CHARMAINE TAVARES
Mayor

BRIAN T. MOTO
Corporation Counsel

DEPARTMENT OF THE CORPORATION COUNSEL
COUNTY OF MAUI
200 SOUTH HIGH STREET
WAILUKU, MAUI, HAWAII 96793
TELEPHONE: (808) 270-7740
FAX: (808) 270-7152

March 13, 2007

MEMO TO: Danny A. Mateo
Council Member

F R O M: Edward S. Kushi, Jr.
Deputy Corporation Counsel

SUBJECT: **COUNCIL'S ABILITY TO MODIFY CHAPTER 201H PROJECTS**
(PAF 06-208)

We respond to your inquiry of January 8, 2007, as to whether, pursuant to Act 180,[1] and Act 217,[2] Session Laws of Hawaii 2006, the Maui County Council (the "Council"), as the legislative body of the county in which a project is situated, has the authority to approve, with modifications, a project proposed under Section 201H-38, Hawaii Revised Statutes, ("201H-38 project").

We understand that the Department of the Attorney General ("Attorney General") has given your staff an oral opinion confirming the Council's authority to approve, with modifications, proposed Section 201H-38 projects. We believe it prudent to obtain a written opinion from the Attorney General. Accordingly, we have written a request for such an opinion to Deputy Attorney General Nalani Wilson-Ku, a copy of which is attached hereto.

Pending a response from the Attorney General, we have reviewed the relevant legislation, and the Hawaii Supreme Court case referenced by the Attorney General, and concur with the oral advice rendered by the Attorney General.

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[1]H.B. No. 2966, H.D.2, S.D.2, C.D.1, effective July 1, 2006.

[2]S.B. No. 3000, S.D.2, H.D.1, C.D.1, effective July 1, 2006.

DISCUSSION:

Act 180 repealed Chapter 201G, HRS,[3] and established a new Chapter 201H, HRS.[4] As codified and published,[5] Section 201H-38, HRS, in relevant part, states:

> 201H-38. **Housing development; exemption from statutes, ordinances, charter provisions, and rules.** (a) The corporation may develop on behalf of the State or with an eligible developer, or may assist under a governmental assistance program in the development of, housing projects that shall be exempt from all statutes, ordinances, charter provisions, and rules of any government agency relating to planning, zoning, construction standards for subdivisions, development and improvement of land, and the construction of dwelling units thereon; provided that:
>
> . . . .
>
> (3) The legislative body of the county in which the housing project is to be situated shall have approved the project:
>
> (A) The legislative body shall approve or disapprove the project by resolution within forty-five days after the corporation has submitted the preliminary plans and specifications for the project to the legislative body. If on the forty-sixth day a project is not disapproved, it shall be deemed approved by the legislative body;
>
> (B) No action shall be prosecuted or maintained against any county, its officials, or employees on account of actions taken by them in reviewing, approving, or disapproving the plans and specifications; . . . .

The portion of Section 201H-38(a)(3)(A) and (B), HRS, referenced above is identical to Section 201G-118(a)(4)(A) and (B),

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[3]Note 1, Section 29.

[4]Note 1, Section 3.

[5]Hawaii Revised Statutes, 2006 Cumulative Supplement, Vol. 4.

HRS, prior to its amendment by Act 217 and repeal by Act 180. As discussed in a previous Corporation Counsel opinion,[6] old Section 201G-118, HRS, limited the Council to either approving or disapproving a project within forty-five days, without modifications.

In 2006, the State Legislature also enacted Act 217, which amended Section 201G-118(a)(4)(A) and (B), HRS, to read as follows:

> (4) The legislative body of the county in which the project is to be situated shall have approved the project <u>with or without modifications</u>.
>
> (A) The legislative body shall approve, <u>approve with modifications,</u> or disapprove the project by resolution within forty-five days after the administration has submitted the preliminary plans and specifications for the project to the legislative body. If on the forty-sixth day a project is not disapproved, it shall be deemed approved by the legislative body;
>
> (B) No action shall be prosecuted or maintained against any county, its officials, or employees on account of actions taken by them in reviewing, approving, <u>modifying,</u> or disapproving the plans and specifications; . . . .[7]

These Act 217 amendments to Section 201G-118, HRS, were not codified and published in the HRS 2006 Cumulative Supplement.[8] On information,[9] we understand that the Attorney General intended to incorporate the amendments made by Act 217 in new Chapter 201H,

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[6]See attached Memorandum to Dain P. Kane, Chair, Maui County Council, from Edward S. Kushi, Jr., Deputy Corporation Counsel (Nov. 18, 2003)(opining that Council could not modify exemptions or conditions for approval on Chapter 201G, HRS, applications).

