed from the wao kanaka (human zone). To protect this wao akua and keep[] its elements pristine, our ancestors designated the summit as sacred and limited access to a select few, who were only able to access the summit for specific reasons.

The Kanaheles filed a petition for declaratory relief with the Commission pursuant to HRS § 91-8 (2012)[2] and Hawaiʻi Administrative Rules ("HAR") §§ 15-15-98 (2019)[3] and 99 (2019),[4]

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[2] HRS § 91-8 (2012) provides:

> Any interested person may petition an agency for a declaratory order as to the applicability of any statutory provision or of any rule or order of the agency. Each agency shall adopt rules prescribing the form of the petitions and the procedure for their submission, consideration, and prompt disposition. Orders disposing of petitions in such cases shall have the same status as other agency orders.

[3] HAR § 15-15-98(a) (2019) provides that, "[o]n petition of any interested person, the commission may issue a declaratory order as to the

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requesting that the Commission find that under HRS § 205-2,[5] the use of the conservation district lands for astronomy facilities

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applicability of any statutory provision or of any rule or order of the commission to a specific factual situation."

[4] HAR § 15-15-99 (2019) provides the form and contents for a petition for a declaratory order. Those requirements are not at issue in this appeal.

[5] HRS § 205-2 (2005) provides, in part:

> (a) There shall be four major land use districts in which all lands in the State shall be placed: urban, rural, agricultural, and conservation. The land use commission shall group contiguous land areas suitable for inclusion in one of these four major districts. The commission shall set standards for determining the boundaries of each district[.]
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> . . . .
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> In establishing the boundaries of the districts in each county, the commission shall give consideration to the master plan or general plan of the county.
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> (b) Urban districts shall include activities or uses as provided by ordinances or regulations of the county within which the urban district is situated.
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> . . . .
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> (e) Conservation districts shall include areas necessary for protecting watersheds and water sources; preserving scenic and historic areas; providing park lands, wilderness, and beach reserves; conserving indigenous or endemic plants, fish, and wildlife, including those which are threatened or endangered; preventing floods and soil erosion; forestry; open space areas whose existing openness, natural condition, or present state of use, if retained, would enhance the present or potential value of abutting or surrounding communities, or would maintain or enhance the conservation of natural or scenic resources; areas of value for recreational purposes; other related activities; and other permitted uses not detrimental to a multiple use conservation concept. Conservation districts shall also include areas for geothermal resources exploration and geothermal resources development, as defined under section 182-1

creates a "de facto industrial use precinct[.]" The Kanaheles requested the Commission's determination of whether the cumulative impacts from construction and operation of thirteen astronomy facilities necessitates reclassification of the conservations lands to an urban land use designation pursuant to HRS § 205-2.

The majority of the Commission denied the Kanaheles' petition for declaratory relief, concluding that the Commission lacks jurisdiction under HRS chapter 205 to declare whether the cumulative uses were consistent with an urban district, because pursuant to HRS §§ 205-5(a) (2012)[6], 205-15 (1995)[7] and HRS §§ 183C-3 (1994)[8], 183C-6(a)[9], it is the Department and not the Commission that is "statutorily authorized to determine, permit, and enforce land uses within the State Conservation District." As noted, the Chair of the Commission disagreed with the

[6] HRS § 205-5(a) provides that "[e]xcept as herein provided, the powers granted to counties under section 46-4 shall govern the zoning within the districts, other than in conservation districts. Conservation districts shall be governed by the department of land and natural resources pursuant to chapter 183C."

[7] HRS § 205-15 provides that "[e]xcept as specifically provided by this chapter and the rules adopted thereto, neither the authority for the administration of chapter 183C nor the authority vested in the counties under section 46-4 shall be affected."

[8] HRS § 183C-3 describes the powers and duties of BLNR and DLNR, including the power to "[e]stablish and enforce land use regulations on conservation district lands including the collection of fines for violations of land use and terms and conditions of permits issued by the department."

[9] HRS § 183C-6(a) provides that "[t]he department shall regulate land use in the conservation district by the issuance of permits."

majority of the Commission and concluded it was the duty of the Commission to consider the Kanaheles' petition for declaratory relief. The Kanaheles filed a direct appeal to this court of the Commission's decision denying their request for declaratory relief.

