

The Lum Court, Land Use, and the Environment: A Survey of Hawai'i Case Law 1983 to 1991

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I. INTRODUCTION

Given the plethora of land use regulations at the state and local level in Hawai'i,¹ the relative dearth of land use cases reaching the appellate courts of Hawai'i is still something of an anomaly.² This was true in the Richardson years,³ and it is true for the Lum Court as well. This makes trend analysis a risky business.

Nevertheless, there are a few discernible case lines,⁴ short though they may be. These include (1) the relationship between county plans, and to some extent state plans, and zoning regulations;⁵ (2) the role

¹ For analysis and discussion of Hawaii's complex land use regulatory system at the state and county levels see FRED P. BOSSELMAN & DAVID L. CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROLS* ch. 1 (1971); DAVID L. CALLIES, *REGULATING PARADISE: LAND USE CONTROLS IN HAWAII* (1984); DANIEL L. MANDELKER, *ENVIRONMENTAL AND LAND USE CONTROLS LEGISLATION* ch. 7 (1976); PHYLLIS MYERS, *ZONING HAWAII* (1977).

² Such cases do not often reach the United States Supreme Court either, but the Court's 1991-92 term promises to be a watershed one. In three cases, the Court will address and in all likelihood substantially rewrite the law on taking of property by regulation, which will vitally affect the application of land use law in Hawai'i.

In *Lucas v. So. Carolina Coastal Council*, 404 S.E.2d 895 (1991), the Court will address whether a state coastal protection statute forbidding construction on two beach front residential lots is a taking of private property through regulation. In *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28 (1990), the Court will address the application of constitutional due process to alleged defects in Puerto Rico's land use permitting process. Finally, in *Yee v. Escondido*, 274 Cal. Rptr. 551 (1990), the Court will deal with the application of the Fifth Amendment to rent control in the context of a mobile home park.

Coupled with the Court's 1987 trilogy (*Keystone Bituminous Coal v. DeBenedictis*, 480 U.S. 470 (deciding takings); *First English Evangelical Lutheran Church of Glendale v. Los Angeles*, 482 U.S. 304 (requiring compensation for regulatory takings); and *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (requiring an "essential nexus" between land use permit conditions and the proposed land development)), the Court may very well be finally disposing of land use and the Constitution, at least for the balance of this century.

³ William S. Richardson was Chief Justice of the Hawaii Supreme Court from 1966 to 1982.

⁴ Some of the case lines continue the court's interests from the Richardson years. To that end, Richardson Court cases are included in this survey, primarily in the footnotes, for comparison.

⁵ See *infra* part II.

of initiative and referendum in land use regulation;⁶ (3) the role of coastal zone management protection law;⁷ (4) standing;⁸ (5) the presumption of validity afforded administrative agency decisions;⁹ and (6) the role of and standard of review applicable to the zoning board of appeals.¹⁰

The court has also addressed the applicability of zoning regulations to religious buildings in the face of First Amendment challenges.¹¹ More tangentially, from a land use perspective, the court has suggested that the police power is not coterminous with eminent domain in the public purpose area, at least under Hawai'i's land reform act,¹² in welcome contrast to the United States Supreme Court.¹³

This survey also incorporates decisions from the Hawaii Intermediate Court of Appeals (I.C.A.). *Hawaii Revised Statutes* section 602-57 gives the I.C.A. concurrent jurisdiction with the Hawaii Supreme Court to hear all matters.¹⁴ The Lum Court's policy of assigning cases focuses more on an even distribution of the caseload between the supreme court and I.C.A. than on a separation of cases by the issues they present. The rationale behind this division is that strict adherence to the assignment criteria as set forth in *Hawaii Revised Statutes* section 602-6 would place an unmanageable burden on the I.C.A., resulting in a backlog.¹⁵ In order to avoid this overload, the supreme court does

⁶ See *infra* part III.

⁷ See *infra* part IV.

⁸ See *infra* part V.

⁹ See *infra* part VI.

¹⁰ See *infra* part VII.

¹¹ See *infra* part VIII.A.

¹² See *infra* part VIII.B.

¹³ *Berman v. Parker*, 348 U.S. 26 (1954); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

¹⁴ HAW. REV. STAT. § 602-57 (1985).

¹⁵ Interview with Chief Justice Lum by Jon C. Yoshimura, in Honolulu, Haw. (Sept. 24, 1991).

[O]ur number of appeals has gone to about 800 a year. And that's just appeals. Now, if we were to follow the guidelines, I would say that maybe only about 100 to 150 cases would come to us, the rest would go to the I.C.A. and obviously the cases would bog down at the I.C.A. And so I think that as a practical matter, because there are eight of us really, we try to allocate about 100 cases per judge. Roughly, we keep about 500 cases, about 300 cases to the I.C.A. Now, we're trying to get more I.C.A. judges so that we can really handle what is truly the kind of cases the supreme court should be handling. But we have been turned down by the legislature. And for that reason we will

not assign all the cases which the I.C.A. might normally be expected to hear.¹⁶

II. PLANNING AND ZONING: THE CONFORMITY REQUIREMENT

The most significant land use law and policy contribution of the Lum Court is its ringing defense of the land use plan as the basis for land use controls in *Lum Yip Kee, Ltd. v. City & County of Honolulu*¹⁷ and *Kaiser Hawaii Kai Development Co. v. City & County of Honolulu*¹⁸ (commonly referred to as "Sandy Beach"). There can be no question after these two decisions that land use plans are paramount in the land use regulatory scheme in Hawai'i—and particularly in the City and County of Honolulu. Furthermore, the cases make clear that in the event of conflict with zoning ordinances or land use initiatives, it is the plan which will control. Hawai'i thus retains its position among states in the forefront of the requirement that zoning must conform to and be based upon comprehensive planning.¹⁹ Of the two cases, the most fulsome and important is *Lum Yip Kee*.

In *Lum Yip Kee*,²⁰ the court had before it a land use initiative of the type that it later condemned on land use planning grounds in *Sandy*

continue with the same policy. . . . Generally that's the sort of policy I adopted when I was assignment justice, and I think Justice Padgett has likewise continued to do that.

Id.; see Jon C. Yoshimura, *Administering Justice or Just Administration: The Hawaii Supreme Court and The Intermediate Court of Appeals*, 14 U. HAW. L. REV. 271 (1992).

¹⁶ See interview with Chief Justice Lum, *supra* note 15.

Justice Moon was recently appointed assignment justice in place of Justice Padgett. This may impact the policy of distribution observed in the court thus far because Justice Moon favors stricter compliance with HAW. REV. STAT. § 602-6. Interview with Justice Moon by Jon C. Yoshimura, in Honolulu, Haw. (Oct. 1, 1991).

¹⁷ 70 Haw. 179, 767 P.2d 815 (1989) (Lum, C.J.).

¹⁸ 70 Haw. 480, 777 P.2d 244 (1989) (Wakatsuki, J.) [hereinafter *Sandy Beach*].

¹⁹ Other jurisdictions in which "in accordance with a comprehensive plan" is more than lip service with respect to the relationship of planning to zoning are California, Washington and Florida. For examples of statutes and cases see DAVID L. CALLIES & ROBERT H. FREILICH, *CASES AND MATERIALS ON LAND USE* chs. 3, 9 (1986).

²⁰ 70 Haw. 179, 767 P.2d 815 (1989) (Lum, C.J.). In *Lum Yip Kee*, the landowner challenged two ordinances which changed the land use designation of his property from "high density apartment" to "low density apartment". The dispute spanned three annual development plan reviews by the Honolulu City Council in which the property was reclassified from high density apartment use to medium density and then back to high density. Frustrated with the City Council's indecisiveness, the voters of

Beach, but which it failed to resolve because the City Council passed an ordinance virtually identical to the initiative,²¹ rendering the propriety of the initiative issue moot.²²

However, in the course of a lengthy opinion, Chief Justice Lum made it crystal clear that land use controls in Hawai'i are founded absolutely on the planning process,²³ a sentiment echoed by Justice Wakatsuki writing for the majority in *Sandy Beach* the following year.²⁴

The court commenced its discussion with the general principle that the "actual physical development of a site is controlled by the development plan of the area in which the site is located."²⁵ The court had previously noted that in Honolulu land use controls are implemented through a "three-tier regime" consisting of the island-wide general plan; the eight regional development plans; and zoning and subdivision

the City and County of Honolulu turned to the initiative process and adopted an ordinance in November of 1984. Finally, in May of 1985, the City Council adopted a similar ordinance designating the property as low density apartment use. *Id.* at 184-85, 767 P.2d at 819.

²¹ *Id.* at 185, 767 P.2d at 819. The redesignation from high density to low density was part of the overall Development Plan Amendment Ordinance, No. 85-46. *Id.*

²² *Id.* at 181, 767 P.2d at 817. The property owner in *Lum Yip Kee* also claimed the City Council's reclassification of its fairly large parcel from high to low density apartment use on the applicable development plan map constituted spot zoning. *Id.* at 190, 767 P.2d at 822. Spot zoning is universally condemned as the zoning of a usually small parcel in a manner wildly inconsistent with surrounding zones and uses without a rational basis. CALLIES & FREILICH, *supra* note 19, at 95-97; DANIEL L. MANDELKER, LAND USE LAW § 6.24 (1988). The court noted that it had defined spot zoning as an arbitrary zoning action applied to a small area within a larger area, different from and inconsistent with the surrounding classifications and not in accordance with a comprehensive plan. 70 Haw. at 190, 767 P.2d at 822 (citing *Life of the Land v. City Council*, 61 Haw. 390, 429, 606 P.2d 866, 890 (1980) (Marumoto, J.)). The court concluded that there had been no spot zoning here, finding that the council's action was not arbitrary, but based upon sound planning principles. Moreover, the area surrounding the Lum Yip Kee parcel was not inconsistent with low density apartment use. Finally, the court noted that since some of the plans applicable to the parcel had as objectives the provision of affordable housing, there was a reasonable basis for the reclassification. *Id.* at 191-92, 767 P.2d at 823.

²³ *Sandy Beach Defense Fund v. City Council*, 70 Haw. 361, 773 P.2d 250 (1989) (Lum, C.J.).

²⁴ *Kaiser Hawaii Kai Dev. Co. v. City & County of Honolulu*, 70 Haw. 480, 777 P.2d 244 (1989) (Wakatsuki, J.).

