NO. 28359

IN THE SUPREME COURT OF THE STATE OF HAWAII

PONO, an unincorporated association; WALTER RITTE, JR,; WAYDE LEE; MATTHEW ADOLPHO and JOSEPH KALIPI, as individuals and members of PONO, Petitioners and Plaintiffs/Counterclaim Defendants-Appellants, vs. HALONA KAOPUIKI, Plaintiff/Counterclaim Defendant-Appellee, vs. MOLOKAI RANCH, LTD., a Hawaii corporation; Respondent and Defendant/Counterclaimant-Appellee, JAMES W. MOZLEY, JR.; CHARLES JENCKS, as an individual and in his capacity as Director of the County of Maui Department of Public Works and Waste Management; LINDA CROCKETT LINGLE, as an individual and in her capacity as Mayor of the County of Maui; COUNTY OF MAUI, a governmental entity, Defendants-Appellees.	CIVIL NO. 97-0383(2) (Declaratory Relief) APPEAL FROM THE ORDER GRANTING PLAINTIFF PONO'S MOTION FOR RULE 54(b) CERTIFICATION OF ORDERS WHICH RESOLVE COUNTS I, II, III, IV, V, VI, VII, VIII, IX, X, XI, XII AND XIII OF PLAINTIFF'S AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF FILED ON JUNE 25, 1997, FILED JULY 5, 2006, AMENDED FINAL JUDGMENT, FILED DECEMBER 14, 2006, ORDER GRANTING DEFENDANT MOLOKAI RANCH, LTD.'S MOTIONS NO. 1, 2, 3, 4 AND 7, FILED AUGUST 19, 1998, AND DENYING PLAINTIFFS PONO ET AL.'S MOTION FOR PARTIAL SUMMARY JUDGMENT NO. 1, FILED JANUARY 12, 2000; EXHIBIT "A", FILED APRIL 28, 2000, SPECIAL MASTER'S REPORT AND RECOMMENDATIONS TO: (1) GRANT MOLOKAI RANCH, LTD.'S MOTIONS NO. 1: MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNT IV (HRS 343), AND MOTION NO. 3: MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNT III (HRS 6E); (2) DENY WITHOUT PREJUDICE MOLOKAI RANCH, LTD.'S MOTION NO. 5: MOTION FOR SUMMARY JUDGMENT DUE TO PLAINTIFFS' LACHES; AND (3) GRANTING MOLOKAI RANCH, LTD.'S MOTION NO. 4: MOTION TO DISMISS COUNT I (HRS 205) FOR LACK OF SUBJECT MATTER JURISDICTION; APPENDICES "A"-"B", FILED MAY 11, 1999, **AND** SPECIAL MASTER'S REPORT AND RECOMMENDATIONS TO: (1) GRANT MOLOKAI RANCH, LTD.'S MOTION NO. 2, MOTION FOR PARTIAL SUMMARY

) JUDGMENT ON COUNT VIII (MOLOKAI
) COMMUNITY PLAN) AND MOTION NO.
) 7, COUNT VII (MAUI COUNTY
) AGRICULTURAL DISTRICT
) ORDINANCE, MCC SECTION 19.30.020);
) (2) IDENTIFY AS MOOT, WITHOUT
) PREJUDICE, MOLOKAI RANCH, LTD.'S
) MOTION NO. 6, COUNT I (HRS 205 ON
) THE MERITS) AND PONO'S MOTION
) FOR SUMMARY JUDGMENT
) CONCERNING HRS CHAPTER 205,
) FILED MAY 11, 1999
)
) CIRCUIT COURT OF THE SECOND
) CIRCUIT, STATE OF HAWAII
)
) The Honorable Joseph E. Cardoza, Judge
) The Honorable Joel E. August, Judge
) The Honorable Artemio C. Baxa, Judge
) The Honorable Rhonda I.L. Loo, Judge
) The Honorable E. John McConnell, Judge