On direct appeal, the Kanaheles argue that the Commission erred in its determination that it lacks subject matter jurisdiction to issue a declaratory order as to whether the uses of the Astronomy Precinct on Mauna Kea are consistent with the conservation district classification, given the successive issuances of thirteen CDUPs and associated development, or alternatively, whether a district boundary amendment is required, reclassifying the land to an urban use designation.

III. Discussion

A. The Kanaheles' petition does not request the Commission to determine what constitutes prohibited uses in the conservation district, but asks whether the cumulative uses of the Astronomy Precinct are consistent with an urban district classification rather than a conservation district classification.

The Majority asserts that the Kanaheles' petition asks "the Commission to determine what constitutes prohibited land uses within a conservation district and to thereby enforce the Astronomy Precinct's conservation district designation." On this premise, the Majority holds that the Commission correctly

concluded that it lacks jurisdiction to issue the requested declaratory order, because the Department already approved and issued the CDUPs for the uses in the Astronomy Precinct. However, the Kanaheles' petition does not challenge the issuance of a specific CDUP, but rather requests the Commission's opinion as to whether the accumulated land uses within the astronomy district are consistent with an urban rather than a conservation district classification. The Kaneheles' petition seeks an "interpretation" of statutes and rules administered by the Commission under HRS chapter 205 and HAR chapter 15-15, not an interpretation of statutes or rules administered by the Department. See Fasi v. State Pub. Emp. Relations Bd., 60 Haw 436, 444, 591 P.2d 113, 118 (1979) (Declaratory rulings by agencies are "designed to provide a means for securing from an agency its interpretation of relevant statutes, rules and orders.").

Specifically, the Kanaheles seek a declaration by the Commission of whether, given the cumulative impact of all land uses and associated development, the Astronomy Precinct remains consistent with a conservation district classification.[10] To

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[10] For example, the Kanaheles sought a declaratory order from the Commission stating that:

> "even if a single scientific laboratory or other research facility may be appropriate within non-urban districts, the

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rule on the petition, the Commission must interpret provisions under HRS chapter 205 (e.g., HRS § 205-2,[11] HRS § 205-4 (2017),[12] HRS § 205-17 (2008)[13]) and associated regulations (HAR § 15-15-20 (2019),[14] HAR § 15-15-18 (2019),[15]) to determine whether the land

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> successive, individual approval of thirteen scientific laboratories, other research facilities, and associated offices, parking lots, and utilities within the de facto industrial use precinct constitutes urban uses inconsistent with conservation district uses and/or detrimental to a multiple use conservation concept for which a district boundary amendment must be obtained."

The Majority elevates form over substance in contending that the Kanaheles' petition requests a declaration that the astronomy facilities are prohibited uses within the conservation district. The Kanaheles are instead looking at the cumulative impact of all land uses in the Astronomy Precinct, and asking the Commission whether the land is most appropriately classified as conservation or urban.

[11] HRS § 205-2(e) defines what conservation districts shall include and HRS § 205-2(b) defines what urban districts shall include. In ruling on the Kanaheles' petition, the Commission would evaluate whether the current land uses within the conservation district comply with the statutory description of conservation districts in HRS § 205-2(e) or alternatively, the statutory description of urban districts in HRS § 205-2(b).

[12] HRS § 205-4(h) provides that the Commission must comply with HRS § 205-17 in amending district boundaries.

[13] HRS § 205-17(2) provides that in reviewing a petition for reclassification of district boundaries, the Commission is to consider "[t]he extent to which the proposed reclassification conforms to the applicable district standards[.]" Thus, in ruling on the Kanaheles' petition, the Commission would evaluate whether reclassifying the land as urban would be consistent with the urban district standards.

[14] HAR § 15-15-20 provides the "[s]tandards for determining [] conservation district boundaries."

[15] HAR § 15-15-18 provides the "[s]tandards for determining [] urban district boundaries."

area is consistent with a conservation or urban classification.[16] See Fasi, 60 Haw at 444, 591 P.2d at 118.