[7]Note 2, Section 4.

[8]*See* Note 5.

[9]Your memorandum of January 8, 2007 to Brian T. Moto, Acting Corporation Counsel.

HRS, when Chapter 201H, HRS, was published by the Legislative Reference Bureau; however, for unexplained reasons, said Act 217 amendments were not incorporated in the 2006 Cumulative Supplement. Notwithstanding said error or omission by the Legislative Reference Bureau, the Attorney General advised orally that: the 2006 State Legislature's intent in enacting Act 217 was clear; the Act 217 amendment authorizing a legislative body to modify a Chapter 201H project application is effective; and Section 201H-38, as published in the 2006 Cumulative Supplement, Volume 4, was amended by implication to incorporate the Act 217 amendments.

To support this position, the Attorney General cites the Hawaii Supreme Court decision In re Water Use Permit Applications, Petitions for Interim Instream Flow Standard Amendments, and Petitions for Water Reservations for the Waiahole Ditch Combined Contested Case Hearing, 113 Hawai'i 52, 147 P.3d 836 (2006) ("Waiahole No. 4").

Waiahole No. 4 wrestled with the issue as to which Hawaii appellate court had jurisdiction to hear appeals from decisions of the Commission on Water Resource Management ("CWRM"). Prior to July 1, 2006, appeals from the CWRM were directly to the Hawaii Supreme Court.[10] In 2004, the Hawaii State Legislature passed Act 202, effective July 1, 2006, the purpose of which was to:

> change the appellate structure of the state courts to require appeals from the circuit courts and decisions of administrative agencies to be heard by the intermediate appellate court. Under [Act 202], the Supreme Court will retain original jurisdiction only in certain cases and, in all other cases, will hear appeals only upon acceptance of a writ of certiorari or transfer application from the intermediate appellate court.[11]

To implement Act 202, the Legislature amended fifty-three HRS sections that previously authorized appeals directly to the Supreme Court, but did not amend Section 174C-60, HRS, that allowed direct appeals from CWRM decisions to the Supreme Court. The Court stated that "the legislature's failure to amend HRS §174C-60 (1993) to authorize an appeal to the intermediate appellate court rather than

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[10]Section 174C-60, HRS.

[11]Waiahole No. 4, at 54.

to the supreme court was clearly an oversight."[12] The Court concluded that "[p]ursuant to the principle of statutory construction of amendment by implication, the legislature will be held to have changed a law that it did not have under consideration while enacting a later law when 'the terms of the subsequent act are so inconsistent with the provisions of the prior law that they cannot stand together.'"[13]

Accordingly, we believe that the "amendment by implication" position adopted by the Court in Waiahole No. 4 supports the Attorney General's oral opinion that Section 201H-38, HRS, was amended by implication and authorizes the Council to approve 201H-38 projects with or without modifications.

ESK:lkk
Enclosures
cc: Vanessa A. Medeiros, Director, Department of Housing and Human Concerns
Michele M. White, Legal Assistant

APPROVED FOR TRANSMITTAL:

BRIAN T. MOTO
CORPORATION COUNSEL

S:\ALL\ESK\Advisory\memo to mateo re hrs 201H, hrs 2.wpd

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[12] *Id.*

[13] *Id.*

ALAN M. ARAKAWA
Mayor

BRIAN T. MOTO
Corporation Counsel

DEPARTMENT OF THE CORPORATION COUNSEL
COUNTY OF MAUI
200 SOUTH HIGH STREET
WAILUKU, MAUI, HAWAII 96793
TELEPHONE: (808) 270-7740
FAX: (808) 270-7152

November 18, 2003

MEMO TO: Honorable Dain P. Kane, Chair
Maui County Council

F R O M: Edward S. Kushi, Jr.
Deputy Corporation Counsel

SUBJECT: **CLARIFICATION ON ABILITY TO MODIFY EXEMPTIONS OR CONDITIONS FOR APPROVAL ON HRS 201G APPLICATIONS SUBMITTED TO THE COUNCIL** (PAF 03-211)

Pursuant to your November 12, 2003 memo, you have requested our office to respond to the following inquiries:

1. Provide the authority relied upon in concluding that the project must be either approved or disapproved as submitted.

2. Consult with Honolulu's Corporation Counsel and the State Office of the Attorney General to see if some consensus can be reached.