²⁵ *Lum Yip Kee*, 70 Haw. at 182, 767 P.2d at 817 (citing *Protect Ala Wai Skyline v. Land Use & Controls Comm.*, 6 Haw. App. 540, 548, 735 P.2d 950, 955 (1987) (Heen, J.) (citing CALLIES, *supra* note 1, at ch. 3, and 1 EUGENE McQUILLIN, MUNICIPAL CORPORATIONS §§ 1.72, 1.75 (1971))).

laws, rules, and regulations. It is the development plan land use map which is a part of each of the eight development plans that "indicates the location of various land uses such as residential, recreation and parks, agriculture, commercial, military, and preservation."²⁶ The Public Facilities Map shows existing and future location of roads and streets, sewer lines and other proposed facilities.²⁷

The court first summarized the various requirements for annual review and amendment of development plans pursuant to the City Charter.²⁸ It observed that "[t]he Charter requires zoning ordinances to conform to and implement the development plan for that area. . . . In order to meet this conformance requirement, it is frequently necessary for a landowner first to seek a development plan amendment from the City before requesting a zoning change."²⁹

Since the plaintiffs in *Lum Yip Kee* attacked not only the development plan amendment and conformance to zoning in the County's procedures but also its conformance to state planning requirements applicable to counties,³⁰ the court then proceeded to review those requirements as well. First, it noted that state statutes require that "county development plans shall be formulated with input from state and county agencies as well as the general public."³¹ Furthermore, observed the court, "The formulation, amendment, and implementation of county general plans or development plans shall take into consideration statewide objectives, policies and programs stipulated in state functional plans approved in consonance with this chapter."³² However, the court further observed that "[t]he state functional plans are broad policy

²⁶ *Id.* at 182, 767 P.2d at 817.

²⁷ *Id.* at 182, 767 P.2d at 818.

²⁸ *Id.* at 183, 767 P.2d at 818.

²⁹ *Id.* (citing *CALLIES*, *supra* note 1, at 27). Unfortunately, the court also blithely accepted a previous—and pre-development—plan "recognition" that not only enactments but also amendments to development plans constitute legislative acts of the Council (*see Kailua Community Council v. City & County of Honolulu*, 60 Haw. 428, 432, 591 P.2d 602, 605 (1979) (Menor, J.)), thus raising a presumption that map amendments to the development plans may also be legislative acts. *Id.* at 187, 767 P.2d at 820. This has a variety of ramifications, not the least of which is to make them subject to initiative and referendum should Hawai'i, through appropriate legislation, choose to reinstate these popular techniques held illegal in *Sandy Beach*, discussed *infra* part III.

³⁰ *Id.* at 186, 767 P.2d at 820.

³¹ *Id.* at 188, 767 P.2d at 821 (citing HAW. REV. STAT. § 226-61(a) (1985)).

³² *Id.*

guidelines providing a framework for state and county planning and do not constitute legal mandates, nor legal standards of performance."³³ This is significantly different from the way the state functional plans were to interact with county plans originally,³⁴ but at the very least the counties must make some attempt to "consider" state policies in formulating their plans,³⁵ which in turn control their zoning and subdivision laws.³⁶

Noting that the action of the City Council in amending the applicable development plan furthered at least two articulated policies of the State Housing Functional Plan,³⁷ the court also observed that "studies were made, public hearings held, field investigations were conducted, public testimony was considered, and findings were made."³⁸ Therefore, the court concluded that the City and County had acted in accordance with state functional plan requirements as well as its own general and development plan requirements in amending its development plan.³⁹ In a critical footnote, it also observed that although the challenge was only to the development plan amendment and that is all the City had so far done, "[t]he zoning issue is necessarily moot, however, because zoning is required to conform to the development plan. . . . Thus, it would not be possible to rezone [the subject property for high density use] after the development plan had been amended to 'Low Density Apartment.' Such a rezoning would be void."⁴⁰

³³ *Id.*

³⁴ *Id.* The difference is due to a change in the language of the statute. As the court noted: "The Hawaii Legislature made this [difference in interaction with the county plans] clear in 1984, when it amended the State Planning Act to eliminate the requirements of conformance by the counties with the Act. [HAW. REV. STAT.] § 226-61(a) was amended so that the counties would only have to 'consider' the functional plans." See H.R. CONF. COMM. REP. NO. 35-84, 12th Leg. Sess., Reg. Sess. (1984), reprinted in 1984 HAW. H.R. J. 732-33.

³⁵ *Lum Yip Kee*, 70 Haw. at 188, 767 P.2d at 821.

³⁶ *Id.* at 183, 767 P.2d at 818.

³⁷ *Id.* at 189, 767 P.2d at 821. Act 100, the State Plan (codified at HAW. REV. STAT. § 226), calls for 12 so-called functional plans to be formulated by state agencies and approved by the legislature, for agriculture, housing, tourism, transportation, conservation lands, education, higher education, energy, health, recreation, historic preservation, and water resource development. *Id.*

³⁸ *Id.* at 189, 767 P.2d at 821.

³⁹ *Id.*

⁴⁰ *Id.* at 192 n.15, 767 P.2d at 823 n.15. In this assertion, the court is not quite correct, strictly speaking. The County Charter specifically requires that no zoning or subdivision ordinance may be "initiated or adopted unless it conforms to and imple-

These views of the Lum Court on the importance of the plan foreshadowed its decision in *Sandy Beach*,⁴¹ in which it reiterated the tight fit between land use controls and planning. Suffice it here to observe that, in that case, the court said, "Zoning by initiative is inconsistent with the goal of long range comprehensive planning"⁴² and cited with approval those cases which have so held from other states. The court then reiterated its view of the legislature's "concern for comprehensive long range planning"⁴³ by its enactment of the State Plan⁴⁴ setting out county planning requirements and their relationship to state plans, all, as the court here observed, as set out in the *Lum Yip Kee* case.⁴⁵

In sum, the place of planning in the land development and regulation process in Hawai'i is clearly recognized in all its sophistication and detail by Hawai'i's Supreme Court. While hardly a departure from previous decisions, the court had not previously dealt, approvingly or otherwise, with planning and land use in such comprehensive detail. The full ramifications of this clearly plan-based land regulatory system will in all probability take years of judicial decision-making to clarify. The court's treatment of initiative and referendum is consequently no surprise.

III. INITIATIVE, REFERENDUM, AND LAND USE PLANNING IN HAWAI'I

How to deal with the use of initiative and referendum as applied to land use decision making is a subject which has bedeviled land use

ments the development plan for that area." HONOLULU, HAW., REV. ORDINANCES § 5-412(3) (1984). It is therefore possible for a landowner to proceed under a zoning classification which existed prior to the passage of a development plan or amendment thereto without violating that charter requirement. Hawai'i courts have not yet decided, as have the courts in at least one state with similar conformance requirements, *see, e.g., Fasano v. Board of County Comm'rs of Washington County*, 507 P.2d 23 (Wash. 1973), that the county is under a duty to conform its zoning map with its development plan map and that until that is done, the development plan map controls. It is however, still possible to read earlier statements of the court in this case, as favoring such an interpretation. *See infra* notes 25-36 and accompanying text. However, because the City Council almost inevitably does so conform its zoning map to the relevant development plan map, this legal "gap" may have little real significance.

⁴¹ *See infra* part III.

⁴² *Kaiser Hawaii Kai Dev. Co. v. City & County of Honolulu*, 70 Haw. 480, 484, 777 P.2d 244, 247 (1989) (Wakatsuki, J.).

⁴³ *Id.* at 486 n.2, 777 P.2d at 248 n.2.

⁴⁴ HAW. REV. STAT. § 226 (1985).

⁴⁵ *Sandy Beach*, 70 Haw. at 486-87, 777 P.2d at 248.

commentators for many years.⁴⁶ There are several theories upon which cases dealing with the subject turn,⁴⁷ among which is the effect of ballot box zoning on comprehensive planning.

The issue of ballot box zoning has come before the Hawaii Supreme Court three times. In the first case, *County of Kauai v. Pacific Standard Life Insurance Co.*⁴⁸ (commonly referred to as "Nukoli'i"), the Richardson Court rejected a developer's claim of estoppel while appearing to approve of referendum as a means of downzoning parcels of land. Pursuant to the county charter,⁴⁹ Kauai voters passed a referendum measure which repealed a Kauai County Council map amendment to the Comprehensive Zoning Code permitting resort development at Nukoli'i Beach.⁵⁰ After the referendum petition had been certified by the county clerk,⁵¹ the Planning Commission approved a Special Management Area (SMA) use permit for the project. The developer proceeded with expenditures on the project even though the referendum vote was pending.⁵² Then at the general election the voters voted to repeal the zoning code amendment.⁵³

In its analysis, the court rejected the developer's argument that the County should be estopped from prohibiting the project from contin-

⁴⁶ See, e.g., David L. Callies, Nancy C. Neuffer & Carlito P. Caliboso, *Ballot Box Zoning: Initiative, Referendum, and the Law*, 39 J. URB. AND CONTEMP. L. 53 (1991); Robert H. Freilich & Derek B. Guemmer, *Removing Artificial Barriers to Public Participation in Land Use Policy: Effective Zoning and Planning by Initiative and Referendum*, 21 URB. LAW. 511 (1989); Jon E. Goetz, *Direct Democracy in Land Use Planning: The State Response to Eastlake*, 19 PAC. L. J. 793 (1987); Ronald H. Rosenberg, *Referendum Zoning: Legal Doctrine and Practice*, 53 U. CIN. L. REV. 381 (1984).

⁴⁷ E.g., whether the rezoning act is legislative (referendable) or quasijudicial (non-referendable), whether federal or state due process requirements are met, whether the power is reserved to the people in the state constitution, and whether direct democracy is discriminatory. Callies, Neuffer & Caliboso, *supra* note 46.

⁴⁸ 65 Haw. 318, 653 P.2d 766 (1982) (Richardson, C.J.) [hereinafter *Nukoli'i*], *appeal dismissed*, *Pacific Standard Life Ins. Co. v. Committee to Save Nukolii*, 460 U.S. 1077 (1983). For full discussion of this case and its aftermath, see Benjamin A. Kudo, *Nukolii: Private Development Rights and the Public Interest*, 16 URB. LAW. 279 (1984); CALLIES, *supra* note 1, at 168-69.

⁴⁹ KAUAI, HAW., CHARTER art. XXII (1986). In the *Nukoli'i* opinion, the court cited to art. V of the Kauai County Charter. However, art. XXII addresses initiative and referendum.

⁵⁰ *Nukoli'i*, 65 Haw. at 322, 653 P.2d at 771.

⁵¹ *Id.* at 321, 653 P.2d at 770.

⁵² *Id.* at 333-34, 653 P.2d at 777.

⁵³ *Id.* at 322, 653 P.2d at 771.

uing.⁵⁴ The court first stated that there could be no claim of estoppel until there was reliance on a final discretionary action.⁵⁵ In this case the final discretionary action on which the developer could rely was the referendum because it had been certified prior to the final discretionary action under the permit process—the issuing of the SMA use permit.⁵⁶ The court therefore rejected the developer's estoppel claim; the developer had proceeded with development prior to the referendum vote at the risk of the zoning ordinance being repealed and at the risk of loss of its investment up to that point.⁵⁷

Despite the lengthy discussion on estoppel, the court did not address the validity of referendum in the planning and zoning process. *Nukoli'i* appears to assume that referenda are appropriate means of effecting zoning code amendments under the law.