RESPONDENT AND DEFENDANT-APPELLEE MOLOKAI PROPERTIES, LTD.'S RESPONSE TO APPLICATION FOR WRIT OF CERTIORARI

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I. INTRODUCTION

Petitioners' Application For Writ of Certiorari should be rejected. Article XI, section 9 of the Hawaii Constitution does not require a court to imply original subject matter jurisdiction over a private party's claim that a property owner's use of its land is incompatible with the statewide zoning law, Haw. Rev. Stat. ch. 205. Article XI, section 9 of the Hawai'i Constitution requires the Legislature to allow private enforcement of "laws relating to environmental quality" via "appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law," but the plain language of that provision does not include zoning statutes within its terms, and further does not require a circuit court exercise *original* jurisdiction. Haw. Const. art. XI, § 9.

Classic *Euclid*ean zoning statutes such as Haw. Rev. Stat. ch. 205, which classify land by area and prescribe the permitted and prohibited uses within zoning districts, are not "environmental quality" laws. But even if they are, Petitioners were not denied access to "appropriate legal proceedings," because the County of Maui has a well-established procedure for reviewing a zoning agency's decision under chapter 205, which includes judicial review pursuant to the Hawai'i Administrative Procedures Act, Haw. Rev. Stat. § 91-14 (1993 & Supp. 2007) ("HAPA"). When a regulatory scheme places issues such as a proposed land use's compatibility with zoning requirements within the "special competence" of an agency, and avenues of administrative relief exist, the agency's review process must be utilized *before* going to circuit court as matter of subject matter jurisdiction, and cannot be bypassed. *Kona Old Hawaiian Trails Group v. Lyman*, 69 Hawai'i 81, 94, 734 P.2d 161, 169 (1987) (agencies have primary jurisdiction and their procedures must be exhausted before a circuit court has subject matter jurisdiction). Here, Petitioners did not seek available administrative review by the Maui County Board of Variances and Appeals ("BVA"), which possesses "special competence" on zoning issues, or judicial review under HAPA, even though these procedures were beyond doubt constitutionally adequate "appropriate legal proceedings" they should have pursued, but did not.

In the thirty years since Hawai'i amended the Constitution to add article XI,[1] the Legislature routinely enacted or amended statutes which vest the circuit courts with original subject matter jurisdiction in "laws relating to environmental quality" such as the Hawai'i Environmental

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[1]This case was languishing in the circuit court for nearly ten of the thirty years, and in fact it was dismissed for want of prosecution in 2005. Record on Appeal ("RA") Volume ("Vol") 21 at 5540-5543.

Policy Act, Haw. Rev. Stat. § 343-7 (1993 & Supp. 2007) ("HEPA"); the Environmental Response Law, Haw. Rev. Stat. § 128D-21(a)(1) (1993); and the Air Pollution Control statute, Haw. Rev. Stat. § 342B-56(a)(1)& (3) (1993). Chapter 205 was not included, most obviously because it is not a statute "relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources." The Legislature must not believe chapter 205 is a "law relating to environmental quality" because when it repeatedly amended chapter 205 during the same thirty year period, it pointedly did *not* create original jurisdiction in the circuit courts to review zoning issues. Thus, Petitioners' assertion has essentially been addressed and routinely rejected over the years, and their Application presents nothing new.

Instead, Petitioners ask this Court, in a case independently lacking subject matter jurisdiction, to imply a private right of action and unnecessarily determine that a straightforward zoning statute is an "law[] relating to environmental quality" in derogation of the plain meaning of that term.[2] The Intermediate Court of Appeals ("ICA") was correct by not implying original circuit court jurisdiction in this case, since Petitioners had adequate avenues of judicial relief, but chose not to use them. *Pono v. Molokai Ranch, Ltd.*, 119 Hawai'i 164, 194 P.3d 1126 (2008). The decision of the ICA was not gravely wrong, and does not merit this Court's review.