3. If revisions are permissible, whether:

   a. they are limited in kind to 201G-118 exemptions; and;

   b. HCDCH and Kauaula Associates, LLC must approve of any revisions proposed by the Council within the 45-day period.

4. Whether Council approval would be limited to the specific 201G-118 exemptions requested, or would be tantamount to approval of other developer representations made in the application, regardless of whether they are set forth in the proposed resolution.

Notwithstanding the time constraints that prevented our office from more fully reviewing and discussing these issues with the aforementioned third-party agencies, we respond as follows:

I. **APPROVE OR DISAPPROVE THE PROJECT AS SUBMITTED.**

Section 201G-118, Hawaii Revised Statutes ("HRS"), in pertinent part, states:

> (3) The legislative body of the county in which the project is situated shall have approved the project.
>
> (A) The legislative body shall approve or disapprove the project by resolution within forty-five days after the corporation has submitted the preliminary plans and specifications for the project to the legislative body. If on the forty-sixth day a project is not disapproved, it shall be deemed approved by the legislative body;
>
> (B) No action shall be prosecuted or maintained against any county, its officials, or employees on account of actions taken by them in reviewing, approving, or disapproving the plans and specifications; and
>
> (C) The final plans and specifications for the project shall be deemed approved by the legislative body if the final plans and specifications do not substantially deviate from the preliminary plans and specifications.... (emphasis added)

It is common practice that in reviewing legislation, the Maui County Council, through its committees and/or by the Council itself, will propose and/or impose revisions, modifications and/or conditions to the legislation, as initially submitted. However, the "fast-track" Section 201G-118, HRS, process is a creature of State legislation that provides for significant exemptions from planning, zoning, and construction standards that would otherwise apply to a development. Therefore, Section 201G-118 should be construed pursuant to the terms, conditions, and language of the statute itself.

In interpreting statutes, the fundamental starting point is the language of the statute itself. State v. Kalama, 94 Hawai`i 60 (2000). When construing a statute, the court's foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. Coon v. City and County of Honolulu, 98 Hawai`i 233 (2002). If the language of a statute is clear and unambiguous, a court will apply the plain meaning of the

language unless a plain meaning interpretation would lead to an absurd result or a result at odds with the legislature's intent. Makin ex rel Russell v. Hawaii, 114 F. Supp. 2d 1017 (1999). A rational, sensible, and practicable interpretation of a statute is preferred to one which is unreasonable or impracticable. Metcalf v. Voluntary Employee's Ben. Ass'n. of Hawaii, 99 Hawai`i 53 (2002). The legislature is presumed not to intend an absurd result, and legislation will be construed to avoid, if possible, inconsistency, contradiction, and illogicality. Beneficial Hawaii, Inc. v. Kida, 96 Hawai`i 289 (2001).

Section 201G-118(a)(3)(A), HRS, states that the legislative body "shall approve or disapprove" the project. Section 201G-118, HRS, has no language explicitly providing for modification of the "preliminary plans and specifications" submitted, nor does it provide for approval in part and disapproval in part. Further, Section 201G-118(a)(3)(B), HRS, which provides the County and its officials with immunity from lawsuit, references actions taken by the County and its officials "in reviewing, approving, or disapproving the plans and specifications". Here again no explicit reference is made to the possibility of revisions, modifications, or partial approvals being made by the Council.

A cursory review of the legislative history of Section 201G-118, HRS, and Chapter 201G reveals no specific discussion that sheds light on this issue. However, Sections 201G-118(a)(3)(A) and (C), HRS, mandate that the preliminary plans and specifications be deemed the final plans and specifications if there are no substantial deviations from the preliminary plans. This implies that Section 201G-118 does not contemplate or anticipate that changes may be made by the legislative body to the preliminary plans and specifications. It also implies that a review and determination as to whether substantial deviations exist must necessarily occur after Council approval of the subject resolution.