In the second case, *Lum Yip Kee v. City & County of Honolulu*,⁵⁸ the issue of zoning by initiative was raised briefly. However, the court did not rule on its validity because the Honolulu City Council passed an ordinance essentially the same as that approved by the voters, rendering the issue of ballot box zoning validity moot.⁵⁹

Shortly after *Lum Yip Kee*, the court got its chance to rule on zoning by initiative when it decided *Kaiser Hawaii Kai Development Co. v. City & County of Honolulu*⁶⁰ (*Sandy Beach*). In *Sandy Beach* the Lum Court seized upon the opportunity to reinforce the importance of the planning process in land use policy which it had stressed in *Lum Yip Kee*.⁶¹ The controversy in *Sandy Beach* centered around the proposed development of a parcel of land located in Hawai'i Kai. *Sandy Beach*, a popular surfing and picnic area, is located across the street from the proposed development. The property had been zoned for residential use since 1954. During the permit application process,⁶² the public expressed its concern about the impact of the development on *Sandy Beach*. When

⁵⁴ *Id.* at 326, 653 P.2d at 773.

⁵⁵ *Id.* at 328, 653 P.2d at 774 (citing *Life of the Land v. City Council*, 61 Haw. 390, 606 P.2d 866 (1980) (Marumoto, J.)).

⁵⁶ *Id.* at 329-30, 653 P.2d at 775.

⁵⁷ *Id.*

⁵⁸ 70 Haw. 179, 767 P.2d 815 (1989) (Lum, C.J.).

⁵⁹ *Id.* at 181, 767 P.2d at 817.

⁶⁰ 70 Haw. 480, 777 P.2d 244 (1989) (Wakatsuki, J.).

⁶¹ *See supra* part II.

⁶² The parcel in question required an SMA use permit under the Coastal Zone Management Act (CZMA), HAW. REV. STAT. § 205A (1985). *Sandy Beach*, 70 Haw. at 481-82, 777 P.2d at 245.

the City Council granted the SMA use permit, the public opposition turned into an initiative petition drive which had as its goal the downzoning of the property from residential to preservation.⁶³

During the petition drive, the developer sought an injunction to keep the Coalition, a group of citizens formed to prevent the development, from putting the petition on the ballot and a declaration that zoning by initiative constituted an illegal procedure to downzone the property.⁶⁴ The circuit court ruled in favor of the developer and issued an injunction.⁶⁵ The supreme court stayed the injunction but reserved the right to decide the issue of zoning by initiative at a later date.⁶⁶ The Coalition succeeded in putting the proposed initiative ordinance on the ballot, and the voters approved the proposal in the general election in November of 1988.⁶⁷ Subsequent to the election, the supreme court held that zoning by initiative was illegal.⁶⁸

The court's reasoning in *Sandy Beach* focused primarily on the policy expressed in the Zoning Enabling Act⁶⁹ which "clearly indicates the legislature's emphasis on comprehensive planning for reasoned and orderly development."⁷⁰ It held that "zoning by initiative is inconsistent with the goal of long range comprehensive planning."⁷¹ The court distinguished *Sandy Beach* from *Nukoli'i* by declaring that "the court in the *Nukolii* case was not faced with the issue of whether zoning by referendum is permissible in light of [*Hawaii Revised Statutes* section] 46-4(a)."⁷² Therefore, *Nukoli'i* was inapposite.⁷³

The Lum Court has decided that the use of initiative to rezone land is not available to voters of Hawai'i under current law because such zoning is inconsistent with long-range planning. It is interesting to note the effect that initiative has had on public officials, however. In both *Lum Yip Kee* and *Sandy Beach*, the City Council amended the zoning ordinances to do what the initiatives were intended to do. If

⁶³ *Id.* at 492, 777 P.2d at 246.

⁶⁴ *Id.* at 482, 777 P.2d at 246.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* Nevertheless, the City Council did in fact downzone the subject property in accordance with the purpose of the now-illegal initiative vote.

⁶⁹ HAW. REV. STAT. § 46-4 (1985).

⁷⁰ 70 Haw. at 484, 777 P.2d at 246-47.

⁷¹ *Id.* at 484, 777 P.2d at 247.

⁷² *Id.* at 485, 777 P.2d at 248.

⁷³ *Id.*

the Council was acting in accordance with long-range comprehensive planning when it amended the ordinances, as it must under the Charter, then it is also arguable that the initiative votes were both in accordance with comprehensive plans. Of course, it is the process, and not the results, which is the key. That ballot box zoning may occasionally result in the same decision that the comprehensive planning process might produce is a far different "guarantee" than that the land use decision-making process will always be required to accord with comprehensive planning.

Although initiative is no longer available as a means of rezoning, there is a remote possibility that the applicability of referenda to land use decision making remains unsettled. The court in *Nukoli'i* impliedly approved of referendum as a means to amend the zoning code. However, the Lum Court in *Sandy Beach* cited with approval several mainland referendum cases which struck down referenda on various grounds, including effect on planning, in the course of its decision. Therefore the likelihood of the court's distinguishing between initiative and referendum for land use decision making is remote.⁷⁴ What will continue is the court's emphasis on long-range comprehensive planning and the requirement that zoning be based thereon.

In sum, while the Lum Court has clearly removed ballot box zoning from the Hawai'i legal scene, it has done so on narrow, if predictable grounds: illegal damage to Hawai'i's sophisticated land use plans and planning process. However, there are many other bases for striking down ballot box measures which attempt to reclassify property.⁷⁵ It

⁷⁴ The court's treatment of the referendum issue in *Nukoli'i* as "inapposite" to the initiative issue in *Sandy Beach* is less convincing given that the issue of the validity of referendum and planning were raised in *Nukoli'i* in the Motion for Reconsideration. Memorandum in Support of Motion for Reconsideration, County of Kauai v. Pacific Standard Life Insurance, 65 Haw. 318, 653 P.2d 766 (No. 8267) (1982). The court denied the motion, though on what grounds is not clear. 65 Haw. 682 (1982). The implication, though, is that the referendum was not subject to attack on grounds of incompatibility with long range planning. If this is so, the court in *Sandy Beach* was actually overruling that part of *Nukoli'i* which implied the validity of the referendum. However, the court did cite with approval both *Township of Sparta v. Spillane*, 312 A.2d 154 (N.J. Super. Ct. App. Div. 1973), and *Leonard v. City of Bothell*, 557 P.2d 1306 (Wash. 1976), both referendum cases, from which one would logically conclude that, if confronted with any inconsistency between *Nukoli'i* and *Sandy Beach*, it would in all likelihood reconsider and overrule *Nukoli'i*, even though there are sufficient differences between initiative and referendum in terms of due process for the court to make a distinction.

⁷⁵ See, e.g., Callies, Nueffer & Caliboso, *supra* note 46.

would thus be a grave error to assume that simplistic legislative solutions merely creating an exception from the land use planning process for initiative and referendum would result in legal ballot box zoning for Hawai'i.

IV. THE ROLE OF COASTAL ZONE MANAGEMENT PROTECTION LAW

A. SMA Permits: Legislative, Quasijudicial, or Something Else?

One of the most troublesome cases to come from the Lum Court is *Sandy Beach Defense Fund v. City Council*.⁷⁶ Ostensibly about the granting of an SMA permit under local implementation of the state's Coastal Zone Management Act⁷⁷ (CZMA), the case tells a lot about the court's views concerning legislative bodies acting in nonlegislative capacities.

After setting out the process by which the Honolulu City Council grants SMA permits,⁷⁸ the court correctly observed that the Hawaii Administrative Procedure Act⁷⁹ (HAPA) provides no basis for requiring a contested case hearing since HAPA specifically and categorically exempts legislative bodies from its requirements.⁸⁰ It is an unfortunate and myopic exemption for an instance such as the granting of an SMA

⁷⁶ 70 Haw. 361, 773 P.2d 250 (1989) (Lum, C.J.).

⁷⁷ HAW. REV. STAT. § 205A (1985). The Legislature enacted the CZMA in 1977 to provide for the effective planning, management, beneficial use, protection, and development of the coastal zones of the State. For a detailed discussion of the adoption of the CZMA by Hawai'i, see CALLIES, *supra* note 1.

⁷⁸ Space is too short to fully describe the process and the court's reasoning on this issue, but see Lea Oksoon Hong, Recent Development, *Sandy Beach Defense Fund v. City & County of Honolulu: The Sufficiency of Legislative Hearings in an Administrative Setting*, 12 U. HAW. L. REV. 499 (1990).

⁷⁹ HAW. REV. STAT. § 91 (1985).

⁸⁰ HAW. REV. STAT. § 91-1(1) (1985); *Sandy Beach Defense Fund*, 70 Haw. at 369, 773 P.2d at 256.

The Richardson Court decided a case with facts similar to those in *Sandy Beach Defense Fund*. In *Town v. Land Use Commission*, 55 Haw. 538, 524 P.2d 84 (1974) (Kobayashi, J.), the court had to characterize a district designation amendment proceeding. The court held that because the plaintiff, who was an adjacent owner to the parcel in question, had a property interest at stake, the proceeding was properly to be characterized as a contested case proceeding under HAPA. *Id.* at 548, 524 P.2d at 91. Despite the *Town* holding, the court in *Sandy Beach Defense Fund* did not look at the interests claimed to be at stake by appellants. Rather it chose to look only at the exemption which HAPA provides to the City Council as a legislative body. 70 Haw. at 369, 773 P.2d at 256.

permit in which the Honolulu City Council is clearly acting in its quasijudicial, and not its legislative, capacity.⁸¹ However, the court then proceeded, unaccountably, to hold that the CZMA does not require such a contested case hearing either, but merely an informational one.⁸² Because the CZMA contemplates that each county will choose its own method of considering SMA permit applications, by designating the City Council—a HAPA-exempt body—as the appropriate body, Honolulu has opted for informational hearings rather than contested case hearings.⁸³

It is difficult to follow the court's distinction in *Sandy Beach Defense Fund* of its previous decisions in which neighbor island counties were required to hold contested case hearings for SMA permits.⁸⁴ The

⁸¹ The absurdity of this exemption is evident when one considers—as appellants and Justice Nakamura in dissent did—that SMA permits are considered on the neighbor islands by county planning commissions, not county councils, thereby presumably making HAPA applicable to the SMA process there, but not in Honolulu, purely on the basis of which body doles out the permit!

