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SCAP-13-0000765

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

THE SIERRA CLUB and SENATOR CLAYTON HEE,
Petitioners/Appellants-Appellants,

vs.

CASTLE & COOKE HOMES HAWAI'I INC.; THE LAND USE COMMISSION OF THE
STATE OF HAWAI'I; OFFICE OF PLANNING, STATE OF HAWAI'I;
DEPARTMENT OF PLANNING AND PERMITTING,
Respondents/Appellees-Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CAAP-13-0000765; CIV. NO. 12-1-1999)

DISSENT
(By: Pollack, J.)

I agree with the majority that the Land Use Commission erred in failing to find, by a preponderance of the evidence, that the reclassification of 768 acres of land from the agricultural land use district to the urban land use district was not violative of part III of Chapter 205 of the Hawai'i Revised States (HRS) as required by HRS § 205-4(h). As a result of this violation of HRS § 205-4(h), I would vacate the approval

of the petition and remand the case to the Land Use Commission so that it may discharge its duty to find, by a clear preponderance of the evidence, whether or not the proposed reclassification is violative of Part III of Chapter 205. I would also provide further guidance to the Land Use Commission with regard to its review of the petition on remand.

HRS § 205-4(h) requires the Land Use Commission (also "Commission") "to approve a proposed boundary amendment only after concluding, by a preponderance of the evidence, that it is 'reasonable, not violative of section 205-2 and part III of this chapter, and consistent with the policies and criteria established pursuant to sections 205-16 and 205-17.'" Sierra Club v. D.R. Horton-Schuler Homes, LLC, 136 Hawai'i 505, 522, 364 P.3d 213, 230 (2015) (quoting HRS § 205-4(h) (Supp. 2005)). In other words, the plain language of HRS § 205-4(h) requires the Land Use Commission to find upon the clear preponderance of the evidence "that a proposed reclassification is not violative of, *inter alia*, Part III of Chapter 205." Id. at 524, 364 P.3d at 232 (Pollack, J., dissenting). The Commission is directed to make such findings when it reviews "petitions for changes in district boundaries of lands within conservation districts, lands designated or sought to be designated as important agricultural lands, and lands greater than fifteen acres in the agricultural, rural, and urban districts, except as provided in

section 201H-38." HRS § 205-4(a); cf. Ka Pa'akai O Ka'Aina v. Land Use Comm'n, 94 Hawai'i 31, 44, 7 P.3d 1068, 1081 (2000) ("In order to comply with HRS § 205-4(h)'s mandate, the LUC is required to enter specific findings that, *inter alia*, the proposed reclassification is consistent with the policies and criteria of HRS § 205-17(3)(B).").

This court has interpreted policies set forth in statutes to "provide guidance to the reader as to how the act should be enforced." Poe v. Haw. Labor Relations Bd., 97 Hawai'i 528, 540, 40 P.3d 930, 942 (2002) (quoting Price Dev. Co. v. Orem City, 995 P.2d 1237, 1246 (Utah 2000)). Part III of Chapter 205 declares "that the people of Hawaii have a substantial interest in the health and sustainability of agriculture as an industry in the State" and that

[t]here is a compelling state interest in conserving the State's agricultural land resource base and assuring the long-term availability of agricultural lands for agricultural use to achieve the purposes of:

- (1) Conserving and protecting agricultural lands;
- (2) Promoting diversified agriculture;
- (3) Increasing agricultural self-sufficiency; and
- (4) Assuring the availability of agriculturally suitable lands,

pursuant to article XI, section 3, of the Hawaii State Constitution.

HRS § 205-41 (Supp. 2005).

As stated, "[t]he plain language of HRS § 205-4(h) necessitates a finding by the Land Use Commission that a proposed reclassification is not violative of, *inter alia*, Part III of Chapter 205." Horton-Schuler, 136 Hawai'i at 524, 364 P.3d at 232 (Pollack, J., dissenting); see also id. at 522, 364 P.3d at 230 (majority opinion). By extension, HRS § 205-4(h) requires that the Commission's analysis take into account Part III's declaration of policy in HRS § 205-41, which provides guidance to the Commission in determining whether to approve a petition for reclassification:

HRS § 205-41, as a section within Part III of Chapter 205, is expressly cross-referenced by HRS § 205-4(h) as a relevant consideration that the Commission should account for in evaluating petitions for changes in district boundaries listed in HRS § 205-4(a). Hence, the State policies established in HRS § 205-41, although not creating substantive rights for a party, "provide guidance" to the Commission in the course of deciding, pursuant to HRS § 205-4(h), whether to approve amendment petitions enumerated in HRS § 205-4(a), such as the petition involved in this case.