The Commission is the administrative agency with the specific authority and expertise to apply the criteria applicable to urban and conservation land use designations. See, e.g., HRS § 205-2 (providing the Commission with authority to place "all lands in the State" within the "urban, rural, agricultural, [or] conservation" district classifications.) On the other hand, neither the Department's authority nor its expertise includes consideration of criteria for urban districts. Its legal authority and expertise are confined to regulation of the conservation district. HRS § 183C-1; see, e.g., HRS § 183C-3 ("The board and department shall...[i]dentify and appropriately zone those lands classified within the conservation district[.]"). The Department has no authority or expertise to determine whether the Astronomy Precinct is more appropriately classified as an urban district.

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[16] HAR § 15-15-77 (2019) provides the decision-making criteria that the Commission is to use in determining whether a district boundary amendment is appropriate, including "[t]he extent to which the boundary amendment conforms to applicable district standards." HAR § 15-15-18(1), for example, describes the criteria for urban districts (i.e., the applicable district standards) and states that urban districts are to include "lands characterized by "city-like" concentrations of people, structures, streets, urban level of services and other related land uses[.]" Because the Commission is required to analyze the nature of use of the land which it is considering to reclassify, including the "structures" thereon, the Commission must necessarily consider land uses pursuant to CDUPs lawfully issued by the Department.

The Majority notes that the Kanaheles are not asking the Commission to issue a district boundary amendment to convert the Astronomy Precinct from conservation to urban because "the Kanaheles made clear that they would oppose any district boundary amendment petition seeking such a reclassification." Thus, the Majority concludes that because the Kanaheles do not seek a boundary amendment, they must be requesting that the Commission declare that astronomy facilities are prohibited uses within the conservation district. The Kanaheles have the right, as "interested person[s]" under HRS § 91-8, to file a petition requesting the Commission's declaration as to whether the Astronomy Precinct should be classified as conservation or urban, given its existing and future uses. They also have the right to oppose a district boundary amendment petition to change the land's classification. These two rights are not inconsistent, and the fact that the Kanaheles would oppose a district boundary amendment does not change the nature of their petition for a declaratory order.

In sum, the Majority does not explain how the Commission's consideration of the cumulative impact of all land uses in the Astronomy Precinct would exceed the Commission's authority under HRS §§ 205-2(e), 205-3.1, and 205-4 to determine the proper classification of all lands in the State. As the Kanaheles assert, the Department's "determination" that it

properly issued CDUPs in the Astronomy Precinct "in no way binds the [Commission] to a determination [as to] whether the [Astronomy Precinct] should be classified within the conservation district or [urban] district."

The Commission has exercised its authority in the past to declare when the cumulative impact of CDUPs requires reclassification of conservation district land. For example, in Lanihau Properties, LLC., No. A00-730, (Hawaiʻi Land Use Comm'n., 2003) (hereinafter Lanihau Properties), the Commission considered whether to issue a district boundary amendment reclassifying certain conservation land to an urban district. The Commission took into consideration the land uses pursuant to CDUPs:

> "[p]ortions of the Petition Area have been used by various licensees for quarrying and related activities since 1967 under a Conservation District Use Permit (CDUP) covering 261.723 acres. Currently, approximately 100 acres of the Petition Area are being utilized under this CDUP, which allows for eventual expansion of quarry-related activities over the 261.723 acres, including approximately 232 acres within the Petition Area."

Id. at 8. The Commission explicitly stated that the reclassification would "bring a historic quarry/heavy industrial operation into land use conformance." Id. at 12-13 (emphasis added). The Commission's recognition of its authority to consider CDUPs previously issued by the Department as a basis for determining whether a district boundary amendment would bring the land's classification into conformance with its usage

demonstrates that the Commission's authority to consider land uses undertaken pursuant to CDUPs does not conflict with Department's governance authority. Not only does the declaratory order in Lanihau Properties show that the Commission can consider present activities pursuant to CDUPs without undermining the Department's authority, but also that the Commission can consider future, planned activities. In Lanihau Properties, the Commission considered the "eventual expansion of quarry-related activities" pursuant to CDUPs that have been issued, in deciding the proper classification of land. Id. at 8.[17,18]