In light of the strict and expedited 45-day time frame within which approval or disapproval must be rendered, to allow or permit revisions, modifications and/or conditions could be impracticable, and result in new and additional legal issues, such as those posed in question 3(b) of your memorandum. In particular, if modifications were made by Council to the preliminary plans and specifications as a condition of, or incident to, approval of the project, it would render questionable the status and efficacy of the prior approval granted the project by the Housing and Community Development Corporation of Hawaii ("HCDCH"). Indeed, based on the informal comments of the Deputy Attorney General, it appears that modification of the preliminary plans and specifications would necessitate another review of the project by the HCDCH. The fact that Chapter 201G, HRS, does not explicitly provide for such a possibility and complication is further support for the proposition

that modification of project plans by the Council is not something contemplated by Section 201G-118, HRS.

Accordingly, we opine that, based on the language of the State statute and the reasons discussed above, no modifications, revisions, and/or conditions may be made to the initial submittal.

II. **CONSULTATION WITH CITY AND COUNTY OF HONOLULU CORPORATION COUNSEL AND THE STATE ATTORNEY GENERAL'S OFFICE.**

We have not had the time or opportunity to discuss these issues with the Corporation Counsel of the City and County of Honolulu. We did, however, briefly discuss this matter with the State Deputy Attorney General assigned to the HCDCH, and although he, understandably, would not formally respond to the specific inquiry as to whether modifications are permitted, he confirmed that, in the event modifications, conditions and/or revisions are proposed by Council, said changes would have to be reviewed and approved by the HCDCH Board of Directors.

III. **IF REVISIONS ARE PERMISSIBLE, ARE THEY LIMITED TO THE SPECIFIC REQUESTED EXEMPTIONS, OR TO THE PROJECT, AS A WHOLE, AS REPRESENTED AND SUBMITTED TO THE COUNCIL.**

As discussed above, the "project" to be considered is described and detailed by the preliminary plans and specifications, which plans and specifications include any requested statutory or regulatory exemptions. We opine that any and all representations incorporated in the preliminary plans and specifications submitted to Council are part and parcel of the "project."

Call if further discussion and/or clarification is needed. It is hoped that the HCDCH will be successful in obtaining a written opinion from the State Attorney General's Office for our review.

APPROVED FOR TRANSMITTAL:

BRIAN T. MOTO
Corporation Counsel
S:\ALL\ESK\Advisory\memo to kane re puunoa.wpd

CHARMAINE TAVARES
Mayor

BRIAN T. MOTO
Corporation Counsel

DEPARTMENT OF THE CORPORATION COUNSEL
COUNTY OF MAUI
200 SOUTH HIGH STREET
WAILUKU, MAUI, HAWAII 96793
TELEPHONE: (808) 270-7740
FAX: (808) 270-7152

March 13, 2007

Ms. Nalani P. Wilson-Ku
Deputy Attorney General
Department of the Attorney General
State of Hawaii
465 South King Street, Rm. B-2
Honolulu, Hawaii 96813

Re: REQUEST FOR WRITTEN OPINION; CHAPTER 201H, HAWAII REVISED STATUTES

Dear Ms. Wilson-Ku:

Our office advises the Maui County Council ("Council") and has encountered a matter of state-wide concern with regard to the interpretation of recently enacted Chapter 201H, Hawaii Revised Statutes ("HRS").

Attached for your reference and review are the following:

(1) Memorandum dated January 8, 2007 from Council Member Danny A. Mateo to the undersigned, with a copy of the Hawaii Supreme Court decision In re Water Use Permit Applications, Petitions for Interim Instream Flow Standard Amendments, and Petitions for Water Reservations for the Waiahole Ditch Combined Contested Case Hearing, 113 Hawai'i 52, 147 P.3d 836 (2006).

(2) Memorandum to Council Member Mateo, dated March 13, 2007, from Edward S. Kushi, Deputy Corporation Counsel.

In our March 13, 2007 memorandum to Council Member Mateo, after reviewing the question posed, we concluded that we concur with the verbal opinion you gave to Council Member Mateo's staff, specifically that the Council has the authority to approve, with modifications, proposed Section 201H-38 projects. However, we further advised Council Member Mateo that we would be writing to

you to obtain a written opinion from your office.

Accordingly, on behalf of Council Member Mateo and the Council, we respectfully request a written opinion on the following question:

> WHETHER, PURSUANT TO ACT 180 AND ACT 217, SESSION LAWS OF HAWAII 2006, THE MAUI COUNTY COUNCIL, AS THE LEGISLATIVE BODY OF THE COUNTY IN WHICH A PROJECT IS SITUATED, HAS THE AUTHORITY TO APPROVE, WITH MODIFICATIONS, A PROPOSED SECTION 201H-38 PROJECT?

