

CONCURRING OPINION BY FOLEY, J.

I concur.

I.

Pono argues, for the following reasons, that the circuit court erred in determining that it had no jurisdiction to determine whether Molokai Ranch's "series of luxury tourist accommodations on agricultural land" violated HRS Chapter 205:

(1) The circuit court erroneously assumed that Pono's primary complaint was with decisions made by Maui County officials rather than the actions of Molokai Ranch.

(2) The circuit court erroneously assumed that the Maui County Charter authorized the BVA to resolve disputes concerning the interpretation of a state law.

(3) The circuit court erroneously assumed that a county agency may resolve disputes concerning the interpretation of HRS Chapter 205.

(4) The circuit court's decision conflicts with the need for uniformity and consistency in the interpretation of a law of statewide concern.

(5) Pono exhausted the administrative remedies available to it by bringing this issue to the LUC.

In the Stipulated Count I, Pono alleged in relevant part that it was entitled to a declaratory judgment that "Molokai Ranch's resort operations associated with the Project, though disguised as 'open area recreational facilities,' are prohibited on its class C, D, E or U agricultural lands unless and until [Molokai Ranch] applies for and receives a special use permit or boundary amendment pursuant to [HRS] Chapter 205."

In its "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" (April 28, 2000 Order), the

circuit court explained that it granted the motions based, in part, on the reasons set forth in the May 11, 1999 "Special Master's Report and Recommendations to: (1) Grant Molokai Ranch, Ltd.'s Motion[] 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 [sic] Molokai Ranch, Ltd.'s Motion No. 4: Motion to Dismiss Count I (HRS (205) for Lack of Subject Matter Jurisdiction"¹ (Special Master's Report). The Special Master's Report provided in relevant part:

C. GRANTING, MOLOKAI RANCH'S MOTION NO. 4
DISMISSING PLAINTIFFS' COUNT I (HRS [CHAPTER]
205) FOR LACK OF SUBJECT MATTER JURISDICTION

[Molokai] Ranch's Motion No. 4: Motion to Dismiss Count I (HRS [Chapter] 205) for Lack of Subject Matter Jurisdiction is predicated upon [Pono's] failure to appeal "decisions" of Maui's Director ("Director") of Department of Public Works ("DPW") to Maui's Board of Variance [and] Appeals ("BVA"). The parties focus on two types of "decisions":

1. A December 11, 1995 letter of the Director to [Molokai] Ranch, a copy of which is attached to the motion papers; and
2. The issuance of approximately 100 building permits by DPW for tent platforms for overnight camps on such C, D, E or U lands.

It is undisputed that: (i) [Pono] never appealed any of these "decisions" to the BVA; (ii) did not institute this action until May 19, 1997, three and one-half months after the issuance of the last building permit on February 3, 1997; and (iii) Maui adopted a 30-day period for appeals to the BVA on or about November 25, 1996.

. . . There remains . . . a question as to whether the issuance and/or failure to appeal the issue of building permits cuts off [Pono's] right, if any, to seek judicial declaratory relief, their remedy instead being an

¹ Also on May 11, 1999, McConnell filed a second special master's report and recommendation concerning Molokai Ranch's motions numbered 2, 6, and 7 and Pono's motion for summary judgment on HRS Chapter 205.

FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

administrative appeal following the creation of a record by the BVA.

Based upon the Hawaii Supreme Court's holding in Kona Old Hawaiian [Trails Group] v. Lyman, 69 Haw. [81, 734 P.2d 161] (1987), I recommend that [Molokai] Ranch's Motion No. 4: Motion to Dismiss Count I (HRS [Chapter] 205) for Lack of Subject Matter Jurisdiction be granted.

I cannot distinguish the Kona Old case from the facts underlying Pono's jurisdictional argument. Both cases involve: (1) a request for declaratory relief based on allegations that the director of a county agency violated a state statute, i.e., for Pono HRS [§] 205-2(d); in Kona Old HRS [§] 205A-6; and (2) in each case the claimant had an opportunity under County Charter for administrative relief, i.e., section 5-6.3 of the Charter of the County of Hawaii (appeals from actions of the Planning Director and the Planning Commission); for Pono: Charter of the County of Maui section 8-5.4(2) (1988) ("appeals alleging error from any person aggrieved by decision or order of any department charged with the enforcement of zoning, subdivision and building ordinances"). Kona Old holds that judicial relief is not available unless the party affected has taken advantage of the procedures provided for in the administrative process.