The exemption becomes even more troublesome when considered in light of *Kailua Community Council v. City & County of Honolulu*, 60 Haw. 428, 591 P.2d 602 (1979) (Menor, J.). In *Kailua*, the court held that to the extent that the chief planning officer and the planning commission were engaged in purely advisory functions akin to legislative committee work when reviewing applications for amendments to the general plan, their role is part of the legislative process and they are therefore not subject to HAPA requirements, along with the city council. *Id.* at 433-34, 591 P.2d at 606. “To hold otherwise would, by indirection, extend the application of the HAPA to the actions of the city council which by its terms the Act has excluded from operation. [HAW. REV. STAT.] § 91-1(1).” *Id.*

Arguably the court applied a functional approach in *Kailua* to reach its conclusion, which extended the HAPA exemption to government bodies which are executive administrative agencies rather than legislative. In contrast, the *Sandy Beach Defense Fund* court did not look beyond the title of the government body in its analysis. The effect of these two cases is to allow greater freedom to government bodies to act without the procedural safeguards of HAPA.

⁸² *Sandy Beach Defense Fund*, 70 Haw. at 373, 773 P.2d at 258.

⁸³ *Id.* at 372-73, 773 P.2d at 258.

⁸⁴ *Mahuiki v. Planning Comm'n*, 65 Haw. 506, 654 P.2d 874 (1982) (Nakamura, J.); *Chang v. Planning Comm'n*, 64 Haw. 431, 643 P.2d 55 (1982) (Lum, C.J.). In *Chang* the court observed that an “SMA use permit application proceeding was a ‘contested case’ within the meaning of [HAW. REV. STAT.] chapter 91.” *Id.* at 436, 643 P.2d at 60. Also, “[t]he State Coastal Zone Management Act and corresponding planning commission rules specifically make [HAW. REV. STAT.] § 91-9 and planning commission contested case procedures applicable to proceedings on SMA use applications in Maui County.” *Id.* *Mahuiki* involved the Kauai planning commission, and reiterated the observation in *Chang* that an SMA use permit application proceeding

difference is based merely on the fact that in the neighbor island counties it is the planning commissions—which are not HAPA-exempt—which issue the SMA permits rather than the county council.⁸⁵

*Protect Ala Wai Skyline v. Land Use and Controls Committee*⁸⁶ provides another example of the judiciary's approach to the City Council acting in a non-legislative manner. The case involved a challenge to the granting of an SMA use permit by the Honolulu City Council.⁸⁷ The I.C.A. concluded that the incorporation of the specific findings in a committee report, rather than in the resolution issuing the permit, did not violate the CZMA.⁸⁸ Although this decision may be seen as procedurally based, it does reflect the policy that when the Honolulu City Council acts in a non-legislative function, such as the issuing of permits, different standards will apply to these functions.

Hopefully, the court will find an early opportunity to revisit the legislative/quasijudicial issue. The distinction which it has so far espoused leads to differences in results among the four counties for the self-same permitting process, based almost solely on the nature of the body considering the permit, rather than the nature of the process and the permit. Whatever the result, the Lum Court's construction of HAPA and the CZMA requirements has been strict. And, as the discussion below indicates, strict construction is something the court does consistently.

B. SMA Permits and Process: Strict Construction of Procedural Requirements

Both the Hawaii Supreme Court and the I.C.A. have had opportunity to construe the procedural requirements of the CZMA, and specifically, the granting of SMA permits. Both have chosen to construe the CZMA strictly, thereby giving effect to legislative intent.

In *Hui Alaloa v. Planning Commission of the County of Maui*,⁸⁹ the Maui Planning Commission issued two SMA use permits under the CZMA for the construction of a 150-unit condominium project and development of a nearby beach park facility and access road on the island of

was a contested case hearing under HAPA. *Mahuiki*, 65 Haw. at 513, 654 P.2d at 879.

⁸⁵ *Sandy Beach Defense Fund*, 70 Haw. at 373, 773 P.2d at 258-59.

⁸⁶ 6 Haw. App. 540, 735 P.2d 950 (1987) (Heen, J.).

⁸⁷ *Id.* at 542, 735 P.2d at 952.

⁸⁸ *Id.* at 546, 735 P.2d at 955.

⁸⁹ 68 Haw. 135, 705 P.2d 1042 (1985) (Wakatsuki, J.).

Moloka'i.⁹⁰ The Planning Commission issued both permits, after holding contested case and public hearings, on the condition that the developer undertake further archaeological survey and excavation.⁹¹

The court vacated the permits⁹² because the Planning Commission had failed to meet the procedural requirements of the CZMA:⁹³ the county agency authorized to issue permits must *first* find the proposed development consistent with the objectives and policies of the act;⁹⁴ it could not issue them when further study was needed to determine if the objectives of the CZMA would be met.⁹⁵

In *Hui Malama Aina O Ko'olau v. Pacarro*,⁹⁶ the I.C.A. held that the developer fell outside the requirements of the CZMA due to a grandfather clause included in a 1975 legislative act.⁹⁷ There, a community organization attempted to prevent the development of a 164-unit town house project on the windward coast of O'ahu.⁹⁸ The Honolulu City Council approved the planned development in an ordinance adopted on July 21, 1975.⁹⁹ The ordinance contained a time-limit clause which provided that failure to secure building permits within one year of adoption of the ordinance "may" constitute grounds for the City Council to repeal the ordinance.¹⁰⁰ However, upon timely request by the applicant, the City Council had the option of granting an extension of time.¹⁰¹ The appellant argued that the CZMA had been violated because an SMA use permit was required before the Council could approve the extension of time.¹⁰² The I.C.A. held that the developer

⁹⁰ *Id.* at 135-36, 705 P.2d at 1043.

⁹¹ *Id.* at 136-37, 705 P.2d at 1044.

⁹² *Id.* at 138, 705 P.2d at 1045.

⁹³ HAW. REV. STAT. § 205A (1985).

⁹⁴ *Hui Alaloe*, 68 Haw. at 137, 705 P.2d at 1044. Policies include identifying and analyzing significant archaeological resources; maximizing information retention through preservation of remains and artifacts or salvage operations; and supporting state goals for protection, restoration, interpretation, and display of historic resources. *Id.* at 136, 705 P.2d at 1044.

⁹⁵ *Id.*

⁹⁶ 4 Haw. App. 304, 666 P.2d 177 (1983) (Burns, C.J.).

⁹⁷ *Id.* at 319-20, 666 P.2d at 187 (construing Act 176, § 3, 1975 Haw. Sess. Laws 389).

⁹⁸ *Id.* at 305, 666 P.2d at 179.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 306, 666 P.2d at 179.

¹⁰¹ *Id.*

¹⁰² *Id.* at 318-19, 666 P.2d at 186. CZMA provides that "no agency authorized to

was exempt from this requirement under the "grandfather clause" contained in section 3 of Act 176.¹⁰³ "[t]his part shall not apply to developments or structures for which a building permit, planned development permit, planned unit development permit or ordinance, or special permit for cluster development was issued prior to December 1, 1975."¹⁰⁴ The court did not accept appellant's argument that "developments" refers to "actual developments" and not to some conceptual proposal or plan.¹⁰⁵ It concluded that the "natural and most obvious import of the grandfather clause is that the requirements of the Hawaii CZM Act are not applicable to any development, existing or planned."¹⁰⁶

C. Summary

The court's treatment of the CZMA has been one of strict construction. It has led to certain inconsistencies, some of which are arguably of the court's making, while others appear to be inherent in the CZMA itself. For example, the court has strictly construed HAPA and the CZMA so as to insulate legislative bodies from their requirements. This results in further ramifications from inconsistency in treatment of government bodies built into the statutes themselves. The counties have the choice to be exempt from the procedural safeguards usually afforded when administrative/quasijudicial bodies make decisions. In this area, the court has taken a non-activist, strict constructionist role, leaving the decision to deal with the inconsistency for the legislature. Arguably, that is where it belongs.

V. STANDING

A hallmark of the Richardson years was the clear and unmistakable broadening of the standing rights of citizens and citizens' groups before administrative agencies, especially where environmental interests were concerned.¹⁰⁷ As the Richardson Court in *Mahuiki* declared: "[W]here

issue permits pertaining to any development within the special management area shall authorize any development unless approval is first received in accordance with the procedures adopted pursuant to this part." HAW. REV. STAT. § 205A-29(b) (1985).

¹⁰³ Act 176, § 3, 1975 Haw. Sess. Laws 389.

¹⁰⁴ 4 Haw. App. at 319, 666 P.2d at 186.

¹⁰⁵ *Id.* at 319-20, 666 P.2d at 186-87.

¹⁰⁶ *Id.* at 320, 666 P.2d at 187.

¹⁰⁷ *See, e.g.,* *Mahuiki v. Planning Comm'n of Kauai*, 65 Haw. 506, 654 P.2d 874

the interests at stake are in the realm of environmental concerns 'we

(1982) (Nakamura, J.). In *Mahuiki*, a developer sought permission from Kauai Planning Commission to develop property subject to CZMA regulations. *Id.* at 508, 654 P.2d at 876. In response to requests for testimony on developer's request for necessary permits for the project, objections were voiced orally and in writing regarding the project's adverse environmental consequences. *Id.* at 509, 654 P.2d at 876-77. Two of the appellants submitted a written response to the request. *Id.* at 509, 654 P.2d at 877. After "qualified endorsement" of the project by the Planning Director, the Commission granted the permits with conditions, despite reservations by several of the commissioners. *Id.* at 511, 654 P.2d at 877-78. Appellants appealed to Fifth Circuit Court under *Hawaii Revised Statutes* section 91-14, which allows any person "aggrieved by a final decision and order in a contested case" to invoke judicial review. *Id.* at 513, 654 P.2d at 879. Circuit Court dismissed the appeal on the ground that appellants had not participated in the administrative proceedings. *Id.* Upon review, the court set forth the following "guiding tenet": "where the interests at stake are in the realm of environmental concerns 'we have not been inclined to foreclose challenges to administrative determinations through restrictive applications of standing requirements.'" *Id.* (quoting *Life of the Land v. Land Use Comm'n*, 63 Haw. 166, 171, 623 P.2d 431, 438 (1981) (Nakamura, J.)).

The court, having no difficulty determining that there was a final decision and order in a contested case, then had to decide whether appellants had shown that "their interests were injured and they were involved in the administrative proceedings that culminated in the unfavorable decision." *Id.* at 514-15, 654 P.2d at 879-80. The interests involved here were "essentially aesthetic and environmental in character," which the court had previously recognized as sufficient to confer standing when such interests are "personal" and "special", or when there is a property interest involved. *Id.* at 515, 654 P.2d at 880 (citing *Life of the Land, Inc. v. Land Use Comm'n*, 61 Haw. 3, 8, 594 P.2d 1079, 1082 (1979) (Richardson, C.J.)). The court found personal and special interests at stake, since the development would negatively impact the environment in the area in which the appellants lived. *Id.* As for involvement in a contested case hearing, the court stated that it had not "conditioned standing to appeal from an administrative decision 'upon formal intervention in the agency proceeding.'" *Id.* (quoting *Jordan v. Hamada*, 62 Haw. 444, 449, 616 P.2d 1368, 1371 (1980) (Nakamura, J.)). "Participation in a hearing as an adversary . . . has been held sufficient to give rise to appeal rights . . ." *Id.* (quoting *Jordan*, 62 Haw. at 449, 616 P.2d at 1372). Since two of the appellants had written a letter that was a part of the record, the adversary participation requirement was satisfied, and standing to challenge the Commission decision was conferred on appellants (at least the two that wrote the letter). *Id.* The court then went on to find that the Commission had not complied with the requirements of the CZMA and, therefore, the case was remanded. *Id.* at 516-20, 654 P.2d at 880-83.