Your timely review and response will be most appreciated, as we understand the Council may be receiving Section 201H-38 project applications in the near future.

Call if further clarification and/or information is needed.

Sincerely,

Edward S. Kushi, Jr.
Deputy Corporation Counsel

ESK:lkk
Enclosures
cc: Council Member Danny A. Mateo, Maui County Council
Vanessa A. Medeiros, Director, Department of Housing and Human Concerns, County of Maui
Brian T. Moto, Corporation Counsel, County of Maui
S:\ALL\ESK\Advisory\letter to wilson-ku, state ag's office.wpd

COUNTY COUNCIL
COUNTY OF MAUI
200 S. HIGH STREET
WAILUKU, MAUI, HAWAII 96793
www.co.maui.hi.us/council/

January 8, 2007

MEMO TO: Mr. Brian T. Moto
Acting Corporation Counsel

F R O M: Danny A. Mateo
Council Member

SUBJECT: **COUNCIL'S ABILITY TO MODIFY CHAPTER 201H PROJECTS**
(PAF 06-208)

In the State's 2006 Legislative Session, two Acts were passed relating to Chapter 201G, Hawaii Revised Statutes (HRS).

Act 180, effective June 9, 2006 (attached), repealed Chapter 201G, HRS, and added a new Chapter 201H. Section 201H-H (now numbered Section 201H-38) corresponds to the old Section 201G-118.

Act 217, effective June 21, 2006 (attached), amended Section 201G-118, HRS, which had since been repealed, to allow the legislative body of the county in which the project is to be situated to modify a project.[1]

In light of the above, may I please request a written opinion as to whether the Council has the authority to modify a Section 201H-38 project. The Council is expecting to receive Chapter 201H applications at the end of February and beginning of March, 2007.

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[1] Three subsections were amended to reflect the council's authority to modify a project, as follows:

1. Subsection 201G-118(a)(4) provides that: "The legislative body of the county in which the project is to be situated shall have approved the project with or without modifications.".

2. Subsection 201G-118(a)(4)(A) provides that: "The legislative body shall approve, approve with modifications, or disapprove the project by resolution within forty-five days after the administration has submitted the preliminary plans and specifications for the project to the legislative body. If on the forty-sixth day a project is not disapproved, it shall be deemed approved by the legislative body;".

3. Subsection 201G-118(a)(4)(B) provides that: "No action shall be prosecuted or maintained against any county, its officials, or employees on account of actions taken by them in reviewing, approving, modifying, or disapproving the plans and specifications; and".

By way of background information and to assist in your consideration, I would note the following:

1. In August 2006, Deputy Attorney General Nalani Wilson-Ku advised Office of Council Services staff that the Department of the Attorney General intended to incorporate the changes from Act 217 into the corresponding section in Chapter 201H when it was published by the Legislative Reference Bureau, but did not provide the decision in writing.

2. The Act 217 amendments to Section 201G-118 were not incorporated into Section 201H-38 upon publication (see attached).

3. Following publication of Section 201H-38, Ms. Wilson-Ku advised staff that the Department's position is that the amendments explicitly authorizing a legislative body to modify a Chapter 201G project are in effect, and that Section 201H-38 was amended by implication to incorporate the referenced amendments to Section 201G-118, stating that the legislature's intent in enacting Act 217 was clear, and citing the attached Supreme Court opinion for this position.

4. Staff has been informed that the Department does not currently intend to reduce this verbal opinion to writing.

May I please request a response in writing no later than **Friday, January 19, 2007**. To ensure efficient processing, please include the relevant PAF number in the subject line of your response.

Should you have any questions, please contact me, Legislative Analyst Gayle Revels at ext. 7687, or Legislative Attorney Carla Nakata at ext. 7659.

paf:ghr:06-208a

Attachments

H

In re Water Use Permit Applications, Petitions for Interim Instream Flow Standard AmendmentsHawai 'i,2006.

Supreme Court of Hawai'i.
In the Matter of WATER USE PERMIT APPLICATIONS, PETITIONS FOR INTERIM INSTREAM FLOW STANDARD AMENDMENTS, and Petitions for Water Reservations for the **Wai hole** Ditch Combined Contested Case Hearing.
No. 28108.