II.
STATEMENT OF THE CASE

Petitioners were dissatisfied with zoning enforcement decisions made by Maui County's Department of Public Works ("DPW") that the use of land desired by Respondent Molokai Properties, Ltd. ("Respondent")[3] was consistent with the Ag zoning of its land under the State Land Use Law, Haw. Rev. Stat. ch. 205. Pursuant to Haw. Rev. Stat. § 205-12, county zoning enforcement authorities enforce chapter 205, not the State Land Use Commission. *See Lanai Co. v. Land Use Comm'n*, 105 Hawai'i 296, 318-319, 97 P.3d 372, 394 (2004). Petitioners did not seek review of DPW's zoning decisions in the Maui Board of Variances and Appeals ("BVA"), which has exclusive jurisdiction to determine "appeals alleging error from any person aggrieved by a decision or order of any department charged with the enforcement of zoning, subdivision, and building ordinances." Maui Charter § 8-8.7.2 (2003). Having failed to seek a BVA contested case, Petitioners could not invoke

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[2]In essence, Petitioners argue that Haw. Rev. Stat. ch. 205 is unconstitutional unless original circuit court jurisdiction to hear their lawsuit is implied.

[3]Molokai Ranch, Ltd. changed its name to Molokai Properties, Ltd. in 2002. RA Vol 22 at 5592.

judicial review under HAPA. *See E & J Lounge Operating Co. v. Liquor Comm'n of the City and County of Honolulu*, 118 Hawai'i 320, 189 P.3d 432 (2008). The circuit court consequently dismissed the case for lack of subject matter jurisdiction.

On appeal, Petitioners waived their claims against Defendant/Appellee County of Maui and its officials (collectively "County"), arguing they could bypass County's zoning enforcement agencies and avoid exhausting available administrative remedies and the primary jurisdiction doctrine, and instead invoke the circuit court's original jurisdiction to sue Respondent alone. As the ICA correctly held, however, circuit courts have no original subject matter jurisdiction to hear lawsuits by a private party against another alleging violation of chapter 205 zoning requirements.

III.
ARGUMENT

A. CHAPTER 205 IS A ZONING LAW, NOT A "LAW RELATING TO ENVIRONMENTAL QUALITY."

Zoning laws regulate the use of land, *Morehart v. County of Santa Barbara*, 872 P.2d 143 (Cal. 1994), and the primary purpose of zoning regulations is to confine certain classes of uses and structures to designated areas. *Ragucci v. Metropolitan Dev. Comm'n of Marion County*, 702 N.E.2d 677 (Ind. 1998). Hawai'i's State Land Use Law, Haw. Rev. Stat. ch. 205, is plainly a zoning law. *See, e.g., Maha'ulepu v. Land Use Comm'n*, 71 Hawai'i 332, 337 n.3, 790 P.2d 906, 909 n.3 (1990) ("HRS §§ 205-2 and 205-4.5 enumerate permissible uses within the agricultural district. HRS § 205-2 outlines permissible uses on lands classified by the Land Study Bureau's Detailed Land Classification as Overall Productivity Rating Class C, D, E or U, while lands classified A or B are restricted to the uses described in HRS § 205-4.5."); David L. Callies, *Preserving Paradise* at 12 (1994) ("The land-use law is essentially local zoning writ large."). *See also Hale O Kaula Church v. Maui Planning Comm'n*, 229 F. Supp.2d 1056, 1060 n.2 (D. Haw. 2002) (describing permissible uses in the Ag district). Classic *Euclid*ean zoning regulations such as chapter 205 classify land by districts, and set forth the permissible (and impermissible) uses of land within each district. *See Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (zoning land and segregation of uses does not violate due process).

Petitioners, however, assert chapter 205 is an "environmental quality" statute, and attempt to equate it with a Constitutional provision, statutes, and cases which have a plain connection to "environmental quality" such as HEPA, the Environmental Response Law, and the Air Pollution Control statute. In contrast to zoning laws, HEPA and the other environmental statutes identified by the ICA are the type of "environmental quality" laws referred to in the 1978 constitutional amendment.