The Lanihau Properties boundary amendment proceeding demonstrates that the Commission has the authority to decide when the cumulative impact of CDUPs and associated development creates land usage that is more appropriately classified as urban rather than conservation. The duty of the Commission to

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[17] Similarly, in Hawaiʻi Electric Light Co., No. A03-743, (Hawaiʻi Land Use Comm'n., 2005), the petitioner requested a reclassification of conservation lands to an urban district pursuant to an order from the Department and a settlement negotiation. In granting the petition, the Commission stated that the reclassification will accomplish the "assignment of a more appropriate designation for the petition area in conformance with its long standing use as a power generating facility," pursuant to a CDUP and CDUP amendments issued by the Department. Id. at 15.

[18] The fact that the Kanaheles requested the Commission's interpretation of whether a district boundary amendment is appropriate in the context of a HRS § 91-8 declaratory ruling makes no substantive difference in terms of the Commission's authority to consider uses pursuant to CDUPs in determining the proper classification of land.

ensure the proper classification of land districts by considering whether the cumulative impact of CDUPs and associated development requires classification of the land as urban rather than conservation is a primary duty, regardless of whether its performance is sought through a request for declaratory relief or a petition for district boundary amendment.[19]

[19] The Majority asserts that the Lanihau Properties boundary amendment proceeding is inapposite because there, "a party with a property interest entitled to seek reclassification requested redistricting[.]" While Lanihau Properties was in the context of a district boundary amendment proceeding, that does not change the fact that the Commission's analysis in Lanihau Properties demonstrates the Commission's authority to consider the cumulative impact of CDUPs without overriding the Department's permitting authority. In other words, in Lanihau Properties, the Commission found that reclassifying the district from conservation to urban would bring the district into "land use conformance" given the impact of successive CDUPs issued by the Department. Lanihau Properties at 12-13. The Majority offers no reason why the Commission cannot declare, in the form of a declaratory order, that reclassifying the Astronomy Precinct to an urban district would bring it "into land use conformance[,]" given the cumulative impact of CDUPs, as it did in Lanihau Properties. Id.

Though the Kanaheles are not landowners seeking to reclassify the Astronomy Precinct, the Commission does not lose its authority to declare when the cumulative impact of CDUPs would support an urban designation. The Majority ignores the Commission's declaratory order in Sierra Club & David Kimo Frankel, No. DR00-23 (Hawaiʻi Land Use Comm'n., 2000) [hereinafter "Sierra Club"]. In Sierra Club, in response to a petition from a concerned non-profit organization – not the landowner – the Commission declared that the land at issue must be reclassified from agricultural to urban in order for a development to proceed. See infra pp. 21-22. Sierra Club demonstrates the Commission's authority to declare when reclassification is appropriate in response to a petition for a declaratory order filed by a non-landowner. In addition, recently in Hoʻomoana Foundation v. LUC, SCWC-17-0000181, 2023 WL 2455253 (Haw. Mar. 10, 2023), we acknowledged the Commission's authority to grant a non-landowner's petition for a declaratory order. The Commission declared that that an overnight campground required a district boundary amendment and could not proceed by special use permit in an agricultural district.

B. The Kanaheles' petition does not ask the Commission to review any previous, specific decision made by the Department.

The Majority, citing Citizens Against Reckless Dev. v. Zoning Bd. of Appeals, 114 Hawaiʻi 184, 159 P.3d 143 (2007) [hereinafter "CARD"], concludes that "[i]nsofar as (1) it is the Department's responsibility to identify permissible land uses within a conservation district and (2) the Department has determined that the astronomy facilities constitute permissible conservation district land uses, the Kanaheles may not use the declaratory ruling procedure to seek review of the Department's prior determinations."

CARD is inapplicable. The Kanaheles are not requesting that the Commission review the Department's decision to issue a specific CDUP. CARD explains that "the declaratory ruling procedure of HRS § 91-8 is meant to provide a means of seeking a determination of whether and in what way some statute, agency rule, or order, applies to the factual situation raised by an interested person. It was not intended to allow review of concrete agency decisions[.]" 114 Hawaiʻi at 198-97, 159 P.3d at 155-56. In CARD, the Director of the Department of Planning and Permitting ("DPP") issued a conditional use permit to Wal-Mart, and a declaratory petition was later filed with DPP, challenging that specific decision. Id. at 145, 149, 159 P.3d at 186, 190. This court held that the declaratory ruling procedure is not a

proper means to seek review of specific agency decisions, because the "applicability" of relevant law to that factual circumstance was already determined. Id. at 156, 159 P.3d at 197. Rather, a declaratory ruling procedure "only makes sense where the applicability of relevant law is unknown[.]" Id.

