

PR Supreme Court Affirms Court of Appeals' Judgment Declaring the 2020 Joint Regulation Null and Void

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PRACTICE AREAS

- Environmental, Energy & Land Use
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On March 14, 2023, the Supreme Court of Puerto Rico issued a decision in the case of *Conservation Trust v. Commonwealth of Puerto Rico et al*, holding that the Permits Management Office (“OGPe” for the agency’s Spanish acronym) is not an indispensable party in the judicial review of the process for the adoption of the 2020 Joint Regulation for the Evaluation and Issuance of Permits Related to Development, Land Use, and Business Operations (“2020 Joint Regulation”), thus affirming the Puerto Rico Court of Appeals’ decision declaring the 2020 Joint Regulation null and void.

Before summarizing the facts of the *Conservation Trust* decision and its holding, a brief background is in order.

Background

The Joint Regulation for the Evaluation and Issuance of Permits for Land Use and Development (“Joint Regulation”) is the body of rules and requirements under which most permits are issued in Puerto Rico. In 2010, the Planning Board, empowered by the Puerto Rico Permit Process Reform Act, Act 161-2009, as amended (“Permits Reform Act”), adopted Regulation No. 7951, the first version of the Joint Regulation (“2010 Joint Regulation”).

On March 24, 2015, the Planning Board adopted Regulation No. 8573 (the “2015 Joint Regulation”). However, the 2015 Joint Regulation was annulled by the Court of Appeals, on December 21, 2016, in the case of *Morales Vargas v. Planning Board* (Civil Case No. KLRA 2015-00421). In response to the nullity of the 2015 Joint Regulation, on March 1st, 2017, the Planning Board issued Resolution No. JP-31-10-2017, where it reverted to the 2010 Joint Regulation.

On June 7, 2019, the Planning Board adopted Regulation No. 9081 (“2019 Joint Regulation”). However, the 2019 Joint Regulation was also judicially challenged. On March 6, 2020, the Court of Appeals annulled the 2019 Joint Regulation in the case of *Aequitas LLC v. Planning Board* (Civil Case No. KLRA-2019-000413). The rationale for that decision was that the Planning Board never issued a report to the heads of all the agencies involved in the process prior to the adoption of a joint regulation, as mandated by Section 2.18 of Act 38-2017,

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known as the Puerto Rico Uniform Administrative Procedure Act, 3 LPRÁ § 9601 *et seq.* (“APA”). The Government sought review of this decision before the Supreme Court via writ of certiorari. A final decision on the certiorari petition is still pending.

In December of 2020 the Planning Board adopted the 2020 Joint Regulation, effective on January 2, 2021, which superseded the 2019 Joint Regulation. The 2020 Joint Regulation was also annulled by the Court of Appeals in two separate cases: *Comité Pro-Seguridad ARRAQ y ARESPA v. Planning Board* (Civil Case No. KLRA-2021-00044), due to the lack of an abstract with an analysis of the purpose, costs and benefits of the proposed regulation, and the reasons for its adoption or amendment; and by *Conservation Trust v. Commonwealth of Puerto Rico et al.* (Civil Case No. KLRA202100047), due to the fact that the notice issued in connection with the public hearings lacked specific information on the content of the proposed regulation and therefore, was insufficient to inform the public regarding the implications of its adoption. The Government sought review of both decisions before the Supreme Court via writs of certiorari, but only the *Conservation Trust* petition was granted.

On October 28, 2022, the Planning Board issued a public notice regarding its intention to adopt a new version of the Joint Regulation (“2023 Joint Regulation”). The draft for the 2023 Joint Regulation is currently under evaluation after the conclusion of the public hearings and comments’ period.

Conservation Trust v. Commonwealth of Puerto Rico

The Puerto Rico Conservation Trust (the “Trust”) filed a request for Judicial Review before the Court of Appeals challenging the 2020 Joint Regulation on its face under Section 2.7 of APA. In summary, the Trust argued that the 2020 Joint Regulation was null and void because during the adoption process the public was not properly notified about the intention to adopt the regulation, nor was broad citizen participation afforded in the process.

The Court of Appeals declared null and void the 2020 Joint Regulation after concluding that the regulatory development and adoption processes carried out by the Planning Board did not satisfy the requirements for broad citizen participation that arise from both APA and the Permits Reform Act. OGP_e then appeared before the Court of Appeals through a Motion for Reconsideration and to Dismiss for Failure to Join an Indispensable Party. OGP_e argued that the

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Permits Reform Act, as amended, instructed OGPe to participate in the adoption of the Joint Regulation and that due to its role in said process, as well as in the implementation of the regulation, the fact that it was not joined as a party in the judicial review petition deprived the Court of Appeals of jurisdiction, based on which OGPe argued that the Trust's petition should have been dismissed.

After the appellate court denied the petition for reconsideration, OGPe filed a writ of certiorari before the Supreme Court arguing that the Court of Appeals erred by not dismissing the Trust's petition for judicial review for failing to include it as an indispensable party. The OGPe petition did not challenge the merits of the Court of Appeals decision *per se*, but rather questioned the Court's jurisdiction.

The Supreme Court determined that: (1) OGPe was not an indispensable party in the judicial review of the process for the adoption of the 2020 Joint Regulation; (2) the Legislative Assembly delegated specifically to the Puerto Rico Planning Board the power to adopt the 2020 Joint Regulation; and (3) the Joint Regulation is "joint" insofar as the exercise of determining its content was done in collaboration with OGPe and other government entities, but "the ultimate power of adopting [the Joint Regulation] rests undoubtedly with the Puerto Rico Planning Board [and not with OGPe]".

Current Status

On March 20, 2023, the Senate's Commission on Economic Development, Essential Services and Consumer Matters held an emergency public hearing with the Planning Board, OGPe and the Department of Economic Development and Commerce to inquire as to the agencies' action plan to address the current situation. During the hearing, the Planning Board stated the following regarding:

1. the Conservation Trust case: Since the Supreme Court's decision annulling the 2020 Joint Regulation is not final, the Planning Board intends to file a motion for reconsideration before the Supreme Court on or before March 30, 2023.
2. the status of permits issued under the 2020 Joint Regulation: Pursuant to Article 9.10 of the Permits Reform Act, all final determinations of the Planning Board's (as well as those issued by OGPe and/or the Autonomous

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Municipalities with appropriate delegation) issued under the 2020 Joint Regulation regarding permits, consultations, variations and recommendations, among others, shall be presumed legal and valid. Any challenges to the validity of permits shall be examined individually on a case-by-case basis.

3. the current regulatory status:
 1. Pending the issuance of the Supreme Court's ruling on the motion for reconsideration, the agencies will continue to implement the 2020 Joint Regulation.
 2. On reconsideration, if the Courts of Appeals' decision annulling the 2020 Joint Regulation is reversed by the Supreme Court, there will be no change on the regulatory status.
 3. If the 2020 Joint Regulation is declared null via final judgment, the Planning Board could:
 1. revert to the 2019 Joint Regulation, which is currently null *sub-judice* pending the Supreme Court's decision on the *Aequitas* certiorari;
 2. approve an emergency regulation (which would be an adapted version of the draft for the 2023 Joint Regulation, according to the Planning Board);
 3. adopt the 2023 Joint Regulation, currently under evaluation after the conclusion of the public hearings and comments' period; or
 4. revert to the 2010 Joint Regulation.
1. the Single Business Portal ("SBP"): the SBP is currently operating and fully functional.

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