Chapter 343 contains express private right of action provisions. *See* Haw. Rev. Stat. § 343-7. Petitioners concede, as they must, that the framers of the amendment explained that the laws article XI, section 9 is concerned with are those dealing with "environmental quality." Application at 6 (*quoting Proceedings of the Constitutional Convention of Hawai'i of 1978*, Vol. 1, Journal and Documents, at 689-90 (1980)). "Environmental quality" is a very specific and precise term; the framers did not use either the term "zoning" or "land use," and had they intended "zoning laws" be included as "environmental quality" laws, they presumably would have included it along with laws relating to the "control of pollution and conservation, protection and enhancement of natural resources." Haw. Const. art. XI, § 9. But the framers did not. Consequently, the court's role is limited to examining the constitutional text, and if it is clear and unambiguous, to construe the words as written. *Blair v. Harris*, 98 Hawai'i 176, 178-79, 45 P.3d 798, 800-801 (2002) (text should be followed because constitutions derive their power and authority from the people, whose intent is found "*in the instrument itself*") (emphasis added). Implying original circuit court subject matter jurisdiction by an overinclusive reading of the term "laws relating to environmental quality" when the Constitution does not provide it is particularly damaging to a proper respect for the limited role of courts in a democratic society.

Petitioners set forth no limits on what, under their expansive theory, is included within the meaning of "laws relating to environmental quality," because there is none. Petitioners' reading of article I, section 9 means that virtually every statute could conceivably be tied in some fashion to "environmental quality" as Petitioners attempt to do with chapter 205 and county general and community plans.[4] But this Court applies the plain meaning of Constitutional provisions, not "butterfly effect" arguments that such as Petitioners make.

B. PETITIONERS DID NOT PURSUE JURISDICTIONALLY REQUIRED REMEDIES, WHICH ARE CONSTITUTIONALLY ADEQUATE "LEGAL PROCEEDINGS."

Even if chapter 205 is an "environmental quality" law, Petitioners' assertion they were deprived of remedies because the ICA did not imply original circuit court jurisdiction under that statute also fails because it ignores the latter phrase in the second sentence in article XI, section 9, which states "[a]ny person may enforce this right against any party, public or private, *through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law*." Haw. Const. art.

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[4]The analysis regarding Haw. Rev. Stat. ch. 205 applies with equal force to Petitioners' claim that county general and community plans are also "laws relating to environmental quality." *See* Application at 7.

XI, § 9 (emphasis added). County's established procedures by which Petitioners could have sought administrative relief, followed by judicial review of DPW's zoning decisions, are "appropriate legal proceedings" pursuant to which Petitioners could have pursued enforcement of any chapter 205 rights they may have possessed.

As this Court held in *Kona Old Hawaiian Trails* and other cases, agencies such as the BVA have primary subject matter jurisdiction in zoning cases. Primary jurisdiction is "closely related to the doctrine of exhaustion of administrative remedies," *The Aged Hawaiians v. Hawaiian Homes Comm'n*, 78 Hawai'i 92, 202, 891 P.2d 279, 289 (1995), and applies *"where a claim is originally cognizable in the courts*, and . . . enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." *Kona Old Hawaiian Trails*, 69 Hawai'i at 93, 734 P.2d at 168 (emphasis added) (quoting *United States v. Western Pac. R.R.*, 352 U.S. 59, 63-64 (1956)). "The primary jurisdiction doctrine is designed to promote uniformity and consistency in the regulatory process." *The Aged Hawaiians*, 78 Hawai'i at 202, 891 P.2d at 289. In other words, even if the circuit court *could* exercise original subject matter jurisdiction over Petitioners' claims – either under chapter 205 or under Haw. Rev. Stat. § 607-25 (a fee-shifting statute) – the primary jurisdiction doctrine holds that agency procedures cannot be simply bypassed, and the courts must withhold exercising that jurisdiction until the agency has an opportunity to review the case.[5] Because zoning enforcement "has been placed within the special competence of an administrative body," Petitioners were required to avail themselves of these processes, not ignore them. *Kona Old Hawaiian Trails*, 69 Hawai'i at 93, 734 P.2d at 168 (emphasis added) (quoting *United States v. Western Pac. R.R.*, 352 U.S. 59, 63-64 (1956)). *See also The Aged Hawaiians v. Hawaiian Homes Comm'n*, 78 Hawai'i192, 202, 891 P.2d 279, 289 (1995).