CARD is both procedurally and substantively distinct. Procedurally, the Kanaheles did not file their petition for a declaratory ruling with the same agency that issued CDUPs in the Astronomy Precinct. Substantively, the Kanaheles are not challenging any specific CDUP issued under HRS § 183C-6, which provides that the Department "shall regulate land use in the conservation district by the issuance of permits[.]" Rather, the Kaneheles seek a declaration of whether, given the successive issuances of CDUPs and associated development, the Astronomy Precinct comports with a conservation district classification under HRS § 205-2(e) or, alternatively, whether it comports with an urban district classification under HRS § 205-2(b). The Kanaheles are correct that their petition "could not constitute an attempt to evade a prior decision" by the Department because the Department lacks authority to render declaratory rulings on the classification of lands into districts.

The Majority concludes that the Commission does not have jurisdiction to issue a declaratory order as to whether the

Astronomy Precinct should be classified as an urban district because that would usurp the Department's regulatory authority. To the contrary, the Majority usurps the authority of the Commission. In contravention of HRS §§ 205-2 and 205-4, the Majority finds that the Commission loses jurisdiction to reclassify a conservation district once the Department has authorized a CDUP for the use of conservation lands. The Majority's position is that once the Department has issued a CDUP, the Commission is bound to a determination that the land remains in the conservation district.[20,21] However, the Majority

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[20] The Majority states that "[g]iven that the Kanaheles did not ask the Commission to reclassify the Astronomy Precinct, the Commission did not conclude that it was precluded from ever reclassifying the Astronomy Precinct." However, the Kanaheles request for a declaratory ruling is not significantly dissimilar to a request to the Commission to reclassify the Astronomy Precinct. The Kanaheles' request was for a declaratory ruling pursuant to HRS § 91-8, seeking an agency "interpretation of relevant statutes, rules and order". Fasi, 60 Haw. at 444, 591 P.2d at 118 (emphasis added). Thus, the Kanaheles requested the Commission's interpretation of whether the Astronomy Precinct is more appropriately classified as an urban or conservation district, given the cumulative impact of CDUPs and associated development. The Majority fails to explain how the Commission is without jurisdiction to issue the Kanaheles' requested declaratory order, when the Commission presumably retains the authority to issue a district boundary amendment reclassifying conservation district land to an urban use designation based upon the cumulative impact of CDUPs and associated development, as demonstrated by Lanihau Properties (supra pp. 12-14).

[21] The Majority also agrees with the Commission's determination that it lacks jurisdiction over the Kanaheles' petition because the Kanaheles are not a landowner, the Commission does not have authority to compel a landowner to petition for a district boundary amendment, and the Commission does not have authority to sua sponte reclassify conservation district land. However, even if the Kanaheles were a landowner (i.e., if a landowner petitioned the Commission for a declaratory order as to whether the landowner should pursue a district boundary amendment given successive CDUPs and associated development), the Majority's reasoning would seemingly require the Commission to conclude that it lacks jurisdiction. This is because the crux of the Majority's holding is that the "Commission lacks jurisdiction to issue a

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fails to explain how the Department's decision to issue CDUPs pursuant to HRS § 183C-6(a) precludes the Commission from determining the proper classification of the Astronomy Precinct pursuant to HRS § 205-2, which is a distinct statutorily mandated duty. See Lanihau Properties, supra pp. 12-13.

