

\*\*\* FOR PUBLICATION \*\*\*

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DISSENTING OPINION BY NAKAYAMA, J.,  
IN WHICH ACOBA, J., JOINS

I respectfully dissent from the majority's holding that the cellular antenna in this case constitutes a "communications equipment building" under Hawai'i Revised Statutes (HRS) § 205-4.5(a)(7).

The majority bases its decision on Curtis v. Board of Appeals, County of Hawai'i, in which we held that a 140-foot cellular telephone tower was not a "communications equipment building" under HRS § 205-4.5(a)(7), and that a special permit was therefore required to construct the tower in the state agricultural district. 90 Hawai'i 384, 394-395, 978 P.2d 822, 832-33 (1999) (opinion by Nakayama, J.). Our conclusion stemmed from our commonsense understanding of the term "building," which in our opinion appropriately denoted the small prefabricated structure adjacent to the cellular tower, but plainly did not describe the tower itself. Id. at 395, 978 P.2d at 833. I have always read Curtis to mean what it says -- namely, that cellular antennas and towers proposed in the state agricultural district require special permits prior to construction because they present a "novel and unique use" that lacks "specific reference" in HRS § 205-4.5(a). Id. at 397, 978 P.2d at 835.

Today's decision interprets Curtis to endorse the far different proposition that a cellular antenna or tower may be shielded from special permit review simply by having its structure enclosed.<sup>1</sup> In arriving at this conclusion, the

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<sup>1</sup> Indeed, if our chief quarrel in Curtis had merely been that U.S. Cellular's tower was "exposed," we might cordially have suggested that the company sheath the offending edifice within some other structure to spare the  
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majority reasons that (1) a fake chimney is a "building" because it is a "structure designed for storage" and an "edifice enclosing a space within its walls," (2) a cellular antenna constitutes "communications equipment," and (3) the housing of "communications equipment" within a "building" makes the structure a "communications equipment building" under HRS § 205-4.5(a)(7).

As the telecommunications industry will no doubt concede, all "communications equipment" may be completely "stored" within another "structure or edifice enclosing a space within its walls" given the requisite economic incentive.<sup>2</sup> The majority's analysis accordingly permits a properly concealed cellular tower or antenna of any size to be built as of right in the state agricultural district -- the only caveat being that the structure complies with the less restrictive land use controls found in the counties' respective zoning ordinances.

The majority fails to appreciate the untoward mischief that will result from tasking those ordinances with primary

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<sup>1</sup>(...continued)  
expense of obtaining a special permit. That suggestion we obviously declined to make -- in my view, for the reasons set forth below.

<sup>2</sup> The emergence of "stealth" antennas camouflaged as 80-foot "pine trees," 130-foot "lighthouses," and 50-foot "cacti" attests to the ingenuity with which transmitting equipment may now be concealed. See Julie Rawe, Cellular's New Camouflage, Time, Dec. 3, 2002, available at <http://www.time.com/time/insidebiz/printout/0,8816,1101021209-395336,00.html>; James Gonser, Fake Tree May Hide New Cellular Tower, Honolulu Advertiser, Dec. 10, 2002, available at <http://the.honoluluadvertiser.com/article/2002/Dec/10/ln/ln12a.html>; Michelle Delio, Stealth Antennas Try to Blend In, Wired News, Jan. 14, 2003, available at [http://www.wired.com/news/wireless/0,1382,57199,00.html?tw=wn\\_story\\_related](http://www.wired.com/news/wireless/0,1382,57199,00.html?tw=wn_story_related).

responsibility for regulating all such "buildings" sited on agricultural lands. By way of example, the Hawai'i County Code (HCC) permits "telecommunications antennas"<sup>3</sup> to be constructed as of right within the county's agricultural district,<sup>4</sup> and further allows their maximum height to reach "five hundred feet from existing grade."<sup>5</sup> Such towers and antennas need only receive approval from the director of the county planning department,<sup>6</sup> who acts under significant time constraints<sup>7</sup> and without the benefit of public notice or hearing.<sup>8</sup> An enclosed cellular tower or antenna<sup>9</sup> may therefore ascend far above the county agricultural district's 35-foot height limit for residential buildings,<sup>10</sup> and may be constructed with much greater rapidity and markedly less oversight than would be the case had HRS § 205-

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<sup>3</sup> The HCC defines a "telecommunications antenna" as "an antenna, tower and other accessory structures for radio frequency (RF) transmissions intended for specific users who must have special equipment for transmission and/or reception . . . ." HCC § 25-1-5(b)(101).