The BVA had primary jurisdiction over Petitioners' chapter 205 claims because pursuant to the Maui Charter, the BVA has the exclusive authority to:

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[5]Comity, respect for the agencies of coordinate branches, and the need for uniform results override a grant of original jurisdiction. *Kona Old Hawaiian Trails*, 69 Hawai'i at 94, 734 P.2d at 169. This analysis applies to Petitioners' assertion the Legislature in section 607-25 recognized that a private party may invoke a circuit court's original jurisdiction under chapter 205, even though chapter 205 itself does not recognize such jurisdiction. *See* Application at 8. Thus, even if Petitioners are correct and the circuit court had original jurisdiction, neither section 607-25, nor *Kahana Sunset Owners Ass'n v. Maui County Council*, 86 Hawai'i 132, 948 P.2d 122 (1997) superceded the primary jurisdiction doctrine, which this Court and the ICA have repeated affirmed, as recently as *Jou v. Nat. Interstate Ins. Co. of Hawaii*, 114 Hawai'i 122, 157 P.3d 561 (App.), *cert. rejected*, 115 Hawai'i 362, 167 P.3d 355 (2007).

> [h]ear and determine appeals alleging error from any person aggrieved by a decision or order of any department charged with the enforcement of zoning, subdivision, and building ordinances.

Maui Charter § 8-8.7.2 (2003). *See also* Rules of Practice and Procedure for the Board of Variances and Appeals § 12-801-18 (3)(B) (BVA reviews "[a]ppeals from decisions or orders of any department charged with the enforcement of zoning and building ordinances"). The type of plenary circuit court review Petitioners seek is particularly suited to BVA review. Requiring initial review in the agency with primary jurisdiction promotes the goals of efficiency, regulatory uniformity and consistency, and judicial deference to the agency's discretion and factfinding:

> in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by [the legislature] for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by *preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure*.

Kona Old Hawaiian Trails, 69 Hawai'i at 94, 734 P.2d at 169 (emphasis added) (quoting *Far East Conference v. United States*, 342 U.S. 570, 574–75 (1952)). Petitioners make no claim the BVA's procedures, followed by judicial review in circuit court, were not available to them, or Constitutionally inadequate because they are not "appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law" under article XI, section 9.

When a claim is cognizable in an agency, "judicial interference is withheld until the administrative process has run its course." *Kona Old Hawaiian Trails*, 69 Hawai'i at 93, 734 P.2d at 169. Exhaustion of remedies is also jurisdictional and "comes into play 'where a claim is cognizable in the first instance *by an administrative agency alone*.'" *Id.* (emphasis added) (quoting *United States v. Western Pac. R.R.*, 352 U.S. 59, 63 (1956)). In the present case, Petitioners' chapter 205 claims were "cognizable in the first instance by an administrative agency alone," because the Maui Charter gives the BVA exclusive first review jurisdiction over the decisions by DPW. The "exhaustion principle asks simply that the avenues of relief nearest and simplest should be pursued first." *Kona Old Hawaiian Trails*, 69 Hawai'i at 93, 734 P.2d at 169. "Judicial review of agency action will not be available unless the party affected has taken advantage of all the corrective procedures provided for in the administrative process." *Id.* (emphasis added). *See also Lichter v. United States*, 334 U.S. 742,

792 (1948) (administrative appeal was not optional and failure to pursue that avenue of redress "left [plaintiffs] no right to present" those issues in court).