The Majority also supports its conclusion that the Commission is without jurisdiction to determine the proper classification of the Astronomy Precinct by stating that the Office of Planning and Sustainability Development ("Planning Office") did not recommend reclassification of the Astronomy Precinct in its recent study of the classification of all lands in the State. Specifically, the Majority contends that the five-year boundary review done by the Planning Office pertaining to land use districts precludes the Commission from exercising its duty to group "all lands in the State...in one of the[] four major districts." HRS § 205-2. The Majority posits that because the Planning Office completed a district boundary review in 1992, and again in 2021, and did not recommend reclassifying the Astronomy Precinct, the Commission can no longer exercise its expertise to consider the appropriate land use classification for the land that is included in the Astronomy

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declaratory order to review already-made decisions" by DLNR and the Planning Office.

Precinct. The Majority concludes that "the Planning Office [has] implicitly adopted the Department's determination that the current industrial research facility uses within the Astronomy Precinct are appropriate within the conservation district" and thus, CARD prevents the Kanaheles from filing their petition for a declaratory order with the Commission. To the contrary, CARD did not hold that the Planning Commission can preempt the Commission's authority to determine state land use designations. CARD explicitly states that "the declaratory ruling procedure is not a proper means to seek review of specific agency decisions." 114 Hawaiʻi at 155, 159 P.3d at 196 (emphasis added). The Planning Office's boundary review evaluates "the classification and districting of all lands in the State." HRS § 205-18 (Supp. 2021). The Planning Office's discretionary[22] boundary review reports cannot be a substitute for the statutorily mandated duty of the Commission to be the arbiter of the land use districts of the State of Hawaiʻi. The reports of the Planning Office may be used as a reference, but they are not meant to bind the Commission.

Respectfully, the Majority's analysis leads to absurd results which conflict with the Commission's duty to ensure that

[22] HRS § 205-18 provides that "[t]he office of planning and sustainable development may undertake a review of the classification and districting of all lands in the State."

state land use designations comply with the criteria applicable to each district. For example, the consequence of the Majority's view would be to prohibit the Commission from considering whether factories, or other urban uses permitted in the Astronomy Precinct, comport with the purpose of the conservation district.

C. The Kanaheles do not seek to enforce a provision of law, but merely seek the Commission's interpretation of applicable law.

The Majority asserts that the legal effect of the Kanaheles' petition would be to require the landowner to petition for a district boundary amendment. The Majority therefore concludes that the Commission correctly found that it does not have jurisdiction to issue the Kanaheles' requested declaratory order because the Commission lacks authority to compel the reclassification of conservation districts.

The Kanaheles do not seek to enforce any provision of law, such as to compel the landowner to petition for reclassification, but merely seek the Commission's interpretation of the proper classification of the Astronomy Precinct.

A request for a declaratory ruling does not seek an enforcement order; it seeks an agency's interpretation of relevant statutes and rules. In Sierra Club & David Kimo Frankel, No. DR00-23 (Hawaiʻi Land Use Comm'n., 2000)

(hereinafter "Sierra Club"), the petitioners requested the Commission's interpretation as to whether a proposed development in an agricultural district that included single-family homes could proceed via a county special permit, or alternatively, whether it was necessary to reclassify the agricultural designation to urban. The developer argued that because counties are given the authority under HRS § 205-5(b) to further define accessory agricultural uses and the county has by ordinance permitted single family dwellings on agricultural lands, the county preempted the Commission's authority to require a district boundary amendment. Id.

The Commission rejected the argument that the county supplanted the authority of the Commission to determine whether a use is consistent with a state land use classification. The Commission concluded that HRS § 205-5(b) does not "grant the counties such unfettered authority," and that "judging [the] project as a whole, this development has all the characteristics we normally consider to be urban[.]" Id. at 19, 22. Significantly, the Commission explicitly stated that the declaratory ruling procedure under HRS § 91-8 "is not an enforcement order assessing penalties or imposing injunctive relief[,]" which would fall within county jurisdiction on agricultural land. Id. at 13 (emphasis added). The Commission's declaratory order in Sierra Club specifically

denied the petitioner's request for an order "commanding" the developer "to apply for a district boundary amendment" and also an order "enjoining the County from issuing a special permit." Id. at 13, n.6.

As in Sierra Club, the Commission has the authority to issue a declaratory order in response to the Kanaheles' petition for an "interpretation of relevant statutes, rules and orders." Fasi, 60 Haw. at 444, 591 P.2d at 118 (emphasis added).