<sup>4</sup> See HCC § 25-5-72(a)(21).

<sup>5</sup> See HCC § 25-4-22(c).

<sup>6</sup> See HCC § 25-2-75(c), § 25-2-76, § 25-4-12(a).

<sup>7</sup> See HCC § 25-2-75(e) ("The director shall render a decision to either approve or deny a plan approval application within thirty days after acceptance of the application.").

<sup>8</sup> See HCC § 25-2-71(c)(3), § 25-2-72, § 25-2-74.

<sup>9</sup> Contrary to the majority's assertion, I believe that a cellular tower or antenna that is wholly enclosed continues to fall within the definition of a "telecommunications antenna" set forth in HCC § 25-1-5(b)(101). See Kau v. City & County of Honolulu, 104 Hawai'i 468, 474, 92 P.3d 477, 483 (2004) ("[W]hen interpreting a municipal ordinance, we apply the same rules of construction that we apply to statutes. The interpretation of a statute is a question of law reviewable de novo.").

<sup>10</sup> See HCC § 25-5-73.

4.5(a)(7) been interpreted less expansively.<sup>11</sup>

The majority's position is moreover in error, in my view, because an enclosed cellular tower or antenna constitutes no more a "permitted use" under HRS § 205-4.5(a) than one that is exposed. That much is apparent from the history<sup>12</sup> of HRS § 205-

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<sup>11</sup> The majority responds that "an enclosed antenna does not fall within the definition of a 'telecommunications antenna'" because the "building" that encloses the antenna "is the main building" and not an "accessory structure." Majority at 18-19. If this is so, I question how an enclosed antenna that is not a "telecommunications antenna" can be built in the county agricultural district without a special permit. As with other zoning ordinances, the HCC enumerates certain "permitted uses" that may be undertaken as of right in the agricultural district, see HCC § 25-5-72(a), and also allows -- again as of right -- "[b]uildings and uses accessory to [those] uses." HCC § 25-5-72(e). Uses or structures that are not either "permitted" or "accessory" under the HCC must generally obtain a special permit pursuant to HRS chapter 205 if, as is the case here, the proposed structure is located in the state agricultural district. HCC § 25-5-72(c) & (d).

HCC § 25-5-72(a)(21) designates "telecommunications antennas" as a "permitted use," and allows them to be built as of right in the county agricultural district. In light of the majority's claim that an enclosed cellular antenna is not a "telecommunications antenna," I for one am unable to discern any alternative "permitted use" in HCC § 25-5-72(a) which would allow such antennas to be constructed as of right and without a special permit.

As a further unintended consequence, the majority's holding renders inapplicable a number of county restrictions specific to "telecommunications antennas." HCC § 25-4-12(a), for instance, prohibits a "telecommunications antenna" from being constructed unless it is "not hazardous or dangerous to the surrounding area and the director has issued plan approval for such use." An application for "plan approval" must contain assurances from a licensed structural engineer and various federal agencies that the proposed antenna is structurally sound and complies with applicable federal regulations. HCC § 25-2-74. The director may only approve the application after considering certain "[r]eview criteria and conditions," HCC § 25-2-76, among them whether the structure adheres to "minimum setback" requirements and has a "hard survivability [in] sustained winds of at least one hundred miles per hour." HCC § 25-4-12(b) & (c).

As the foregoing restrictions apply only to "telecommunications antennas," they are inapplicable to enclosed cellular antennas if, as the majority contends, such antennas are not "telecommunications antennas."

<sup>12</sup> While I agree that we generally "turn to legislative history as an interpretive tool only where a statute is unclear or ambiguous," the exclusion of probative extrinsic indicia of legislative intent is by no means absolute. In this connection, we have previously stated:

Although the intention of the legislature is to be obtained  
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4.5(a)(7), which added the term "communications equipment building" during the 1977 legislative session<sup>13</sup> to facilitate cost-effective land-line telephone service in agricultural areas.<sup>14</sup> As telephone companies were already free to string

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<sup>12</sup>(...continued)

primarily from the language of the statute itself, we have rejected an approach to statutory construction which limits us to the words of a statute, for when aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no rule of law which forbids its use, however clear the words may appear on superficial examination. Thus, the plain language rule of statutory construction does not preclude an examination of sources other than the language of the statute itself even when the language appears clear upon perfunctory review. Were this not the case, a court may be unable to adequately discern the underlying policy which the legislature seeks to promulgate and, thus, would be unable to determine if a literal construction would produce an absurd or unjust result, inconsistent with the policies of the statute.