While I am troubled that there was no formal notice to Pono on the granting of the building permits, Kona Old, to me, stands for the proposition that such notice is not required. Kona Old relates that as long as the claimant has the opportunity for relief in the administrative process, the court cannot take jurisdiction under the doctrine of primary jurisdiction. Simply put, when an administrative appeal agency is designed for this purpose, the proper initial appeal forum is the administrative one. Although I am concerned that there may not be any relief available when claimants do not monitor the issuance of building permits, I believe that a trial court must adhere to the dictates of our Supreme Court [sic]. As stated by the Supreme Court [sic]:

"Primary jurisdiction . . . applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, has been placed within the special competence of an administrative body . . . (citations omitted) [sic] When this happens, 'judicial process is suspended pending referral of such issues to the administrative body for its views.' (citation omitted) [sic] In effect, 'the courts are divested of whatever original jurisdiction they would otherwise possess' (citation omitted) and 'even a seemingly contrary statutory position will yield to the overriding policy promoted by the doctrine.'"

[Kona Old, 69 Haw. at 93, 734 P.2d at 168-69.]

Therefore, as I believe that Kona Old required [Pono] in the first instance to have taken [its] Count I, HRS [Chapter] 205 claim to Maui's BVA, rather than to the Circuit Court, this Court has no subject matter jurisdiction over that claim. As such, I recommend that [Molokai] Ranch's Motion No. 4 be granted and [Pono's] Count I be dismissed with prejudice.

(Footnotes in original omitted.)

In Kona Old, Kona Old Hawaiian Trails Group (Kona Old Group), an association of Kona residents formed "to protect and preserve the ancient trails and access routes along the Kona Coast," objected to the issuance of a "special management area minor use permit" by the director of the Hawai'i County Planning Department to Lanihau Corporation, an owner of real property who planned to develop and market the property. 69 Haw. at 83-85, 734 P.2d at 163-64.

Kona Old Group, purporting to invoke the jurisdiction of the Circuit Court of the Third Circuit (third circuit court) pursuant to HRS §§ 91-14 (1985),² 205A-6 (1985),³ and 603-21

² In 1987, HRS § 91-14 (1985) provided in relevant part:

§ 91-14 Judicial review of contested cases. (a) Any person aggrieved by a final decision and order in a contested case or by a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief is entitled to judicial review thereof under this chapter; but nothing in this section shall be deemed to prevent resort to other means of review, redress, relief, or trial de novo, including the right of trial by jury, provided by law.

³ In 1987, HRS § 205A-6 (1985) provided:

§205A-6 Cause of action. (a) Subject to chapters 661 and 662, any person or agency may commence a civil action alleging that any agency:

- (1) Is not in compliance with one or more of the objectives, policies, and guidelines provided or authorized by this chapter within the special management area and the waters from the shoreline to the seaward limit of the State's jurisdiction; or
- (2) Has failed to perform any act or duty required to be performed under this chapter; or

(continued...)

(1968),⁴ sought judicial review of the director's action, claiming the director had violated the Coastal Zone Management Act (CZMA), breached public trust, and disturbed traditional public easement rights by improvidently granting the permit. 69 Haw. at 83, 86 & 89, 734 P.2d at 163, 164 & 166. Kona Old Group also "averred that mandates of the Hawaii Administrative Procedure Act, HRS [C]hapter 91, had not been observed, since rules governing the issuance of permits had not been promulgated." 69 Haw. at 86, 734 P.2d at 164-65. Kona Old prayed "that the permit be voided and the proposed construction be enjoined." Id. at 86, 734 P.2d at 165.

The director moved to dismiss the appeal, arguing, among other things, that Kona Old Group had not "exhausted administrative remedies before seeking judicial review." Id. at 86, 734 P.2d at 165. The third circuit court dismissed the appeal. Id. Although the third circuit court did not give its

³(...continued)

(3) In exercising any duty required to be performed under this chapter, has not complied with the provisions of this chapter.

(b) In any action brought under this section, the lead agency, if not a party, may intervene as a matter of right.

(c) A court, in any action brought under this section, shall have jurisdiction to provide any relief as may be appropriate, including a temporary restraining order or preliminary injunction.