Id. at 525, 364 P.3d at 233 (Pollack, J., dissenting) (citing Poe, 97 Hawai'i at 540, 40 P.3d at 942).

HRS § 205-4(h) expressly requires consideration of Part III--including the general guidance set forth in HRS § 205-41--for all proposed reclassifications for lands greater than fifteen acres in agricultural, rural, and urban districts. There is no exception for lands that are anticipated to be reclassified. As such, consideration of Part III "is not contingent on whether the petition lands were already slated for

urban development under county plans or on whether the county does not intend to designate them as important agricultural lands." Id. at 525, 364 P.3d at 233. Instead, the Land Use Commission's obligation to render findings with regard to Part III is triggered when a petition is governed by HRS § 205-4(a). The Commission's statutory requirements pursuant to HRS § 205-4(a) will not be excused based on the perceived intentions of the counties with regard to the designation process regarding important agricultural lands outlined in Part III. Indeed, the very existence of the Land Use Commission, its authority to grant and deny such applications, and its statutory obligations to conserve and protect agricultural lands demonstrates that the Commission's role is not merely to defer to the counties' decision with regard to how lands are to be used. See id. at 525, 364 P.3d at 233. Thus, in accordance with the "policies underlying Part III, state and county government should consider the 'compelling state interest in conserving the State's agricultural land resource base assuring the long term availability of agricultural lands for agricultural use.'" Id. at 507, 364 P.3d at 215 (majority opinion).

However, as it did in D.R. Horton-Schuler Homes, the Land Use Commission failed to make any findings with regard to Part III of Chapter 205, and "by neglecting to consider Part III, as required by HRS § 205-4(h), the Commission failed to

incorporate the guidance that HRS § 205-41 provides in its analysis and in its final approval of the proposed reclassification." Id. at 525, 364 P.3d at 234 (Pollack, J., dissenting). In failing to consider Part III, the Commission erred. "Whether this error is harmless cannot be determined with reasonable certainty because this court is not in a position to conclude that the Commission would have acted in the same or similar manner had it fully applied Part III of section 205--specifically the policies embodied by HRS § 205-41--in its decision-making calculus." Id. (collecting cases and concluding that the complexity and scope of a proposed residential and commercial development involving 1,500 acres of prime agricultural land renders inappropriate a harmless error evaluation).

In this case, the Land Use Commission considered whether 768 acres of prime agricultural land should be reclassified from the state agricultural land use district to the state urban land use district. The proposed development would reclassify this prime agricultural land to make way for the building of 5,000 residential units, a medical center complex, a "mixed-use village center," hotel, "commercial development," "light industrial," schools, churches, recreation centers, and roadways. The written testimony of University of Hawai'i professor and vegetable crop extension specialist, Hector

Valenzuela, stated that the reclassification of the land "would represent a permanent loss to Oahu and to the state of a substantial portion of the precious remaining prime agricultural land available for diversified agricultural production." And, indeed, the requested reclassification pertains in part to lands that Professor Valenzuela identifies as being of "unique and extraordinary value" because of the availability of near ideal soil quality, ideal geographical isolation and microclimatic conditions for the production of high value specialty horticultural crops, current availability and infrastructure for irrigation water, and proximity to local markets.

"The complexity and scope of the project involved in this case complicate, and render not feasible, a harmless error analysis." Horton-Schuler, 136 Hawai'i at 526, 364 P.3d at 235 (Pollack, J., dissenting). The Land Use Commission has broad discretion in reviewing a petition for reclassification, such as the one in this case, and it may have reached a number of different conclusions if it applied the proper analysis:

Had the Land Use Commission adhered to its duty to consider Part III in its decision-making process, a number of possible results could have been reached. The Commission could have decided in the same manner as it did in this case. Another possibility is that the Commission could have imposed any number of different or additional conditions as part of its approval of the reclassification petition. Alternatively, the Commission could have opted to limit the area of land to preserve the agricultural viability of some of the State's most fertile lands. The Commission could even have denied the proposed reclassification.