Nov. 29, 2006.

Background: On second remand of contested hearing related to ditch system for collecting fresh surface water and dike-impounded ground water, the Water Commission issued its findings of fact, conclusions of law, and decision and order. Appeals were taken.

Holding: The Supreme Court held that jurisdiction to hear and determine appeal, which was filed after July 1, 2006, was with intermediate appellate court.

Appeal directed to intermediate appellate court.

West Headnotes

[1] Waters and Water Courses 405 ⚿133

405 Waters and Water Courses
405VI Appropriation and Prescription
405k133 k. Proceedings to Effect and Character and Elements of Appropriation in General. Most Cited Cases

Jurisdiction to hear and determine appeal from the Water Commission, which was filed after July 1, 2006, was with intermediate appellate court, subject to review by Supreme Court by transfer of certiorari; concurrent jurisdiction of supreme court and intermediate appellate court to hear and determine appeals from any other court or agency was discontinued with enactment of jurisdictional statutes that gave supreme court jurisdiction to hear and determine appeals only by application for a writ of certiorari to the intermediate appellate court or by transfer as specified. HRS §§ 174C-60, 602-5(a)(1), 602-57(1).

[2] Statutes 361 ⚿142

361 Statutes
361IV Amendment, Revision, and Codification
361k142 k. Implied Amendment. Most Cited Cases

Pursuant to the principle of statutory construction of amendment by implication, the legislature will be held to have changed a law that it did not have under consideration while enacting a later law when the terms of the subsequent act are so inconsistent with the provisions of the prior law that they cannot stand together.

West CodenotesRecognized as Repealed by ImplicationHRS § 174C-60 (1993)

****836** PER CURIAM.[FN1]

FN1. Considered by: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.

***52** This is an appeal from a decision and order of the Commission on Water Resource Management (Water Commission). The appeal was filed after the July 1, 2006 effective date of Act 202, 2004 Hawai'i Session Laws (Act 202) that changed the jurisdiction of the supreme court and the intermediate appellate court.

We hold that pursuant to Hawai'i Revised Statutes (HRS) §§ 602-57(1) (Supp.2005) and 602-5(a)(1) (Supp.2005), quoted *infra,* jurisdiction to hear and determine appeals from the Water Commission, filed after July 1, 2006, is with the intermediate appellate court, subject to review by the supreme court by transfer or certiorari.

I. *Background*

This appeal arises from the Water Commission's combined contested case hearing on applications and petitions concerning use of water from the **Wai hole** Ditch system. On December 24, 1997, the Water Commission issued its final decision and order in the combined contested case hearing. On appeal of that decision and order, we partly affirmed and partly vacated the decision and remanded seven issues for further findings and conclusions. *In re Use Permit Applications,* 94 Hawai'i 97, 9 P.3d 409 (2000). On remand, the Water Commission determined the seven issues and issued on December 28, 2001 its findings of fact and decision and order. On appeal of that decision and order, we partly affirmed and partly vacated the decision and remanded six issues for further findings and conclusions. *In re Use Permit Applications,* 105 Hawai'i 1, 93 P.3d 643 (2004). On second remand, the Water Commission determined the six issues and issued on July 13, 2006 its ***53 **837** findings of fact, conclusions of law, and decision and order.

Notices of appeal from July 13, 2006 decision and order were timely filed in the instant case on August 11, 2006 by appellants Hakipu'u 'Ohana and Ka Lahui Hawai'i and appellant Hawai'i's Thousand Friends. The appeals were filed pursuant to HRS § 174C-60 (1993),[FN2] which authorizes an appeal of the Water Commission's final decision and order in a contested case. The appeals were docketed in the appellate court on October 10, 2006 and were docketed in the supreme court rather than in the intermediate appellate court because HRS § 174C-60 (1993) provides for an appeal "to the supreme court."

FN2. HRS § 174C-60 (1993) provides:
Contested cases. Chapter 91 shall apply except where it conflicts with this chapter. In such a case, this chapter shall apply. Any other law to the contrary notwithstanding, including chapter 91, any contested case hearing under [the State Water Code] shall be appealed upon the record directly to the supreme court for final decision.