Mahuiki continued a line of cases by the Richardson Court which extended standing rights. In *Dalton v. City & County of Honolulu*, 51 Haw. 400, 462 P.2d 199 (1969) (Kobayashi, J.), the court conferred standing on individuals who lived across the street from a proposed high rise development and who wished to challenge a general plan amendment. *Id.* at 403, 462 P.2d at 202. Because the development would result in

have not been inclined to foreclose challenges to administrative determinations through restrictive applications of standing requirements."¹⁰⁸ The Lum Court retreats not an iota from this position in the two land use cases which raised the issue most prominently: *City & County of Honolulu v. F.E. Trotter, Inc.*¹⁰⁹ and *Kona Old Hawaiian Trails Group v. Lyman.*¹¹⁰

In *Kona Old Hawaiian Trails*, the court held that parties may have standing to pursue a land use case, even if the particular controversy is moot, provided there is a public interest question to be resolved.¹¹¹ The case arose over the challenge to the granting of an SMA permit by the County of Hawaii's Planning Commission under the authority of the State CZMA¹¹² for the construction of a roadway and installation of utility lines pursuant to a four-lot residential planned unit development.¹¹³ Kona Old Hawaiian Trails, a group of Kona residents formed to protect ancient trails and access routes, objected and sought judicial review of the permit issuance.¹¹⁴ It claimed that the public trust had been violated and that procedures required by the CZMA and by HAPA had not been followed.¹¹⁵ The owners, having finished the work under a valid permit and having sold the property, sought dismissal of the suit on the ground that the controversy was now moot.¹¹⁶

"restricting the scenic view, limiting the sense of space and increasing the density of population," the court held that this was a "concrete interest" in a "legal relation" so as to give standing. *Id.*

In *East Diamond Head Ass'n v. Zoning Board of Appeals*, 52 Haw. 518, 479 P.2d 796 (1971) (Kobayashi, J.), the court granted standing to a private unincorporated organization consisting of individuals who owned or resided upon land neighboring the parcel which was the subject of a zoning variance proceeding. The court stated that the appellants in this case asserted the same rights as those in *Dalton*; that is, "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." *Id.* at 521-22, 497 P.2d at 798.

¹⁰⁸ *Mahuiki v. Planning Comm'n of Kauai*, 65 Haw. 506, 512, 654 P.2d 874, 878 (1982) (Nakamura, J.) (quoting *Life of the Land v. Land Use Comm'n*, 63 Haw. 166, 171, 623 P.2d 431, 438 (1981) (Nakamura, J.)).

¹⁰⁹ 70 Haw. 18, 757 P.2d 647 (1988) (Lum, C.J.).

¹¹⁰ 69 Haw. 81, 734 P.2d 161 (1987) (Nakamura, J.).

¹¹¹ *Id.* at 87, 734 P.2d at 165.

¹¹² HAW. REV. STAT. § 205A (1985), which implements the federal CZMA and for which the State of Hawaii has been exceedingly well-paid.

¹¹³ *Kona Old Hawaiian Trails*, 69 Haw. at 84, 734 P.2d at 164.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 86, 734 P.2d at 164-65.

¹¹⁶ *Id.* at 86, 734 P.2d at 165.

The court, in a unanimous opinion by Justice Nakamura, found nevertheless that the suit “retains vitality.”¹¹⁷ While the court noted that there was still some construction left to be done, it nevertheless observed that

even if all of the work sanctioned by the two permits is finished, a basis for the exercise of our appellate jurisdiction remains. For we recognize that in exceptional situations mootness is not an obstacle to the consideration of an appeal. . . . We think the situation would call for the exercise of our appellate jurisdiction even if there is no more work to be done under the minor permit. The questions posed here are of public concern and, even if they recur in the future, are of a nature that would be as likely as not to become moot before they could be determined on appeal.¹¹⁸

Although standing was conferred upon Kona Old Hawaiian Trails, it eventually lost the appeal. The court determined that first of all, Kona Old Hawaiian Trails had failed to avail itself of the opportunity for an agency hearing on SMA permits provided by Hawaii County Charter.¹¹⁹ Thus it had deprived itself, and the court, of a final decision or order in a contested case hearing¹²⁰ which would otherwise have been reviewable under HAPA.¹²¹ Second, it could not avail itself of the CZMA provision allowing “any person . . . [to] commence a civil action alleging that any agency” has breached the CZMA¹²² because, until that matter had been appealed to the county zoning board of appeals, it was not a judicial action of which the court could be cognizant for lack of exhaustion of administrative remedies.¹²³ In sum, as the court itself observed, Kona Old Hawaiian Trails failed because of the timing of its appeal in the administrative process, not because of any standing or aggrieved party problems.¹²⁴

This broad approach to the open court room door was affirmed by Chief Justice Lum in the unanimously decided opinion of *City & County of Honolulu v. F.E. Trotter, Inc.*¹²⁵ There the court held that a private

¹¹⁷ *Id.* at 87, 734 P.2d at 165.

¹¹⁸ *Id.* at 87-88, 734 P.2d at 165-66.

¹¹⁹ HAWAII, HAW., CHARTER art. V, § 5-4.3 (1980).

¹²⁰ *Kona Old Hawaiian Trails*, 69 Haw. at 92, 734 P.2d at 168.

¹²¹ HAW. REV. STAT. § 91-14(a) (1985).

¹²² HAW. REV. STAT. § 205A-6 (1985).

¹²³ 69 Haw. at 93-94, 734 P.2d at 169.

¹²⁴ *Id.*

¹²⁵ 70 Haw. 18, 757 P.2d 647 (1988) (Lum, C.J.).

landfill operator was able to challenge a taking by the City and County of Honolulu of property for a landfill, even though the operator had only an unrecorded lease in the premises which terminated upon condemnation. The court stated:

A party has standing if he alleges such a personal stake in the outcome of the controversy that the court should exercise its remedial powers on his behalf. [The landfill operator] has a personal interest in the outcome because it is an unrecorded lessee of the property being condemned. Thus, [it] has standing to challenge the validity of the taking.¹²⁶

The court, however, refused to grant the operator relief because it had not yet commenced any operations on the subject property, and had no city permits to do so.¹²⁷

I.C.A. decisions have not uniformly applied the standing rule developed in the Richardson Court and upheld under Chief Justice Lum. In *Waikiki Discount Bazaar v. City & County*,¹²⁸ the I.C.A. found Waikiki Discount did not have standing because it failed to make the requisite showing to support its allegations.¹²⁹ Waikiki Discount alleged, inter alia, that (1) Hemmeter Center Company had persuaded Waikiki Discount to terminate their lease and had subsequently defaulted on an agreement to provide retail space and (2) the City and County illegally and knowingly allowed Hemmeter to violate certain Comprehensive Zoning Code requirements and fire regulations.¹³⁰ A member of the public may sue to enforce the rights of the public if he can show that he has suffered an injury in fact.¹³¹ The plaintiff must show that (1) he has suffered actual or threatened injury as a result of the defendant's alleged illegal conduct; (2) the injury can be traced to the challenged action; and (3) the injury is likely to be remedied by a favorable decision.¹³² This dispute did not concern an environmental issue and so the court was not required to apply the standing rule

¹²⁶ *Id.* at 20-21, 757 P.2d at 649 (citing *Life of the Land v. Land Use Comm'n*, 63 Haw. 166, 172, 623 P.2d 431, 438 (1981) (Nakamura, J.)).

¹²⁷ *Id.* at 22, 757 P.2d at 650.

¹²⁸ 5 Haw. App. 635, 706 P.2d 1315 (1985) (Burns, C.J.).

¹²⁹ *Id.* at 641, 706 P.2d at 1320.

¹³⁰ *Id.* at 640-41, 706 P.2d at 1319.

¹³¹ *Id.* at 641, 706 P.2d at 1319 (citing *Akau v. Olomana Corp.*, 65 Haw. 383, 652 P.2d 1130 (1982) (Richardson, C.J.)).

¹³² *Id.* at 641, 706 P.2d at 1319-20 (citing *Akau v. Olomana*, 65 Haw. 383, 389, 652 P.2d 1134, 1135 (1982)).

liberally. The situation in *Protect Ala Wai Skyline v. Land Use and Controls Committee*¹³³ presented an environmentally related dispute in which the standing of the appellants was an issue.

In *Protect Ala Wai Skyline*, the I.C.A. applied the liberal standing rule for environmental concerns. The I.C.A. held that appellee's argument that appellant lacked standing was without merit.¹³⁴ Appellee asserted that because appellant had not incorporated until after the Honolulu City Council granted the SMA use permit, appellant could not raise the permit issue.¹³⁵ The I.C.A. decided that if appellant was not granted standing, the two individuals who had extensively involved themselves from the beginning would be denied the opportunity to show that the permit was illegal.¹³⁶

However, in *Pele Defense Fund v. Puna Geothermal*,¹³⁷ the I.C.A. held that appellants had no standing to raise a due process issue because appellants had not shown any injury.¹³⁸ In this case the appellants appealed the Hawaii County Planning Commission's award of a geothermal resource permit claiming it was invalid due to violation of their due process rights.¹³⁹ Appellants argued that the rule providing that a reasonable attempt to notify residents within one thousand feet of the geothermal project's boundaries did not meet minimum due process requirements because it was not large enough to cover everyone who might suffer injury to property or health from the project.¹⁴⁰

Persons seeking to challenge an agency's rule that an applicant for a geothermal development permit must make a reasonable attempt to give notice of a public hearing on its application to residents beyond 300 feet but within 1000 feet of the perimeter of the project's boundaries on the ground that the rule is facially inadequate because the geothermal development activity has the potential to affect property and human health over large areas of the region, but who have not shown they have been injured by the rule, have no standing to raise the issue.¹⁴¹

The court did not use lack of standing to justify dismissal of appellants' other arguments;¹⁴² however, this decision does seem to

¹³³ 6 Haw. App. 540, 735 P.2d 950 (1987) (Heen, J.).

¹³⁴ *Id.* at 543, 735 P.2d at 953.

¹³⁵ *Id.*

¹³⁶ *Id.* at 544, 735 P.2d at 953.

¹³⁷ 8 Haw. App. 203, 797 P.2d 69 (1990) (Heen, J.).

¹³⁸ *Id.* at 211, 797 P.2d at 73.

¹³⁹ *Id.* at 210, 797 P.2d at 73.