(d) Any action brought under this section shall be commenced within sixty days of the act which is the basis of the action.

(e) Nothing in this section shall restrict any right that any person may have to assert any other claim or bring any other action.

⁴ HRS § 603-21 (Jurisdiction; circuit courts) was repealed in 1972, and in 1987, the relevant jurisdictional provisions were found in HRS §§ 603-21.5 (1985), 603-21.6 (1985), 603-21.7 (1985), and 603-21.8 (1985). Kona Old, 69 Haw. at 86 n.4, 734 P.2d at 165 n.4.

reasons for dismissing the appeal, its dismissal was clearly on jurisdictional grounds. Id. at 89, 734 P.2d at 166.

Kona Old Group appealed to the Hawai'i Supreme Court, arguing that the third circuit court should not have dismissed its appeal on jurisdictional grounds because HRS § 91-14 gave Kona Old Group the right to seek judicial review of the administrative action. 69 Haw. at 89, 734 P.2d at 166. Kona Old Group argued, alternatively, that HRS § 205A-6 entitled it to invoke judicial intervention in the controversy. 69 Haw. at 89, 734 P.2d at 166-67. The Hawai'i Supreme Court explained the procedural process of contesting the issuance of special management area use permits:

At issue here is the CZMA, a statute embodying "the state policy to preserve, protect, and where possible, to restore the natural resources of the coastal zone of Hawaii." HRS § 205A-21. The task of implementing the policy, however, "has been delegated in large part to the counties, and they are responsible for the administration of the special management area use permit procedure and requirements." Mahuiki v. Planning Commission, 65 [Haw.] 506, 517, 654 P.2d 874, 881 (1982). "State primacy nevertheless has been retained," and the legislature has attempted to "maintain the integrity of its declared policy by establishing guidelines in HRS § 205A-26 that must be followed by the counties in reviewing applications for special management area use permits." [Mahuiki, 65 Haw.] at 517-18, 654 P.2d at 881-82.

The counties are further compelled to adopt specific procedures consistent with the CZMA for the issuance of "special management area minor permits," and these procedures must provide for "judicial review from the grant and denial thereof." A person aggrieved by a county agency's failure to comply with the Act is accorded a right thereunder to initiate a civil action against the noncomplying agency. Thus, the governing statutory scheme provides two means through which judicial intervention may be sought to enforce the state policy enunciated in HRS [C]hapter 205A.

Id. at 88-89, 734 P.2d at 166 (brackets in original and footnotes omitted).

The supreme court explained that for Kona Old Group to invoke judicial review under the Administrative Procedure Act, Kona Old Group was required, pursuant to HRS § 91-14, to

participate in a contested case hearing before an administrative agency prior to appealing to the third circuit court. 69 Haw. at 90, 734 P.2d at 167. The supreme court stated that a "contested case" was defined in HRS § 91-1(5) (1985) as "a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing" and an "agency hearing" was described by HRS § 91-1(6) (1985) as "such hearing held by an agency immediately prior to a judicial review of a contested case as provided in section 91-14." 69 Haw. at 90, 734 P.2d at 167. The court further stated that, under the County of Hawai'i Planning Commission Rules, Rule 9-10, "the planning director's decision to grant a permit did not need to be preceded by a hearing." 69 Haw. at 90, 734 P.2d at 167. Therefore, the supreme court held, the director's "decision to grant a minor permit could not have been a final decision or order in a contested case from which an appeal to [the third circuit] court was possible." Id. at 90-91, 734 P.2d at 167 (internal quotation marks and citation omitted).

Notwithstanding the lack of a contested case hearing, the supreme court explained, the procedures included in the charter of the County of Hawai'i provided Kona Old Group with "an opportunity for an agency hearing and [met] the statutory demand for specific procedures culminating in judicial review." Id. at 91, 734 P.2d at 167. The charter established a board of appeals that "shall hear and determine all appeals from the actions of the . . . planning commission." Id. at 91 n.11, 734 P.2d at 167 n.11 (emphasis omitted). The charter provided for a hearing by the board of appeals "according to the State Administrative Procedures Act," in which the issuance of a minor permit could be contested. Id. at 91, 734 P.2d at 168. The decision of the administrative tribunal would have been appealable to the third circuit court, but since Kona Old Group "did not avail itself of

this opportunity for an agency hearing," the supreme court held, there was "no final decision or order in a contested case which is subject to judicial review by virtue of HRS § 91-14(a)." 69 Haw. at 92, 734 P.2d at 168.