Young v. Planning Comm'n of County of Kaua'i, 89 Hawai'i 400, 408, 974 P.2d 40, 48 (1999) (opinion by Moon, C.J.) (emphasis added) (quoting Sato v. Tawata, 79 Hawai'i 14, 17, 897 P.2d 941, 944 (1995)).

<sup>13</sup> See 1977 Haw. Sess. L. Act 136, § 1, at 243.

<sup>14</sup> Indicative of that purpose, the House standing committee's report on the amendment stated:

The purpose of this bill is to include communications equipment buildings as a permitted use in agricultural land along with other similar utilities now permitted.

This bill will permit Hawaiian Telephone to construct such facilities as other public service companies and agencies are now permitted without the need to apply for variances. It will also enable the customers to receive telephone service much faster than the present time-consuming method.

Hse. Stand. Comm. Rep. No. 690, in 1977 House Journal, at 1605. The Senate standing committee report moreover noted that the proposed inclusion of "communications equipment buildings"

would improve service to telephone customers and reduce the cost of providing service. Other utilities are [now] permitted in agricultural land, such as utility lines,

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"utility lines" upon agricultural lands,<sup>15</sup> the additional "communications equipment" then needed to complete the agricultural district's wire-based networks was certainly not comparable in function to the transmitting towers and antennas now required to send wireless telephone signals into far flung agricultural areas.<sup>16</sup> The absence of a single reported decision dealing with "communications equipment buildings" prior to Curtis moreover indicates to me that such structures were, as a historical matter, sufficiently unobtrusive as to engender no significant litigation within agricultural communities.

By departing from the legislature's original understanding of the operative statutory language, the majority unnecessarily frustrates the State's comprehensive policy of

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<sup>14</sup>(...continued)

electric transformer stations and water booster pumping stations; this bill will include communications equipment buildings as well and will better serve farmers and others residing on agricultural lands.

Sen. Stand. Comm. Rep. No. 840, in 1977 Senate Journal, at 1219; see also Sen. Stand. Comm. Rep. No. 899, in 1977 Senate Journal, at 1230 (same).

<sup>15</sup> As originally enacted in 1976, HRS § 205-4.5(a)(7) restricted prime agricultural lands to the following permitted uses:

Public, private, and quasi-public utility lines, and roadways, transformer stations, solid waste transfer stations, and appurtenant small buildings such as booster pumping stations, but not including offices or yards for equipment, material, vehicle storage, repair or maintenance, treatment plants and major storage tanks not ancillary to agricultural practices, or corporation yards or other like structures[.]

1976 Haw. Sess. L. Act 199, § 1, at 370.

<sup>16</sup> Unlike the majority, I perceive a functional distinction between equipment that assists in transmitting telephonic signals along telephone wires and equipment that emits such signals through the air.

protecting agricultural lands from non-agricultural development.<sup>17</sup> In the wake of our decision, cellular service providers will surely see the virtue in constructing "buildings" to "store" and "enclose" all manner of towers and antennas -- especially since, as Appellant claims here, the ineluctable prospect of public scrutiny, delay, and expense awaits all who elect to expose their towers to the special permit process. The laudable goal of fostering intelligent, effective, and orderly development will unquestionably suffer. See Curtis, 90 Hawai'i at 396, 978 P.2d at 834.

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<sup>17</sup> Whether the benefits of cellular coverage in the agricultural district outweigh its costs, such that cellular towers and antennas should be permitted as of right on agricultural lands, is a question of policy appropriately within the legislative ken. The legislature's regular amendments to HRS § 205-4.5(a) attest to that body's willingness to reassess permissible uses within the agricultural district in the face of changing conditions and needs. See 1977 Haw. Sess. L. Act 136, § 1, at 243 ("communications equipment buildings"); 1980 Haw. Sess. L. Act 24, § 3, at 36 ("wind energy facilities"); 1982 Haw. Sess. L. Act 217, § 1, at 402 ("major water storage tanks"); 1991 Haw. Sess. L. Act 281, § 3, at 675 ("vehicle and equipment storage areas").