

May 14, 1997

The Honorable Michael D. Wilson
Chairperson of the Board of Land
and Natural Resources
State of Hawaii
1151 Punchbowl Street, Room 130
Honolulu, Hawaii 96813

Dear Chairperson Wilson:

Re: Effect of Repeal of Section 183-41, HRS, on Chapter 13-2, HAR

This opinion is in response to your letter dated April 20, 1995. You asked two questions:

1. Because chapter 13-5, Hawaii Administrative Rules (HAR), was adopted without expressly repealing chapter 13-2, HAR, does chapter 13-5, HAR, supersede chapter 13-2, HAR? For the reasons set forth herein, we answer the question in the affirmative. Chapter 13-5, HAR, superseded chapter 13-2, HAR, and chapter 13-2, HAR, is void and not in effect except for permit applications filed prior to July 1, 1994. ([top](#))

2. If an express repeal of chapter 13-2 is required, what kind of notice must the Board of Land and Natural Resources (BLNR) give prior to repealing chapter 13-2, HAR, in view of the fact that section 183-41, Hawaii Revised Statutes (HRS), was repealed on July 1, 1994? The notice requirements are set forth in sections 91-3 and 92-41, HRS, and require notice by publication once at least thirty days prior to the public hearing in a newspaper of general circulation, and a mailing to those persons who timely request advance notice for the Department's rulemaking proceedings. ([top](#))

Factual Summary:

Act 270, passed during the 1994 legislative regular session, repealed section 183-41, HRS (section 183-41 was a section in the forest reserve statute that provided for the regulation of the conservation district). Significantly, section 183-41, HRS, was the legal authority for the administrative rules contained in chapter 13-2, HAR. In addition to repealing section 183-41, Act 270 also created a new chapter, 183C, that set forth in greater detail the department's duties and powers in the regulation of the conservation district. Act 270 was signed into law on July 1, 1994. Act 270 did not contain a savings clause for the rules that had been promulgated under the predecessor statute, section 183-41. ([top](#))

Because there was a legal question as to the continuing viability of chapter 13-2, HAR, after the repeal of the authorizing statutory provision, section 183-41, the BLNR, as a measure of caution, promulgated emergency rules, chapter 13-6, HAR, to fill the possible gap in the existence of the rules. The effective date of those emergency rules was November 2, 1994. By law, the emergency rules expired one hundred twenty days after they were filed with the Office of the Lieutenant Governor. New rules, chapter 13-5, HAR, became legally effective on December 12, 1994. ([top](#))

When section 183-41, HRS, was repealed in July of 1994, without a savings clause, there were questions raised with respect to pending permit applications, the processing of which had been begun under section 183-41, HRS, and chapter 13-2, HAR (the old rules). We orally advised the Department of Land and Natural Resources (DLNR) that it should continue to process those pending permits under chapter 13-2 (the old rules) but that all permit applications filed between July 1, 1994, and December 11, 1994, should be processed under chapter 13-6, HAR (the emergency rules), and that after December 11, 1994, all new permit applications should be processed under chapter 13-5, HAR (the new rules). ([top](#))

Discussion:

As to your first question, we answer in the affirmative. Chapter 13-5, HAR, superseded chapter 13-2, HAR, as to all matters except permit applications that were filed before July 1, 1994. Further, it is our opinion that on or after July 1, 1994, when the statutory authority for chapter 13-2, HAR, was repealed, the old rules were void and not in effect, the only exception being with respect to pending permit applications from the period before July 1, 1994. We further believe that the action of repealing chapter 13-2, HAR, was not a legal necessity. We view this action as in the nature of housekeeping for the purpose of removing chapter 13-2, HAR, from the Office of the Lieutenant Governor as provided in section 91-3, HRS. ([top](#))

Generally, once a statute that authorizes the promulgation of rules expires, rules promulgated under the statute become null and void by operation of law. *Hija Lee Yu v. District of Columbia Rental Housing*, 505 A.2d 1310 (D.C. 1986). See also *Hulmes v. Division of Retirement*, 418 So. 2d 269, 270 (Fla. 1982), review denied 426 So. 2d 26 (Fla. 1983). However, section 91-3, HRS, provides that the rules are not technically repealed, i.e., removed from the current Hawaii Administrative Rules on file with the Lieutenant Governor's office, until a public hearing is held on the proposed repeal and Governor approves the repeal. To avoid confusion with two sets of rules on the books regulating the conservation district, we advised DLNR to go through the mechanics of repealing chapter 13-2, HAR, even though its continued legal effect is non-existent. ([top](#))