The supreme court then turned to "whether Kona Old Group's invocation of HRS § 205A-6, which allows 'any person or agency to commence a civil action alleging that any agency' has breached the CZMA in some respect, vested the circuit court with jurisdiction over the dispute involving the director's grant of a minor permit to Lanihau." 69 Haw. at 92, 734 P.2d at 168 (brackets omitted). The supreme court explained the following with regard to the principles of "primary jurisdiction" and "exhaustion of remedies":

Primary jurisdiction applies where a claim is originally cognizable in the courts, and comes into play whenever 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. When this happens, the judicial process is suspended pending referral of such issues to the administrative body for its views. In effect, the courts are divested of whatever original jurisdiction they would otherwise possess. And even a seemingly contrary statutory provision will yield to the overriding policy promoted by the doctrine.

Exhaustion on the other hand, comes into play where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. The exhaustion principle asks simply that the avenues of relief nearest and simplest should be pursued first. 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. at 93, 734 P.2d 168-69 (internal quotation marks, citations, ellipses, and brackets omitted).

The supreme court then held that under the principle of exhaustion of administrative remedies, "Kona Old clearly had no right to seek judicial review." Id. at 93, 734 P.2d at 169. The supreme court noted, however, that HRS § 205A-6,

in a strict sense, . . . was not meant to afford judicial review as such. It affords an interested party an alternative remedy for an agency's noncompliance with the CZMA by authorizing a civil action in which the circuit court shall have jurisdiction to provide any relief as may be appropriate. The cause of action created thereby seemingly describes a claim originally cognizable in the courts.

69 Haw. at 93, 734 P.2d at 169 (internal quotation marks and citations omitted). Although the supreme court recognized that "[t]aken at face value, [HRS §] 205-6 would sanction judicial intervention in the administrative process upon any allegation of an act inconsistent with the CZMA in any respect[,] " 69 Hawai'i at 92, 734 P.2d at 168, the supreme court held:

Kona Old's claim . . . involves the issuance of a special management area minor permit, and its enforcement requires the resolution of issues which, under the regulatory scheme, have been placed within the special competence of the county planning department. Thus, the request for judicial intervention in the administrative process should not have preceded the resolution by the Board of Appeals of the question of whether the planning director's action in issuing the minor permit was proper.

Id. at 94, 734 P.2d at 169 (internal quotation marks; citation, and brackets omitted).

II.

Pono contends the circuit court erroneously assumed that Pono's primary complaint was with decisions made by Maui County officials rather than the actions of Molokai Ranch. Pono argues that the concepts of "primary jurisdiction" and "exhaustion of administrative remedies" do not apply in the instant case because Pono, a private party, sued Molokai Ranch, another private party, and Pono did not request judicial intervention in an administrative process. In this regard, Pono maintains that Kona Old is not applicable because Pono made it clear in its Stipulated Count I that it challenged the actions of Molokai Ranch, rather than any county official's decision.

In the factual allegations of its Amended Complaint, Pono explained that it disputed the decision of then-Director Jencks and the actions of Lingle and appealed Director Jencks' decision to the LUC. Further, Pono named as defendants Lingle, Jencks, and the County of Maui. Although Pono characterizes its dispute as being primarily with Molokai Ranch, a private party, the record on appeal makes clear that Pono was challenging both the actions of Molokai Ranch and the administrative process by which Molokai Ranch was able to obtain building permits to construct camping accommodations on agricultural land.

III.

Pono asserts that the circuit court erroneously assumed that the Maui County Charter authorized the BVA to resolve disputes concerning the interpretation of a state law. In this regard, Pono argues that Kona Old is distinguishable from the instant case because in Kona Old the Hawai'i County Charter authorized the Board of Appeals to determine all appeals from the actions of the planning director and planning commission, whereas here, Section 8-5.4(2) (1988) of the Maui County Charter authorized the BVA only to "[h]ear and determine appeals alleging error from any person aggrieved by a decision or order of any department charged with enforcement of zoning, subdivision, and building ordinances." (Emphasis in opening brief.)