D. The purpose of HRS Chapter 205 to conserve conservation district lands and ensure development proceeds in an orderly manner compels the Commission's consideration of the Kanaheles' petition.

The purpose of HRS chapter 205 supports the conclusion that the Commission has jurisdiction to rule on the Kanaheles' petition. HRS chapter 205 was passed "in order to preserve, protect and encourage the development of the lands in the State for those uses to which they are best suited for the public welfare." 1961 Haw. Sess. Laws Act 187, § 1 at 299. "Thus, conservation lands must be preserved if practicable, agricultural lands should be protected, and urban lands should be developed in an orderly fashion." Pearl Ridge Estates Comty. Ass'n. v. Lear Siegler, Inc., 65 Haw. 133, 144, n.9, 648 P.2d 702, 709, n.9 (1982) (Nakamura, J., concurring). The Hawai'i legislature established the Commission to administer the state-wide land use law because "inadequate controls have caused many

of Hawaiʻi's limited and valuable lands to be used for purposes that may have a short-term gain to a few but result in a long-term loss[.]" 1961 Haw. Sess Laws Act 187, § 1 at 299.

Consistent with the purpose of HRS Chapter 205, Chairperson Scheuer expressed an intent to provide adequate control of Mauna Kea's conservation land. He observed that on Mauna Kea, "we've had incremental decision-making, CDUP by CDUP by CDUP with no one ever looking at the entirety of the summit and its impacts."[23] As noted, supra p. 3, he continued, "if it's not up to this commission to ensure that the four districts' lines are respected, I don't know who it's up to[.]"

Chairperson Scheuer's statements reflect concern that HRS Chapter 205's purpose to protect conservation district lands is contravened by the Commission's holding that it lacks jurisdiction over the Kanaheles' petition. HRS Chapter 205 was enacted, and the Commission was created, to "protect and conserve" Hawaiʻi's valuable, limited, and sacred lands while development proceeds in an "orderly" and "intelligent" manner. H. Stand. Comm. Rep. No. 395, in 1961 House Journal, at 855-56;

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[23] Chairperson Scheuer further stated that the "[CDUP] process – very clearly from the record of this proceeding – does not allow for that possibility, even if cumulative impacts were looked at in the last CDUP issued" and "[t]he permit itself says: here's the conditions that will be addressed by the new telescope. Here's the conditions that will be addressed by the state, but these conditions are all severable. So we can go forward without any addressing of the comprehensive impacts."

Curtis, 90 Hawai'i at 396, 978 P.2d at 834. To effectuate the purpose of HRS chapter 205, to ensure that conservation districts are duly protected, and to "[s]tage the allocation of land for development in an orderly plan[,]" the Commission must have the authority to declare when the cumulative effect of thirteen astronomy facilities and associated development is incompatible with the definition of a conservation district. See H. Stand. Comm. Rep. No. 395, in 1961 House Journal, at 855-56.

IV. Conclusion

For the foregoing reasons, I respectfully dissent to the Majority's elimination of the Commission's jurisdiction over conservation land bearing CDUPs granted by the Department; and to the Majority's concomitant removal of all conservation land from protection by the Commission that the Department industrializes with CDUPs. The Majority asserts that it is merely engaged in statutory interpretation, and it is the legislature's role to amend the law in order to give proper effect to the statutory scheme's purpose of "protecting conservation district land[.]" Respectfully, the legislature has provided robust protection of the conservation district that is now undone by the Majority's decision. In direct contravention of the existing statutory scheme, the Majority removes the authority granted to the Commission to declare when

the conservation district is used in violation of the core purpose of its legislative creation: to protect Hawaiʻi's most sacred and vulnerable natural resources, including cultural resources.[24] The decision of the Commission dismissing the Kanaheles' petition for declaratory judgment should be reversed and the case remanded to the Commission with instructions to consider the petition.

/s/ Sabrina S. McKenna

/s/ Michael D. Wilson

[24] See In re Conservation Dist. Use Application (CDUA) HA-3568, 143 Hawaiʻi 379, 424, 431 P.3d 752, 797 (2018) (Wilson, J. dissenting) (explaining that HAR Title 13, Chapter 5 defines natural resources to include cultural resources).