¹⁴⁰ *Id.* at 211, 797 P.2d at 73.

¹⁴¹ *Id.* at 204, 797 P.2d at 70.

¹⁴² *Id.* at 209-10, 797 P.2d at 72. Appellants claimed that HAW. REV. STAT. § 205-

move away from the broad rule of standing.

The Lum Court has chosen to continue to allow broad standing to seek judicial review of agency decisions in cases of environmental concern. Although this appears to be a victory for environmental groups, as the following discussion of administrative decisions and agencies shows, having the opportunity to challenge agency decisions in court is not likely to result in their being overturned since the Lum Court holds fast to a policy of deference to agency decisions.

VI. ADMINISTRATIVE DECISIONS AND AGENCIES

The Lum Court has continuously expressed the view that the decisions of administrative agencies and officials are presumptively correct, and cannot be set aside unless the entire record shows them to be clearly erroneous in view of reliable, probative and substantial evidence.¹⁴³ Although the court liberally interprets standing requirements in environmental actions,¹⁴⁴ it does not extend this policy to administrative decisions affecting environmental issues.

Stop H-3 Association challenged the Board of Land and Natural Resources' granting of a conservation district use permit to the State Department of Transportation.¹⁴⁵ The permit allowed for construction of an interstate highway through a conservation district.¹⁴⁶ The court noted that it would not allow an administrative decision to stand if application of the regulation would achieve a statutorily impermissible end.¹⁴⁷ However, the court held that *Hawaii Revised Statutes* section 183-41(c)(3) authorized the Department of Land and Natural Resources to permit land utilizations that are not detrimental to the conservation of necessary forest growth, the conservation and development of adequate

5.1, which authorizes the issuance of geothermal permits, violated their due process rights. *Id.* The court held that the statute had already been found to comply with all constitutional requirements. *Id.* (citing *Medeiros v. Hawaii County Planning Comm'n*, 8 Haw. App. 183, 797 P.2d 59 (1990) (Heen, J.)).

¹⁴³ *Stop H-3 Ass'n v. Dep't of Transportation*, 68 Haw. 154, 706 P.2d 446 (1985) (Lum, C.J.).

¹⁴⁴ *See supra* part V.

¹⁴⁵ *Stop H-3 Ass'n*, 68 Haw. at 155, 706 P.2d at 448.

¹⁴⁶ *Id.* at 156, 706 P.2d at 448.

¹⁴⁷ *Id.* at 161, 706 P.2d at 451 (citing *Hall v. Schweiker*, 660 F.2d 116, 119 (5th Cir. 1981)).

water resources for present and future needs, and the conservation and preservation of open spaces for the public use and enjoyment.¹⁴⁸ The court accepted the Board of Land and Natural Resources' findings that the highway would have significant effects on the conservation district but would not be injurious to forest growth, water resources, and open spaces.¹⁴⁹ The court concluded that the contesting party had failed to meet its burden of showing the Board's findings of fact to be clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.¹⁵⁰

The statutory interpretation practiced by the court strengthens the deference shown to an administrative agency's decision. The court has stated that its primary duty in interpreting statutes is to give effect to the legislature's intent which, in the absence of a clearly contrary expression, is conclusively obtained from the language of the statute itself.¹⁵¹ The court applied this rule very precisely in *Maha'ulepu v. Land Use Commission*.¹⁵²

In *Maha'ulepu*, the dispute involved the issuance of a special use permit by the Kauai county planning commission for the construction of a golf course on prime agricultural land.¹⁵³ The appellants raised two issues on appeal: (1) whether *Hawaii Revised Statutes* section 205, as amended by Act 298,¹⁵⁴ authorized the Land Use Commission and the county planning commission to issue special use permits for golf courses on agricultural B lands;¹⁵⁵ and (2) whether the planning commission committed procedural irregularities which deprived appellant of a full and fair hearing.¹⁵⁶ The supreme court gave the decision of

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* The Board of Land and Natural Resources, also known as the Land Board, acts in executive fashion as a "director" does in other state agencies, but in addition has quasijudicial functions as well, particularly with respect to permitting uses on both public and private lands classified under the state land use law by the Land Use Commission in the Conservation District. For further discussion of both the Land Board and Land Use Commission statutory duties and activities see BOSSELMAN & CALLIES; CALLIES; MANDELKER AND MYERS, all *supra* note 1.

¹⁵⁰ *Stop H-3 Ass'n*, 68 Haw. at 161-62, 706 P.2d at 451-52.

¹⁵¹ *Id.* at 161, 706 P.2d at 451.

¹⁵² 71 Haw. 332, 709 P.2d 906 (1990) (Lum, C.J.); see also Douglas K. Ushijima, Note, *Maha'ulepu v. Land Use Commission: A Symbol of Change; Hawaii's Land Use Law Allows Golf Course Development on Prime Agricultural Land by Special Use Permit*, 13 U. HAW. L. REV. 205 (1991).

¹⁵³ *Maha'ulepu*, 71 Haw. at 334-35, 709 P.2d at 907-08.

¹⁵⁴ 1985 Haw. Sess. Laws 298.

¹⁵⁵ *Id.* at 333-34, 709 P.2d at 907.

¹⁵⁶ *Id.* at 339, 709 P.2d at 910.

the agencies wide latitude in its holding. The court held that statutes should be read as being in accord, and not in conflict, with each other.¹⁵⁷ Further, the court noted that it does not support repeals by implication so that wherever possible an earlier statute should be presumed to remain in force, and not repeal a later statute.¹⁵⁸ Related to the second issue, the court held that deference should be accorded to an administrative agency's interpretation of its own procedural rules unless the decision is clearly erroneous or inconsistent with underlying legislative purposes.¹⁵⁹

The I.C.A. appears to follow the lead of the Hawaii Supreme Court in its reluctance to overturn administrative agency decisions related to land use and zoning. Actions brought contesting administrative decisions usually result in judgment for the agency, even where the agency's actions constituted illegal procedure. *Outdoor Circle v. Harold K.L. Castle Trust Estate*¹⁶⁰ exemplifies this point.¹⁶¹

In *Outdoor Circle*, the I.C.A.'s opinion stressed the presumption of validity accorded to decisions of administrative bodies acting within their sphere of expertise. A party challenging a decision carries a heavy burden because the challenging party must show that the order is

¹⁵⁷ *Id.* at 337-38, 709 P.2d at 909.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 339, 709 P.2d at 910.

¹⁶⁰ 4 Haw. App. 633, 675 P.2d 748 (1983) (Tanaka, J.), *cert. denied*, 67 Haw. 1, 677 P.2d 965 (1984) (*per curiam*).

¹⁶¹ *Chang v. Planning Comm'n of County of Maui*, 64 Haw. 431, 643 P.2d 55 (1982) (Lum, J.), also illustrates this point. In *Chang* a resident appealed the decision by the Maui Planning Commission to grant an SMA use permit for the development of a condominium project. *Id.* at 432-33, 643 P.2d at 58. The challenge focused on the Planning Commission's failure to adhere to the notice and open deliberations requirements of HAPA, *Hawaii Revised Statutes* chapter 92, Planning Commission Rules, and the County Charter. While agreeing that the Commission had not followed the exact notice requirements of HAPA § 91-9, the court nevertheless stated that "while the planning commission may have committed a technical statutory violation in its published notices, appellant cannot be heard to complain of harm or injustice caused thereby as he subsequently received ample notice . . ." *Id.* at 440, 643 P.2d at 62. The court further determined that the Commission had carried on closed deliberations in contravention of planning commission rules and the Maui County Charter. *Id.* at 443-44, P.2d 643 at 64. Still, this did not entitle appellant to voidance of the SMA use permit because "appellant has failed to allege or otherwise establish that his substantial rights may have been prejudiced by the commission's closure of deliberations." *Id.* at 444, 643 P.2d at 65. The court placed the burden on the person challenging the closed deliberation to allege impropriety during the its course, a difficult task. *Id.*

unjust and unreasonable in its consequences. Even a procedural violation on the part of the agency may not lighten this burden.

In *Outdoor Circle* the State Department of Planning and Economic Development (D.P.E.D.) filed a petition with the Land Use Commission (L.U.C.) requesting reclassification of approximately 244 acres from urban to conservation land.¹⁶² After conducting the required pre-hearing conference and public hearings pursuant to *Hawaii Revised Statutes* section 205-4(e)(1), the L.U.C. denied the petition.¹⁶³ D.P.E.D. appealed the L.U.C.'s decision and appellants were allowed to intervene in the action.¹⁶⁴ The L.U.C. claimed that after accepting the final version of the findings of fact and voting to deny D.P.E.D.'s petition at open meetings, its adjudicatory functions were concluded.¹⁶⁵ The work remaining was simple "housekeeping chores" which were not adjudicatory functions requiring any further open meetings; therefore, the L.U.C. declared that it had not violated the Sunshine Law.¹⁶⁶ The I.C.A. did not agree with the L.U.C.'s interpretation of its functions as non-adjudicatory.¹⁶⁷ However, because an agency decision is voidable only "upon proof of wilful violation" of the Sunshine Law,¹⁶⁸ the I.C.A. upheld the L.U.C. decision despite the statutory non-compliance of the decision process.¹⁶⁹ The I.C.A. also discussed the standard of review for an appellate court reviewing a circuit court's review of an administrative agency's decision¹⁷⁰ and concluded that the "right/wrong" standard should replace the previous standard of clearly erroneous.¹⁷¹ The supreme court agreed with the result and reasoning of the court

¹⁶² *Outdoor Circle*, 4 Haw. App. at 635-36, 675 P.2d at 787 (1983); see generally CALLIES, *supra* note 1, for a description of the land classification process of the Land Use Commission.

¹⁶³ 4 Haw. App. at 637, 675 P.2d at 788.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 641, 675 P.2d at 791.

¹⁶⁶ *Id.* HAW. REV. STAT. ch. 92, codifies the Hawaii Sunshine Law. The policy and intent behind the Sunshine Law is to open up the governmental processes to public scrutiny and participation as the only viable and reasonable method of protecting the public's interest. HAW. REV. STAT. § 92-1. Under § 92-3 "[e]very meeting of all boards shall be open to the public and persons shall be permitted to attend any meeting unless otherwise provided in the constitution or as closed pursuant to sections 92-4 and 92-5." *Id.* § 92-3 (1985).

¹⁶⁷ 4 Haw. App. at 642, 675 P.2d at 791.

¹⁶⁸ *Id.* (quoting HAW. REV. STAT. § 92-11 (1976)).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 638, 675 P.2d at 789.