Pono contends that at issue in the Stipulated Count I was not the enforcement of a county zoning, subdivision, or building ordinance, but, rather, the interpretation of a state statute. Pono adds that "[b]ecause Count I does not relate to the enforcement of a county zoning, subdivision, or building ordinance, and the charter does not authorize appeals of decisions regarding the applicability of HRS Chapter 205, [Pono] had no reason to administratively appeal the issue to any county

agency. Such an appeal would have been futile." (Emphasis in opening brief.)

Pono cites to GATRI v. Blane, 88 Hawai'i 108, 962 P.2d 367 (1998), in support of this argument. GATRI, a Hawai'i general partnership, submitted a special management area (SMA) permit application to the Planning Department of the County of Maui for construction of a restaurant park commercial project on GATRI's property. Id. at 109, 962 P.2d at 368. The proposed use was allowable under B-R Resort/Commercial zoning. Id. A contested case hearing on GATRI's application was held before the Maui Planning Commission, after which a hearing officer "recommended denial of the permit application on the grounds that the proposed development was inconsistent with the community plan for the parcel." Id. The planning commission voted to defer any action on GATRI's application "until potential changes to the community plan were voted on by the Maui county counsel." Id.

Roughly four years later, GATRI submitted an application for a minor SMA permit for construction of a snack shop on the same piece of its property. Id. The minor permit application went for processing to the director of the Department of Planning, who informed GATRI that GATRI's proposed use of the property was inconsistent with the county general plan. Id.

GATRI appealed the director's decision to the circuit court. Id. at 110, 962 P.2d at 369. GATRI argued that the decision "was erroneous because a development which is consistent with the governing zoning ordinance is per se consistent with the general plan." Id. The director argued that GATRI's appeal should be dismissed because "GATRI had not exhausted its administrative remedies" and "the Director's determination was not erroneous." Id. After a hearing, the circuit court ordered judgment in favor of GATRI. Id. The circuit court found, in relevant part, that the director's decision was "in effect a

denial of GATRI's request for a special management area minor permit and is thus a final decision for purposes of HRS § 91-14." Id. (brackets omitted). The circuit court added that "[n]either the Revised Charter of the County of Maui, the Maui County Code nor the Maui SMA Rules provide the Maui Planning Commission with the authority to review decisions of the Director." Id. (brackets in original omitted).

The director appealed to the Hawai'i Supreme Court, arguing that, inter alia, the circuit court did not have jurisdiction over the agency appeal. Id. at 111, 962 P.2d at 370. The director argued that GATRI had not exhausted its administrative remedies because GATRI had to appeal to the Maui Planning Commission before it could appeal to the circuit court. Id. The Hawai'i Supreme Court held:

There is no express procedure provided in the Maui charter or the Maui SMA rules for an appeal of the Director's decision on a minor permit application to the Commission. The Commission [under Maui SMA rules § 12-202-14] has delegated the authority to render a final decision on a minor permit application to the Director. The Director is required to notify the Commission of permits which he has granted. Based on [Hawaii's Thousand Friends v. City and County of Honolulu, 75 Haw. 237, 858 P.2d 726 (1993)], we hold that, under this scheme, the circuit court had jurisdiction over this appeal of a final decision of the Director. Therefore, GATRI exhausted its administrative remedies.

Id. at 111 & 112, 962 P.2d 370 & 371 (footnote omitted; emphasis in original; bracketed material added).

The supreme court explained that in Kona Old, it had distinguished the holding in Hawaii's Thousand Friends v. City and County of Honolulu, 75 Haw. 237, 858 P.2d 726 (1993):

In Thousand Friends, we distinguished Kona because of the different language contained in the Revised Charter of the City and County of Honolulu. The Honolulu charter established a procedure for appeals from actions of the Department of Land Utilization (DLU) to the Zoning Board of Appeals only for those DLU actions concerning "the administration of the zoning and subdivision ordinances and any rules and regulations adopted pursuant thereto." Thousand Friends, 75 Haw. at [242], 858 P.2d at [729-30].

The challenged action involved an environmental group's petition for a declaration that the City had to obtain a SMA permit for its proposed demolition of structures within the coastal zone management area. The Honolulu charter did not specifically provide for appeals of declaratory judgments regarding the necessity for obtaining a SMA permit. Therefore, we held that the circuit court had jurisdiction to entertain a direct appeal of the DLU action.