Petitioners' failure to exhaust administrative remedies deprived the circuit court of subject matter jurisdiction, and it so held. *See Fish Unlimited v. Northeast Utilities Service Co.*, 756 A.2d 262, 269 (Conn. 2000) ("It is a settled principle of administrative law that if an adequate administrative remedy exists, it must be exhausted before the [trial] court will obtain jurisdiction to act in the matter"). Therefore, the remedy for failure to exhaust is dismissal at any stage of the proceeding. *See, e.g., Reiter v. Cooper*, 507 U.S. 258, 269 (1993) (where "relief is available from an administrative agency, the plaintiff is ordinarily required to pursue that avenue of redress *before* proceeding to the courts; and *until that recourse is exhausted, suit is premature and must be dismissed*") (emphasis added); *Kona Old Hawaiian Trails*, 69 Hawai'i at 93, 734 P.2d at 168-69 (When an agency has primary jurisdiction, the remedy is dismissal of the circuit court lawsuit and "the judicial process is suspended pending referral of such issues to the administrative body for its views," because when an agency has special competence, "the courts are *divested* of whatever original jurisdiction they would otherwise possess.") (emphasis added).

It was Petitioner's burden to prove subject matter jurisdiction at every stage of the case, including in the ICA.[6] Thus, Petitioners were not denied a remedy in "appropriate legal proceedings" – they forfeited it – and since this failure deprived the circuit court of subject matter jurisdiction, it was within the ICA's power to dismiss. Subject matter jurisdiction is an "absolute necessity," and an appellate court may *sua sponte* "at any stage of the case" make its own determination of a circuit court's exercise of jurisdiction. *Waal v. Sakagi*, 27 Hawai'i 609, 613 (1923) (*sua sponte* reversing the trial court's order because "we feel that we cannot overlook the absence of jurisdiction"); *Casuga v. Blanco*, 99 Hawai'i. 44, 49, 52 P.3d 298, 303 (2002) ("It is well-established . . . that lack of subject matter jurisdiction can never be waived by any party at any time."); *Amantiad v. Odum*, 90 Hawai'i. 152, 159, 977 P.2d 160, 167 (1999) (lack of jurisdiction cannot be waived, and may be raised at any stage of a case).

Petitioners attempt to blur the line between standing and subject matter jurisdiction, but this case does not present a standing issue because Petitioners do not claim they were denied standing

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[6] "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court *shall* dismiss the action." Haw. R. Civ. P. 12(h)(3) (emphasis added). Once challenged, *the Plaintiff bears the burden* of proving subject matter jurisdiction. *See, e.g., Bally Export Corp. v. Balicar, Ltd.*, 804 F.2d 398, 401 (7th Cir. 1986) (plaintiff must prove jurisdiction exists once challenged by defendant).

to challenge the DPW decisions before the BVA on the basis that they had no interest in the case. Indeed, Petitioners were not denied a BVA remedy at all, since they did not pursue any. Rather, Petitioners advance the novel position that available, mandatory and jurisdictional agency procedures may be completely ignored, and the circuit court must step into the shoes of the zoning enforcement agencies by exercising original jurisdiction by supplanting the primary jurisdiction of the agencies.

Petitioners fail to cite *Waikiki Discount Bazaar v. City and County of Honolulu*, 5 Hawai'i App. 635, 706 P.2d 1315 (1985), which held that a private party lacked standing to sue the City and County of Honolulu and a private landowner over alleged zoning code and fire code violations. *Id.* at 641-642, 706 P.2d at 1319-1320 ("no statute provides for the enforcement of the [Comprehensive Zoning Code] or Fire Marshal's Rules and Regulations by an individual; rather, authority for enforcement has been explicitly conferred on specific public officials."). Notably, *Waikiki Discount Bazaar* was decided in 1985, seven years after the constitutional amendment.