¹⁷¹ *Id.* at 640, 675 P.2d at 790.

below and denied appellants' writ of certiorari.¹⁷² The supreme court did not address the question of the proper standard of review because under either standard the evidence supported the circuit court's decision.¹⁷³

In *Kilauea Neighborhood Ass'n v. Land Use Commission*,¹⁷⁴ the I.C.A. again stressed the presumption of validity attached to an administrative agency's decision and the heavy burden carried by a party seeking to void the decision.¹⁷⁵ In this case, the appellee filed a petition with the L.U.C. requesting reclassification of approximately twenty-eight acres in Kaua'i from agricultural to urban to allow for development of the land for light industrial use.¹⁷⁶ The L.U.C. approved reclassification of fifteen acres.¹⁷⁷ The appellants claimed that the L.U.C.'s findings of fact and conclusions of law did not meet the statutory requirements of *Hawaii Revised Statutes* section 205-4 which outlines the procedures to be followed in amending district boundaries.¹⁷⁸ The I.C.A. found that although the L.U.C.'s findings were poorly drawn, the record sufficiently supported its decisions.¹⁷⁹ The I.C.A. noted that an agency's findings of fact are reviewable for clear error while its conclusions of law are freely reviewable.¹⁸⁰ The I.C.A. emphasized that where an appellant claims the trial court failed to make adequate findings of fact, the appellate court will examine the entire record to determine whether the findings are (1) supported by the evidence, and (2) sufficiently comprehensive and pertinent to the issues in the case to form a basis for the conclusions of law.¹⁸¹

In *Protect Ala Wai Skyline v. Land Use & Controls Committee*¹⁸² the appellant conceded that although the project in question generally complied with the General Plan's policy of maintaining the viability of O'ahu's visitor industry, the project conflicted with the General Plan

¹⁷² *Outdoor Circle*, 67 Haw. 1, 3, 677 P.2d 965, 965 (1984).

¹⁷³ *Id.*

¹⁷⁴ 7 Haw. App. 227, 751 P.2d 1031 (1988) (Heen, J.).

¹⁷⁵ *Id.* at 230, 751 P.2d at 1034.

¹⁷⁶ *Id.* at 229, 751 P.2d at 1033.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 230, 751 P.2d at 1034.

¹⁷⁹ *Id.* at 233, 751 P.2d at 1035.

¹⁸⁰ *Id.* at 229, 751 P.2d at 1034 (citing *Protect Ala Wai Skyline v. Land Use & Control Comm.*, 6 Haw. App. 540, 735 P.2d 950 (1987) (Heen, J.)).

¹⁸¹ *Id.* at 233, 751 P.2d at 1035 (citing *Nani Koolau Co. v. K & M Construction, Inc.*, 5 Haw. App. 137, 140, 681 P.2d 580, 584 (1984) (Heen, J.)).

¹⁸² 6 Haw. App. 540, 735 P.2d 950 (1987) (Heen, J.).

in its policies of prohibiting major increases in densities and further growth in Waikiki, and preserving O'ahu's beauty, natural environment, and scenic views.¹⁸³ The court found this argument to be without merit.¹⁸⁴ The court held that "[t]he Council's interpretation of the General Plan is to be given deference unless plainly erroneous or inconsistent with the underlying legislative purpose."¹⁸⁵ The court deferred to the City Council's interpretation because of the Council's frequent use and familiarity with the General Plan.¹⁸⁶

The Lum Court tends to defer to the administrative agencies (and legislative bodies acting in nonlegislative capacities) making land use decisions and to interpret statutory language as broadly as necessary in order to uphold an agency's decision. A party appealing an agency's decision has a considerable burden to overcome. This is consistent with the court's deference to other branches of government and not inconsistent with common judicial practice of placing the burden on those who would challenge governmental action, particularly absent claims involving civil rights and others calculated to protect minority rights. Since government in theory represents the people who elect it, it is not surprising that the burden falls on a litigant which challenges that presumption, other things being equal.

VII. ZONING BOARDS AND VARIANCE

It is standard practice for those local governments which exercise the power to zone to also provide for the varying of the requirements of a zoning ordinance upon a showing of a land-use related hardship by a petitioner. Usually this is accomplished by an administrative body called a zoning board of appeals or board of adjustment.¹⁸⁷ While such variances and boards are usually provided for in zoning enabling statutes, in Hawai'i such authority is usually set out in county charters. So it is with Honolulu, whose charter grants the authority specifically to a zoning board of appeals.¹⁸⁸

¹⁸³ *Id.* at 547, 735 P.2d at 955.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 547-48, 735 P.2d at 955 (citing *Int'l Brotherhood of Electrical Workers, Local 1357 v. Hawaiian Tel. Co.*, 68 Haw. 316, 713 P.2d 943 (1986) (Padgett, J.)).

¹⁸⁶ *Id.* at 548, 735 P.2d at 955.

¹⁸⁷ CALLIES, *supra* note 1, at 41; MANDELKER, *supra* note 22, at § 6.36.

¹⁸⁸ HONOLULU, HAW., CHARTER § 6-909 (1984). The mayor of the City and County of Honolulu has, with the approval of the City Council, "reallocated" such power to

The Lum Court has been sharply critical of the zoning variance process as exercised by the zoning board of appeals (Z.B.A.). In *McPherson v. Zoning Board of Appeals*,¹⁸⁹ the Z.B.A. granted a variance to the owner of agriculturally-zoned land to enlarge a nonconforming use of the premises for a piggery in a zone which prohibited such use altogether.¹⁹⁰ The court reversed and remanded the decision of the Z.B.A.¹⁹¹ principally because the Z.B.A. failed to make required findings of fact to support the granting of the variance,¹⁹² as required by the Charter, a common complaint about Z.B.A.s generally.¹⁹³

The court noted that the Charter requires the showing of unnecessary hardship upon a showing that the applicant would be otherwise deprived of the reasonable use of land or building, that the request for the variance is due to unique circumstances not common to the rest of the neighborhood, and that the grant of the variance will not alter the essential character of the locality nor be contrary to the intent and purpose of the zoning ordinance.¹⁹⁴ Applying the requirements, the court observed, first, that "the record however is devoid of any evidence that the appellant could not make reasonable use of the land or buildings in conformity with the AG-1 (Restricted Agricultural district) zoning or her preexisting nonconforming use."¹⁹⁵

As to the uniqueness of appellant's circumstances, the court called it questionable that the violation of the ordinance could, as the Z.B.A. suggested, be a unique circumstance as a matter of law, and that "in our view, the conclusion of law is not supported by the facts in the record."¹⁹⁶ Finally, the court questioned whether, from the record, the essential character of the neighborhood was altered by the vastly increased numbers in the piggery and whether the zoning ordinance intent was adversely affected by permitting by variance what was

grant variances to the Director of the Department of Land Utilization, under a general charter provision granting him the power to reallocate functions among departments. It is the position of the authors, however, that such reallocation power does not apply to specific grants of power under the Charter. The matter is now under consideration by the City Charter Revision Commission during its decennial deliberations.

¹⁸⁹ 67 Haw. 603, 699 P.2d 26 (1985) (Padgett, J.).

¹⁹⁰ *Id.* at 603, 699 P.2d at 26.

¹⁹¹ *Id.* at 607, 699 P.2d at 29.

¹⁹² *Id.*

¹⁹³ See, e.g., CALLIES & FREILICH, *supra* note 19, at ch. 2.

¹⁹⁴ 67 Haw. at 605, 699 P.2d 28 (citing HONOLULU, HAW., CHARTER § 6-909 (1984)).

¹⁹⁵ *Id.* at 606, 699 P.2d at 28.

¹⁹⁶ *Id.*

purposely excluded as a use in AG-1 and relegated to AG-2 (General Agricultural district).¹⁹⁷ The Board was directed upon remand to hold new hearings to permit the parties to introduce relevant evidence in connection with the aforementioned charter criteria for granting variances.¹⁹⁸

The case indirectly raises the issue of whether use variances are in any set of circumstances appropriate, leaving the Z.B.A. only with the power to vary the terms of a zoning ordinance to permit area or bulk variances. What kind of evidence would justify a use contrary to that permitted under a zone classification? Is there any land-use related hardship that is comparable to or less damaging to the neighborhood than, say, the varying of a front or side yard by a few inches or a minimum lot area requirement by a few feet in order to permit construction of an otherwise permitted use? The state of California amended its statute in 1970 to virtually eliminate use variances largely because of these problems.¹⁹⁹

The court also has decided that the Z.B.A. has no authority to hear building permit appeals, even if they deal tangentially with zoning matters. In *Swire Properties (Hawaii), Ltd. v. Zoning Board of Appeals*,²⁰⁰ the court ruled that the decision of the Honolulu Director of the Department of Land Utilization that certain ridgeline property owners were not protected by a view protection ordinance "must stand" since the Z.B.A. lacked jurisdiction under the Charter for the City and County of Honolulu to hear the appeal.²⁰¹ The Charter restricts the Z.B.A.'s appeals to decisions of the Department of Land Utilization (D.L.U.) Director in the administration of the zoning and subdivision ordinances only.²⁰² The court's characterization of the facts also makes it clear that the court was disenchanted with the Z.B.A. reversal of the D.L.U. Director²⁰³ given that the Charter requires that the Z.B.A. must first find that the Director acted in an arbitrary or capricious

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 607, 699 P.2d at 29.

¹⁹⁹ See *Topanga Ass'n for a Scenic Community v. County of Los Angeles*, 522 P.2d 12 n.5 (1974).

²⁰⁰ No. 90-1212, slip op. (Haw. Feb. 27, 1992).

²⁰¹ *Id.* at 7.

²⁰² *Id.* at 4.

²⁰³ The Director of the Department of Land Utilization is responsible for the administration of the Honolulu Land Use Ordinance (LUO) and the Subdivision Code. HONOLULU, HAW., CHARTER § 6-909 (1984).

manner, or had manifestly abused his discretion or had acted on an erroneous finding of material fact.²⁰⁴

In *Foster Village Community Ass'n v. Hess*,²⁰⁵ the I.C.A. faced a novel question of whether a pig is a pet and thus permitted as an accessory use²⁰⁶ and the question of whether a decision on that issue by the Z.B.A. is a rule-making function.²⁰⁷ Chun, the owner of the pig, was informed by the Honolulu Building Department that she was in violation of the Comprehensive Zoning Code (CZC) and must get rid of her pet.²⁰⁸ The D.L.U. decided that Chun was not in violation of the CZC and did not seek a variance.²⁰⁹ The neighborhood board appealed the decision and demanded a hearing in front of the Z.B.A.²¹⁰ The Z.B.A. affirmed the decision of the D.L.U. holding that the D.L.U. had not acted arbitrarily or capriciously in determining that the pig was a pet.²¹¹ The appellants appealed the decision arguing that the D.L.U. and the Z.B.A. engaged in "rule-making."²¹² However, the court held that D.L.U. and the Z.B.A. were engaged in an adjudicative function and not rule-making function.²¹³ Therefore the decision was not invalid for failure of the agency to meet the procedural requirements for performing its rule-making function within the meaning of HAPA.²¹⁴ The court noted the difficulty in distinguishing between the rule-making and the adjudication functions, particularly where statutory language is unclear.²¹⁵

In sum, the court has been critical of the activities of the zoning board of appeals from a variety of perspectives. This is not unusual for such citizen administrative bodies which are often confused concerning their role and the strict legal standards under which they carry out their functions. However, the alternative is giving the "relief valve"

²⁰⁴ HONOLULU, HAW., CHARTER § 6-909 (1973).