GATRI, 88 Hawai'i at 370-71, 962 P.2d at 111-12.

In the Stipulated Count I, Pono argued it was entitled to a declaratory judgment that Molokai Ranch's resort operations associated with the Project were prohibited on class C, D, E or U agricultural lands unless and until Molokai Ranch applied for and received a special use permit or boundary amendment pursuant to HRS Chapter 205.

Under HRS Chapter 205, all land in the state of Hawai'i is to be classified by the LUC into one of four districts or zones: urban, rural, agricultural, and conservation. HRS § 205-2(a) (2001). Land in the agricultural district is further divided into classifications as "A or B" land or as "C, D, E or U" land according to its soil productivity. HRS § 205-4.5 (2001 Repl.). Chapter 205 establishes permissible uses for land in the rural and agricultural districts. HRS §§ 205-4.5 & -5 (2001 Repl.). Within the agricultural district, Chapter 205 imposes greater restrictions on class A or B land. HRS §§ 205-4.5 & -5.

It is undisputed that Molokai Ranch's proposed Project was to be built on agricultural land having a soil classification of C, D, E or U.

Hawaii Revised Statutes § 205-12 (2001 Repl.) provides:

§205-12 Enforcement. The appropriate officer or agency charged with the administration of county zoning laws shall enforce within each county the use classification districts adopted by the land use commission and the restriction on use and the condition relating to agricultural districts under section 205-4.5 and shall report to the commission all violations.

Hawaii Revised Statutes § 205-15 (2001 Repl.) provides:

§205-15 Conflict. Except as specifically provided by this chapter and the rules adopted thereto, neither the authority for the administration of chapter 183C⁵ nor the authority vested in the counties under section 46-4⁶ shall be affected.

(Footnotes not in original.)

Hence, pursuant to Chapter 205, Hawai'i has a two-tiered zoning scheme in which state and local zoning laws co-exist. Under this system, each county is charged with enforcing within that county the conditions relating to agricultural districts under HRS § 205-4.5.

In addition, at the time of the events that led to Pono's lawsuit, Section 8-5.4(2) of the Maui County Charter provided in pertinent part:

Section 8-5.4. Board of Variances and Appeals. . . .

In accordance with such principles, conditions and procedures prescribed by the council, the board of variances and appeals shall:

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2. Hear 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[.]

Rules regarding the processing of permits in Maui County are encapsulated in Chapter 19.500 of the Maui County Code. According to § 19.500.010 of the Code, the purpose and intent of Chapter 19.500 is "to ensure compliance with all provisions of this title and to describe how permit applications are to be processed." Further, § 19.500.020 provides that "[n]o person shall erect, construct, enlarge, extend, structurally alter, or use any building, structure, or parcel of land which does not conform to the provisions of this title or to the plans

⁵ HRS Chapter 183C is entitled "Conservation District."

⁶ HRS § 46-4 (1993) is entitled "County zoning."

required to be approved by the director of public works or the director's authorized representative."

Section 19.500.040(A) and (B)(1) of the Maui County Code provides in relevant part:

A. Administrative Officer Designated. It shall be the duty of the director of public works of the County to administer and enforce the provisions of this title, and therefore, the director of public works shall be known as the administrative officer of this title. Nothing in this article shall be construed to abrogate the authority and responsibilities of the planning director, Maui planning commission, and Molokai planning commission, set forth in this title and in the charter of the County.

B. Duties of Administrative Officer.

1. Generally. In its duty to approve applications for subdivision, building, certificate of occupancy, sign, grading, plumbing, electrical, or other development or construction permits, the director of public works shall approve an application which complies with the provisions of this title. The director of public works shall use the director's best effort to prevent and detect any violation of the provisions of this title and to secure the correction of these violations.

Section 19.500.050(A) provides:

A. Upon receiving an application for a building permit required by the building code of the County, the director of public works shall determine whether the application conforms to the requirements of this title. No building permit shall be issued unless the director of public works, or the director's authorized designee, certifies that the proposed construction and use of the premises conform to all applicable provisions of this title.

Based on the above sections of the Maui County Code, the Maui Department of Public Works and Waste Management was charged in the instant case with "the enforcement of zoning, subdivision and building ordinances." Maui County Charter § 8-5.4(2). Therefore, pursuant to § 8-5.4(2), the BVA had the authority "to hear and determine appeals alleging error from any person aggrieved by a decision or order" of Director Jencks.