Furthermore, none of the cases cited by Petitioners stand for the proposition that a private party can sue another for alleged zoning violations, completely bypassing the county zoning enforcement agencies. For example, in *Akau v. Olohana Corp.*, 63 Hawai'i 383, 652 P.2d 1130 (1982), this Court held that a private class action suit was an appropriate mechanism to enforce public access claims across private property to public beaches. *Akau* did not involve zoning. There is a significant difference between adjudicating a beach access, which typically affects a single landowner, and interpreting and enforcing zoning laws, which affect hundreds of thousands of landowners. "The primary jurisdiction doctrine is designed to promote uniformity and consistency in the regulatory process,"*The Aged Hawaiians v. Hawaiian Homes Comm'n*, 78 Hawai'i 192, 202, 891 P.2d 279, 289 (1995), and bypassing agency review would thwart those goals.

Hawaii's Thousand Friends. v. City and County of Honolulu, 75 Hawai'i 237, 858 P.2d 726 (1993) is merely the corollary to *Kona Old* with respect to exhaustion and primary jurisdiction. In *Kona Old*, the county's laws made available an administrative procedure that must be pursued; therefore, the plaintiffs were required to follow it and could not bring an original jurisdiction declaratory action in circuit court. Conversely, in *Hawaii's Thousand Friends*, the county had no administrative procedures to exhaust, because the Honolulu Zoning Board of Appeals had no jurisdiction to hear appeals under the Coastal Zone Management Act, Haw. Rev. Stat. ch. 205A. As a result, the plaintiffs had no other available remedies, and were allowed to pursue declaratory relief in circuit court. As the concurring opinion of Judge Foley in the case at bar correctly indicates, Maui's BVA has jurisdiction to hear appeals of the DPW's enforcement decisions concerning chapter 205.

Pono v. Molokai Ranch, Ltd., 119 Hawai'i 164, 201, 194 P.3d 1126, 1163 (2008) (Foley, J., concurring) ("Certainly, pursuant to his authority to "determine whether [an] application conforms to the requirements of [Chapter 205]," [DPW] Director Jencks was authorized to interpret Chapter 205 to determine the allowable uses of Molokai Ranch's agricultural land.").

Contrary to Petitioners' assertion, *Citizens for the Protection of the North Kohala Coastline v. County of Hawaii*, 91 Hawai'i 94, 979 P.2d 1120 (1999) does not support its argument that an original jurisdiction action in circuit court can substitute for pursuing administrative relief in the agency with primary jurisdiction. That case stands only for the unremarkable proposition that when a party seeks to challenge the *validity of the underlying law* (as opposed to whether an action allegedly violates that law), a declaratory action pursuant to Haw. Rev. Stat. § 632-1 is an appropriate procedure:

> [A]lthough the underlying premise of Citizens' complaint for declaratory and injunctive relief has the similar effect [as its agency appeal] of challenging Chalon's SMA permit approval, *its complaint for declaratory and injunctive relief goes further to challenge, inter alia, the validity of the ordinances and statutes underlying the Commission's procedures* for granting SMA permits and the applicability of HRS chapter 343 requiring preparation of an EIS by Chalon.

Citizens, 91 Hawai'i at 102, 979 P.2d at 1128 (emphasis added); *see also Dalton v. City and County*, 51 Hawai'i 400, 462 P.2d 199 (1969) (declaratory action to invalidate zoning ordinances). In other words, when a plaintiff challenges the agency's actions applying valid laws, an administrative appeal must be pursued, but when a plaintiff instead challenges the validity of the underlying statutes being applied by the agency, a declaratory action may be the proper remedy. Here, Petitioners do not challenge the validity of chapter 205, they merely assert the DPW's decisions *applying* chapter 205 to Respondent's uses was wrong.

IV.
CONCLUSION

There is nothing new or unique posed by the Application. The ICA applied well-settled principles and did not gravely err. Petitioners' case lacked subject matter jurisdiction. Petitioners have not demonstrated that BVA procedures and judicial review are not constitutionally-permissible

"appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law."

Respondent respectfully requests the Court reject the Application for Writ of Certiorari.

DATED: Honolulu, Hawaii, December 5, 2008.

Respectfully submitted,

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