²⁰⁵ 4 Haw. App. 463, 667 P.2d 850 (1983) (Heen J.), *cert. denied*, 66 Haw. 681 (1983)).

²⁰⁶ *Id.* at 464, 667 P.2d at 851.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 465, 667 P.2d at 851-52.

²⁰⁹ *Id.* at 466, 667 P.2d at 852.

²¹⁰ *Id.*

²¹¹ *Id.* at 467, 667 P.2d at 853.

²¹² *Id.* at 473, 667 P.2d at 856.

²¹³ *Id.* at 474-75, 667 P.2d at 857.

²¹⁴ *Id.*

²¹⁵ *Id.* at 475-76, 667 P.2d at 857.

function contemplated by the drafters of the Standard Zoning Enabling Act to a single administrator. This raises the problem of reconcentrating zoning authority in the hands of executive agency administrators which is not what the aforesaid drafters had in mind.²¹⁶

VIII. . . . AND ALL THE REST BRIEFLY NOTED

In other unrelated (except for their land use impacts) cases, the Lum Court has cut back from the United States Supreme Court definition of public use for purposes of eminent domain, and addressed the conflict between religious practices and land use controls. To these we now briefly turn.

A. *Land Use Controls' Take Precedence Over Religious Practices*

The federal courts have always observed limits on the free exercise of religion guaranteed by the First Amendment.²¹⁷ The Lum Court adheres to this limitation at the state court level when a religious practice, as opposed to a religious belief, conflicts with a land use law.²¹⁸ Acting per curiam in *Marsland v. International Society for Krishna Consciousness*,²¹⁹ the court refused to permit the use of a church as a dwelling where that use conflicted with applicable zoning regulations, even though the owners could show that such group living was a part of its religious practice.²²⁰ In this case, the Krishnas used a residential

²¹⁶ See *Model Act* and commentary in CALLIES & FREILICH, *supra* note 19, at ch. 1; MANDELKER, *supra* note 22, § 4.20.

²¹⁷ See, e.g., *Braunfield v. Braun*, 366 U.S. 599 (1961) (holding that a general state law regulating conduct which indirectly burdens religious observance is constitutional as long as the law is within the power of the state and advances the state's secular goals). Based in part upon the philosophy in *Braunfield*, a federal circuit court has upheld a local zoning ordinance which forbids the construction of churches in most residential zones. *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303 (6th Cir. 1983).

²¹⁸ *Dedman v. Bd. of Land & Natural Resources*, 69 Haw. 255, 740 P.2d 28 (1987) (Lum, C.J.); *Marsland v. Int'l Society for Krishna Consciousness*, 66 Haw. 119, 657 P.2d 1035 (1983) (per curiam).

²¹⁹ 66 Haw. 119, 657 P.2d 1035 (1983) (per curiam).

²²⁰ *Id.* at 121-22, 657 P.2d at 1037-38.

The Richardson Court apparently did not have an opportunity to rule on the issue of conflict between zoning and religious practices. However, in *State v. Maxwell*, 62 Haw. 556, 617 P.2d 816 (1980) (per curiam), which involved the criminal conviction of appellant for operating a hula studio in a residential district, the court did note in

structure as a church and as a dwelling for unrelated persons coming to the temple to learn the Krishna lifestyle.²²¹ The building, a two-story structure originally designed for use as a single-family home, was located in a single-family dwelling zoning district which, under the then-applicable CZC regulations,²²² prohibited more than five unrelated people from occupying a dwelling.²²³ Apparently, there were thirty members living on the premises.²²⁴ The court held that when the premises are used as a residence rather than as a church, then the provisions of the CZC apply, in which case the Krishnas were in violation.²²⁵

The court, in a unanimous opinion by Chief Justice Lum, similarly upheld a geothermal project approval by the state Board of Land and Natural Resources against a claim by Pele practitioners that the use thus permitted would infringe on their religious practices. In *Dedman v. Board of Land & Natural Resources*,²²⁶ Pele practitioners alleged that both the granting of a permit to commence geothermal exploration and the designation of a geothermal subzone by the Land Board infringed upon their religious practices.²²⁷ The court found that the Pele practitioners failed to meet the heavy burden of showing that the actions of the Board demonstrated a coercive effect upon them, as required in such free exercise cases: “[A]pproval of the geothermal plant does not regulate or directly burden Appellants’ religious beliefs, nor inhibit religious speech. Further, the Board’s action does not compel them, by threat of sanctions, to refrain from religiously motivated conduct or engage in conduct they find objectionable on religious grounds.”²²⁸ The court further found that their religious practices were not burdened

dicta that “[t]he total exclusion of places of worship is regarded not only as a regulation not within the scope of the police power, but also as one which infringes upon freedom of religion guaranteed by the constitution.” *Id.* at 561-62, 617 P.2d at 820. The court did not rule on appellant’s argument that hula lessons were an exercise of her religion, nor on the constitutional question because, under the applicable zoning laws, “church use” was a special use, and appellant had failed to apply for a special use permit, rendering the issues not ripe for judicial review. *Id.*

²²¹ *Krishna Consciousness*, 66 Haw. at 120, 657 P.2d at 1037.

²²² Comprehensive Zoning Code § 21-110.

²²³ 66 Haw. at 121, 657 P.2d at 1037-38.

²²⁴ *Id.*

²²⁵ *Id.* at 122, 617 P.2d at 1038.

²²⁶ 69 Haw. 255, 740 P.2d 28 (1987) (Lum, C.J.).

²²⁷ *Id.* at 259, 740 P.2d at 31.

²²⁸ *Id.* at 261, 740 P.2d at 32 (footnotes omitted).

by either the grant of the development permit or the reclassification of land by the state.²²⁹

B. Land Reform and Eminent Domain

In perhaps the most important eminent domain case of the decade, the United States Supreme Court decimated the public purpose clause of the Fifth Amendment to the United States Constitution in *Hawaii Housing Authority v. Midkiff*,²³⁰ which upheld Hawai'i's land reform act.²³¹ The holding that the public purpose was whatever a legislature could conceive it to be²³² was all the more chilling because the United States Supreme Court had nearly done away with the requirement of absolute compensation for physical takings just two years earlier in the case of *Loretto v. Manhattan Teleprompter*.²³³ Take away public purpose and compensation and there is precious little left of the protections the Fifth Amendment was designed to give for those whose property is compulsorily acquired by government. Equally troublesome was the Court's blind allegiance to Justice Douglas's equation of the public use requirement in eminent domain with the state's police power,²³⁴ a mischief-prone joining of two unrelated concepts if there ever was one.

Fortunately, the Lum Court, in a unanimous opinion by Chief Justice Lum, refused to follow that lead. In an otherwise identical opinion to the *Midkiff* decision, *Hawaii Housing Authority v. Lyman*,²³⁵ the Hawaii Supreme Court specifically declined

to embrace the Court's broader ruling in *Hawaii Housing Authority v. Midkiff* . . . equating the public use requirement of eminent domain with the state's police power. Rather, our review is limited to an examination of the [land reform act's] constitutionality under the mini-

²²⁹ *Id.* at 262, 740 P.2d at 33. For detailed discussions of this case, see Jon M. Van Dyke et al., *The Protection of Individual Rights Under Hawai'i's Constitution*, 14 U. HAW. L. REV. 311 (1992); Jeffrey S. Portnoy, *The Lum Court and the First Amendment*, 14 U. HAW. L. REV. 395 (1992); Melody Kapilialoha MacKenzie, *The Lum Court and Native Hawaiian Rights*, 14 U. HAW. L. REV. 377 (1992) (all in this issue).

²³⁰ 467 U.S. 229 (1984).

²³¹ David L. Callies, *A Requiem for Public Purpose: Hawaii Housing Authority v. Midkiff*, 1985 INSTITUTE FOR PLANNING ZONING AND EMINENT DOMAIN, ch. 8.

²³² 467 U.S. at 241.

²³³ 458 U.S. 419 (1982). A substantial minority of the Court was willing to undertake a balancing test to see if a physical invasion was sufficiently significant to warrant compensation. 458 U.S. at 442 (Blackmun, J., dissenting).

²³⁴ *Berman v. Parker*, 348 U.S. 26 (1954).

²³⁵ 68 Haw. 55, 704 P.2d 888 (1985) (Lum, C.J.).

num rationality standard, which we adopt as appropriate for judicial evaluation of the legislature's public use determinations.²³⁶

IX. CONCLUSION

The Lum Court has consistently ruled in the area of land use to give effect to legislative intent. It has strictly construed the State Zoning Enabling Act so as to carry out legislative intent that land use planning and zoning be long range and comprehensive.²³⁷ In doing so, it has stressed the importance of conformity of zoning ordinances to development plans,²³⁸ and has held that the use of initiative to rezone is illegal because it does not further that particular legislative intent which stresses the importance of land use planning in Hawai'i's regulatory system.²³⁹ The court has also strictly interpreted HAPA and the CZMA to carry out legislative intent that legislative bodies be exempt from their procedural requirements even though this has led to inconsistency in application across the four counties.²⁴⁰

The Lum Court has also consistently deferred to agency decisions, which, according to the court, have a presumption of validity that is difficult to overcome, even when the agency engages in procedural irregularities.²⁴¹ Given this presumption, environmental groups attempting to reverse agency decisions have been largely unsuccessful in overturning agency decisions on procedural grounds, despite the court's broad approach to giving such groups standing.²⁴² In contrast, environmental groups have been more successful in persuading legislative bodies to change their planning and zoning decisions.

This is arguably as it should be. Courts are increasingly withdrawing from a role in which they become second legislatures or executive agencies and are increasingly suggesting that policy remedies belong at another, usually legislative, level of government, where members are elected by, and therefore directly accountable to, the people.²⁴³

²³⁶ *Id.* at 69, 704 P.2d at 896-97.

²³⁷ *See supra* part II.

²³⁸ *See supra* part II.

²³⁹ *See supra* part III.

²⁴⁰ *See supra* part IV.

²⁴¹ *See supra* part VI.

²⁴² *See supra* part V.

²⁴³ *See, e.g.,* Garcia v. San Antonio Metropolitan Transit Auth., 469 U.S. 528 (1985) (dealing with this subject in a slightly different but philosophically similar context).

What this means for those with environmental concerns, or for any person dealing with land use agencies, is that the bulk of work, e.g., lobbying, commenting, and adjudicating, should be concentrated at the legislative and administrative levels. The Lum Court's decisions indicate that the court will no longer be a legislature of last resort.