The instant case is similar to Kona Old, for the reasons given by the Special Master in his Special Master's Report. This case is distinguishable from GATRI because, here,

the Maui County Charter provided an express procedure for appealing Director Jenck's decision.

Given the foregoing, I would hold that Pono did not exhaust its administrative remedies prior to bringing suit in the circuit court because Pono did not appeal Director Jenck's decision to the BVA.

It is notable that in its memorandum in opposition to Molokai Ranch's Motion No. 4, Pono argued that the circuit court had jurisdiction to address Count I in part because

even if the December 1995 Jencks Letter was a "decision and order" appealable under § 8-5.4(2) to the [BVA], [Pono] had no notice of the existence of the December 1995 Jencks Letter until long after the applicable deadline for taking an appeal to the BVA and thus no administrative remedy was available to [Pono], relieving [Pono] of the obligation to exhaust this non-existent remedy.

Pono does not argue these points on appeal, and "[p]oints not argued may be deemed waived." Hawai'i Rules of Appellate Procedure Rule 28(b)(7). However, since there was no formal notice to Pono of the granting of the building permits, there may not have been any relief available to Pono when it did not monitor the issuance of building permits to Molokai Ranch. I interpret Kona Old to stand for the proposition that such notice was not required.

IV.

Pono alleges that the circuit court erroneously assumed that a county agency may resolve disputes concerning the interpretation of HRS Chapter 205. Pono maintains that Chapter 205 does not give counties the authority to determine the allowable uses of agricultural land. Rather, Pono asserts, a "state agency, with expertise, is charged with enacting rules and administering the State Land Use Law."

Pono argues that while counties are obliged to enforce Chapter 205, the State retains the authority to determine whether

a particular use is consistent with that chapter. Pono adds that it filed its complaint with the circuit court because Molokai Ranch never sought formal Chapter 205 approval from the LUC or the county.

Pono distinguishes HRS Chapter 205, the State Land Use Law, from HRS Chapter 205A, the CZMA, which was at issue in Kona Old. Pono argues:

Pursuant to HRS Chapter 205A, the counties are "responsible for the administration of the special management area use permit procedure and requirements" and where implementation of policies "has been delegated in large part to the counties[.]" Mahuiki v. Planning Commission, 65 Haw. [at] 517, 654 P.2d [at] 881. Administration, implementation and enforcement of special management area permits are county responsibilities. Id. and Kona Old, [69 Haw.] at 88-89 [&] 93[, 734 P.2d at 166 & 169]. In contrast, [C]hapter 205 provides for a "dual state and county land use designation approach." [Save Sunset Beach Coalition v. City and County of Honolulu, 102 Hawai'i 465, 481, 78 P.3d 1, 17 (2003)]. While the counties are obliged to enforce [C]hapter 205, the state retains the authority to determine whether a particular use is consistent with HRS [C]hapter 205.

The counties have the authority to determine whether a particular use is consistent with Chapter 205. Section 19.500.050(A) of the Maui County Code provides in pertinent part:

A. Upon receiving an application for a building permit required by the building code of the County, the director of public works shall determine whether the application conforms to the requirements of this title. No building permit shall be issued unless the director of public works, or the director's authorized designee, certifies that the proposed construction and use of the premises conform to all applicable provisions of this title.

Certainly, pursuant to his authority to "determine whether [an] application conforms to the requirements of [Chapter 205]," Director Jencks was authorized to interpret Chapter 205 to determine the allowable uses of Molokai Ranch's agricultural land.

V.

Pono argues that the circuit court's decision conflicts with the need for uniformity and consistency in the

interpretation of a law of statewide concern. Pono asserts that uniform interpretation of HRS Chapter 205 cannot be secured through idiosyncratic county determinations. However, HRS Chapter 205 vests the counties with the authority to enforce within each county the conditions relating to agricultural districts under HRS § 205-4.5.

Since the circuit court did not err in dismissing Pono's Amended Complaint for lack of jurisdiction, Pono's remaining point of error is moot.

For the foregoing reasons, I would affirm the Amended Final Judgment filed on December 14, 2006 in the Circuit Court of the Second Circuit.

Samuel R. Foley