A critical exception to the general rule that rules are nullified when their enabling statute is repealed exists with respect to pending permit applications filed under these rules prior to the repeal of the statute. Section 1-3, HRS, prohibits the retroactive application of statutes unless expressly or obviously intended. *Kilauea Neighborhood Ass'n v. Land Use Comm'n*, 7 Haw. App. 227, 230 n.2, 751 P.2d 1031, 1034 n.2 (1988). See also, *Graham Constr. Supply, Inc. v. Schrader Constr., Inc.*, 63 Haw. 540, 546, 632 P.2d 649, 653 (1981), *McKeague v. Talbert*, 3 Haw. App. 646, 663, 658 P.2d 898, 910 (1983); *Molokai Homesteaders Coop. Ass'n v. Cobb*, 63 Haw. 453, 469, 629 P.2d 1134, 1145 (1981). There was no language contained in Act 270 expressly or implicitly mandating that the act have retroactive application to existing applications filed prior to July 1, 1994. ([top](#))

Second, section 1-10, HRS, states that: "[t]he repeal of any law shall not affect any act done, or any right accruing, accrued or acquired, or established, or any suit or any proceedings had or commenced in any civil case, before the time when the repeal takes effect." (Emphases added). In the case of the pending applications, filed prior to July 1, 1994, those applications have been processed under the old law, section 183-41, HRS. Hawaii courts have held that where an application is filed prior to the amendment of a statute but granted after the statute has been amended, the application will be processed under the old statute that existed at the time of the filing of the application. *Kilauea Neighborhood Ass'n v. Land Use Comm'n*, 7 Haw. App. 227, 230 n.2, 751 P.2d 1031, 1034 (1988) (In that case, the Hawaii Supreme Court stated: "We note that HRS chapter 205 was amended subsequent to the LUC hearings in this matter, but prior to the date of the Decision. In our review, we apply the provisions of chapter 205 as they existed at the time of the hearings. HRS §§ 1-3 and -10 (1985); *Clark v. Cassidy*, 64 Haw. 74, 77 n.6, 636 P.2d 1344, 1346 n.6 (1981).") See also, *South Fork Coalition v. Board of Comm'rs of Bonneville County*, 117 Idaho 856, 857, 861, 792 P.2d 882, 886 (Idaho 1990); *Cunningham v. City of Twin Falls*, 125 Idaho 776, 781, 874 P.2d 587, 592 (Idaho Ct. App. 1994); *Friends of the Law v. King County*, 123 Wash. 2d 518, 528-29, 869 P.2d 1056, 1062 (Wash. 1994). ([top](#))

As to your second question, the notice requirements for the repeal of administrative rules such as chapter 13-2, HAR, are set forth in sections 91-3(a) and 92-41, HRS, and require the department to give notice by publication once at least thirty days prior to the public hearing in a newspaper of general circulation in the State and in newspaper in the counties affected by the proposed action. In this case, DLNR complied with the notice requirements of sections 91-3(a) and 92-41, HRS, by publishing a notice of public hearing on June 9, 12 and 19, 1995, in the Honolulu Advertiser and the neighbor island newspapers: Hawaii Tribune-Herald, Maui News, and The Garden Island and

by mailing a notice to all persons who requested advance notice of the Department's rulemaking proceedings. ([top](#))

Also, section 13-2-23(a), HAR, requires that all landowners affected by the proposed amendment be given individual notice by mail. This provision is the identical requirement of individual notice that was contained in section 183-41, HRS, that was repealed in July 1994. It is our conclusion that the DLNR was not legally required to comply with the notice requirements set out in chapter 13-2, HRS, for two reasons: (1) because chapter 13-2, HRS, is no longer in effect for the reasons discussed in answer to question number 1; and (2) because section 13-2-23's notice requirement applies only to the amendment of the rules and not the repeal of rules. For the repeal of rules, sections 91-3, and 92-41, HRS, do not require individual notice to all property owners potentially affected by the change in the rules but only notice by publication, and a mailing to those persons who requested advance notice of the Department's rulemaking proceedings, which was done here.

Very truly yours,

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APPROVED:

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