II. *Discussion*

[1] "The [supreme court and the intermediate appellate court] shall have original and appellate jurisdiction as provided by law[.]" Hawai'i Constitution, article VI, section 1. Before July 1, 2006, the supreme court, pursuant to HRS § 602-5(a)(1) (1993), and the intermediate appellate court, pursuant to HRS § 602-57 (1993), had concurrent appellate jurisdiction to hear and determine "any appeal allowed by law from any other court or agency." Effective July 1, 2006, the intermediate appellate court, pursuant to HRS § 602-57(1) (Supp.2005),[FN3] retains appellate jurisdiction to hear and determine any appeal allowed by law, but the supreme court, pursuant to HRS § 602-5(a)(1) (Supp.2005),[FN4] has appellate jurisdiction to hear and determine appeals only "by application for a writ of certiorari to the intermediate appellate court or by transfer as provided by [HRS § 602-58 (Supp.2005)]." The change in appellate jurisdiction***54 **838** was effected by Act 202. The purpose of Act 202 was

FN3. HRS § 602-57 (Supp.2005) provides:
Jurisdiction. *[Section effective July 1, 2006. For section effective until June 30, 2006, see main volume.]* Notwithstanding any other law to the contrary, the intermediate appellate court shall have jurisdiction, subject to transfer as provided by section 602-58 or review on application for a writ of certiorari as provided in section 602-59:
(1) To hear and determine appeals from the district, family, and circuit courts and from any agency when appeals are allowed by law; and
(2) To entertain, in its discretion, any case submitted without suit when there is a question of law that could be the subject of a civil action or proceeding in the circuit court, or tax appeal court, and the parties agree upon the facts upon which the controversy depends.

FN4. HRS § 602-5 (Supp.2005) provides:
Jurisdiction and powers; filing. *[Section effective July 1, 2006. For section effective until June 30, 2006, see main volume.]* (a) The supreme court shall have jurisdiction and powers as follows:
(1) To hear and determine all questions of law, or of mixed law and fact, which are properly brought before it by application for a writ of certiorari to the intermediate appellate court or by transfer as provided in this chapter;
(2) To answer, in its discretion, any question of law reserved by a circuit court, the land court, or the tax appeal court, or any question or proposition of law certified to it by a federal district or appellate court if the supreme court shall so provide by rule;
(3) To exercise original jurisdiction in all questions arising under writs directed to courts of inferior jurisdiction and returnable before the supreme court, or if the supreme court consents to receive the case arising under writs of mandamus directed to public officers to compel them to fulfill the duties of their offices; and such other original jurisdiction as may be expressly conferred by law;
(4) To issue writs of habeas corpus, or orders to show cause as provided by chapter 660, returnable before the supreme court or a circuit court, and any justice may issue writs of habeas corpus or such orders to show cause, returnable as above stated;
(5) To make or issue any order or writ necessary or appropriate in aid of its jurisdiction, and in such case, any justice may issue a writ or an order to show cause returnable before the supreme court; and
(6) To make and award such judgments, decree, orders and mandates, issue such executions and other processes, and to such other acts and take such other steps as may be necessary to carry into effect the powers which are or shall be given to it by law for the promotion of justice in matters before it.

(b) All cases addressed to the jurisdiction of the supreme court or of the intermediate appellate court shall be filed with the clerk of the supreme court as proved by the rules of court. The clerk shall maintain the record of each case whether addressed to the jurisdiction of the supreme court or the jurisdiction of the intermediate appellate court.

to change the appellate structure of the state courts to require appeals from the circuit courts and decisions of administrative agencies to be heard by the intermediate appellate court. Under [Act 202], the Supreme Court will retain original jurisdiction only in certain cases and, in all other cases, will hear appeals only upon acceptance of a writ of certiorari or transfer application from the intermediate appellate court.
Hse. Stand. Comm. Rep. No. 672-04, in 2004 House Journal, at 1667. *See also* Sen. Stand. Comm. Rep. No. 2939, in 2004 Senate Journal, at 1461 (the purpose of Act 202 is "to require that all appeals from trial courts and administrative agencies be submitted to the Intermediate Court of Appeals, subject to review by the Supreme Court through [ ] transfer or application for a writ of certiorari"); Sen. Stand. Comm. Rep. No. 3131, in 2004 Senate Journal, at 1562 (Act 202 amends the appellate process "[b]y assigning all appeals from the district, family, and circuit courts, civil and criminal, and any agency when appeals are allowed by law to the Intermediate Appellate Court").