Id. at 526, 364 P.3d at 234. In view of the fact, as Professor Valenzuela explained, that the reclassification "represent[s] a permanent loss to Oahu and to the state of a substantial portion of the precious remaining prime agricultural land available for diversified agricultural production," this court cannot conclude with reasonable certainty that the Commission would have reached the same decision upon the petition "given the myriad alternatives to that decision." See id.

Additionally, the fact that the Commission included conclusions of law quoting Article XI, section 3 of the Hawai'i State Constitution and mentioned the State's compelling state interest to conserve agricultural lands under Part III of Chapter 205 does not cure the Commission's failure to make findings that the proposed reclassification is not violative of Part III of Chapter 205 as required by HRS § 205-4(h). Indeed, correctly stating the law and actually applying the law to the facts of the case are separate tasks. And, while a correct understanding of the law is important, it is not sufficient to satisfy the Commission's obligation to apply the law to the facts of this case.

Thus, I would find that the Land Use Commission violated HRS § 205-4(h) in this case and that its approval of the petition for land use boundary reclassification should be vacated and the petition remanded in order for the Commission to

discharge its duty to find, by a clear preponderance of the evidence, whether or not the proposed reclassification is violative of Part III within a decision making framework guided by the State policies declared in HRS § 205-41 and as described by my dissent in Horton Schuler. See id. at 524-26, 364 P.3d at 233-35.

I would also direct the Commission on remand to consider, in its review of the petition, Article XI, Section 3, which conserves and protects agricultural lands. See id. at 526-40, 364 P.3d at 235-40 (discussing the significant constitutional duties of the Land Use Commission with respect to preserving agricultural lands). As discussed in my dissenting opinion in Horton-Schuler, Article XI, Section 3 of the Hawai'i Constitution is a self-executing provision that charges the State with a significant responsibility regarding the protection and conservation of agricultural lands. Id. at 526-32, 364 P.3d at 235-40.¹ "Agencies are often asked to decide issues that are of profound importance to the general public and that implicate constitutional rights and duties." Id. at 532, 364 P.3d at 240. Both the Horton-Schuler case and this one demonstrate "the

¹ Even assuming that Article XI, Section 3 requires implementing legislation to be enforceable, the legislature has provided the necessary legislation in Part III of Chapter 205. Horton-Schuler, 136 Hawai'i at 531, 364 P.3d at 239 (Pollack, J., dissenting).

Commission's role in deciding questions of immense importance to the public that implicate the protections secured by our Constitution." Id. "[T]o the extent possible, an agency must execute its statutory duties in a manner that fulfills the State's affirmative obligations under the Hawai'i Constitution."

Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res., 136 Hawai'i 376, 413, 363 P.3d 224, 261 (2015) (Pollack, J., concurring).

Accordingly, agency decisions involving constitutional rights and duties must be made in accordance with the State's constitutional obligations:

The Land Use Commission, as an agency of the State, is obligated in its decision making to (1) "conserve and protect agricultural lands," (2) "promote diversified agriculture," (3) "increase agricultural self-sufficiency," and (4) "assure the availability of agriculturally suitable lands." The Commission may not act without independently considering the effect of its actions on the protections afforded agricultural farmlands under Article XI, Section III. "Hence, an agency may not fulfill its statutory duties without reference to and application of the rights and values embodied in the constitution."

Horton-Schuler, 136 Hawai'i at 532, 364 P.3d at 240 (Pollack, J., dissenting) (emphasis added) (quoting Mauna Kea Anaina Hou, 136 Hawai'i at 413, 363 P.3d at 261).

In summary, because the Land Use Commission failed to make findings and conclusions as to whether the reclassification, by clear preponderance of the evidence, is not violative of Part III of Chapter 205 as required by HRS § 205-4(h), I would vacate and remand the petition for further proceedings consistent with HRS § 205-4(h), Part III of Chapter

205. And, I would also direct the Commission to fulfill its duties in a manner consistent with its responsibilities under Article XI, Section 3 of the Hawai'i Constitution.

DATED: Honolulu, Hawai'i, April 6, 2016.

/s/ Richard W. Pollack