Act 202 amended the jurisdictional statutes for the supreme court and the intermediate appellate court (HRS §§ 602-5 and 602-57, *see supra* notes 3 and 2) as described above and further amended fifty-three HRS sections [FN5] that authorize appeals from courts and agencies. Those sections, before amendment, authorized appeals from courts and agencies "to the supreme court" and were amended to authorize appeals from courts and agencies "to the intermediate appellate court", not to the supreme court, in accordance with Act 202. The fifty-three sections supposedly included all HRS sections authorizing appeals from courts and agencies, but-as we learned when this appeal was docketed-did not include HRS § 174C-60 (1993)

that authorizes an appeal from a Water Commission case "to the supreme court."

> FN5. HRS §§ 11-51, 40-91, 47-46, 53-6, 91-14, 101-34, 101-52, 124A-105, 128-24, 196D-5, 201G-57, 201G-58, 232-1, 232-19, 232-22, 232-23, 235-114, 261-13, 269-15, 269-15.5, 269-54, 271-27, 271-32, 271-33, 271G-19, 271G-24, 281-92, 286-60, 377-9, 380-10, 383-41, 383-69, 383-76, 386-73, 386-73.5, 386-88, 392-21.5, 392-75, 412:2-501, 431:14-118; 431:14F-113, 482-9, 485-23, 501-63, 571-54, 641-1, 641-11, 641-12, 641-13, 641-17, 664-8, 664-25 and 664-36.

An appeal from the Water Commission is an appeal from an administrative agency for which jurisdiction lies with the intermediate appellate court pursuant to Act 202 and HRS § 602-57(1) (Supp.2005). In enacting Act 202, the legislature undoubtedly intended Water Commission appeals to be heard and determined by the intermediate appellate court, subject to review by the supreme court by transfer or certiorari. In enacting Act 202, the legislature's failure to amend HRS § 174C-60 (1993) to authorize an appeal to the intermediate appellate court rather than to the supreme court was clearly an oversight. The fact that HRS § 174C-60 (1993) authorizes an appeal to the supreme court does not place Water Commission appeals, filed after July 1, 2006, within the jurisdiction of the supreme court. Jurisdiction to hear and determine Water Commission appeals filed after July 1, 2006 is governed by the jurisdictional statutes for the supreme court and the intermediate appellate court, HRS §§ 602-5 and 602-57, as amended by Act 202. HRS § 174C-60 (1993) is inconsistent with those jurisdictional statutes. The inconsistency is resolved by the provision of HRS § 602-57(1) (Supp.2005) that states that "notwithstanding any other law to the contrary," the intermediate appellate court has jurisdiction over appeals from " any agency."

[2] Pursuant to the principle of statutory construction of amendment by implication, the legislature will be held to have changed a law that it did not have under consideration while enacting a later law when "the terms of the subsequent act are so inconsistent with the provisions of the prior law that they cannot stand together." 1A Norman J. Singer, *Statutes and Statutory Construction,* § 22:13 (6th ed.2002). HRS § 174C-60 (1993) is inconsistent with and cannot stand together with HRS §§ 602-5 and 602-57, as ***55 **839** amended by Act 202,[FN6] and is deemed amended by implication, effective July 1, 2006, to authorize appeals from the Water Commission to the intermediate appellate court, not to the supreme court.

> FN6. HRS § 174C-60 (1993) is also inconsistent with HRS § 91-14(b) (Supp.2005), which, as amended by Act 202, provides that in agency cases, " proceedings for review shall be instituted in the circuit court ..., except where a statute provides for a direct appeal to the intermediate appellate court, subject to chapter 602. In such cases, the appeal shall be treated in the same manner as an appeal from the circuit court to the intermediate appellate court[.]"

III. *Conclusion*

Based on the foregoing, we hold that pursuant to HRS §§ 602-57(1) (Supp.2005) and 602-5(a)(1) (Supp.2005), jurisdiction to hear and determine appeals from the Water Commission filed after July 1, 2006 is with the intermediate appellate court, subject to review by the supreme court by transfer or certiorari.

The clerk of the appellate court is directed to docket this appeal with the intermediate appellate court *nunc pro tunc* to October 10, 2006.

Hawai'i,2006.
In re Water Use Permit Applications, Petitions for Interim Instream Flow Standard Amendments
113 Hawai'i 52, 147 P.3d 836

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