IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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KILAKILA ʻO HALEAKALA,
Petitioner/Appellant-Appellant,

vs.

BOARD OF LAND AND NATURAL RESOURCES,
THE DEPARTMENT OF LAND AND NATURAL RESOURCES,
AND WILLIAM AILA, IN HIS OFFICIAL CAPACITY AS
CHAIRPERSON OF THE BOARD OF LAND AND NATURAL RESOURCES,
UNIVERSITY OF HAWAII, AND THOMAS M. APPLE, IN HIS OFFICIAL
CAPACITY AS CHANCELLOR OF THE UNIVERSITY OF HAWAIʻI AT MANOA,
Respondents/Appellees-Appellees.

SCWC-11-0000353

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-11-0000353; CIV. NO. 10-1-2651)

DECEMBER 13, 2013

RECKTENWALD, C.J., NAKAYAMA, McKENNA, AND POLLACK, JJ.,
WITH ACOBA, J., CONCURRING SEPARATELY,
WITH WHOM POLLACK, J., JOINS

OPINION OF THE COURT BY NAKAYAMA, J.

It is well established that under Hawaiʻi Revised Statutes (HRS) § 91-14(a), "[a]ny person aggrieved by a final decision and order in a contested case . . . is entitled to

judicial review thereof under this chapter[.]" In Kaleikini v. Thielen, 124 Hawaiʻi 1, 26, 237 P.3d 1067, 1092 (2010), this court most recently reaffirmed the principle that a denial of a request for a contested case hearing (or a request to intervene and participate in one) also constitutes a "final decision and order" of an administrative agency from which the aggrieved party may appeal pursuant to HRS § 91-14. In this case, we must consider whether a circuit court has jurisdiction over an HRS § 91-14 appeal when an agency makes a final decision on a given matter -- in this case, an application for a conservation district use permit -- without either granting or denying an interested party's request for a contested case hearing on the matter.

This case concerns a proposed project of Respondent/Appellee-Appellee University of Hawaiʻi (UH) to construct an advanced solar telescope, observatory, and associated facilities near the summit of Haleakalā on Maui. Petitioner/Appellant-Appellant Kilakila ʻO Haleakalā (KOH), "an organization dedicated to the protection of the sacredness of the summit of Haleakalā[,]" opposed UH's conservation district use application (CDUA or application) to Respondent/Appellee-Appellee Department of Land and Natural Resources (DLNR or the department) for a conservation district use permit (CDUP or permit) to build

on the project site. KOH also requested and formally petitioned DLNR for a contested case hearing on the application in order for Respondent/Appellee-Appellee Board of Land and Natural Resources (BLNR or the board) to make a decision on the application after having considered evidence on the record, including exhibits and witness testimony. Without either granting or denying KOH's petition, BLNR considered UH's application as an agenda item at a regularly scheduled public board meeting and proceeded to vote to grant the permit. KOH orally renewed its request for a contested case hearing immediately after the vote and submitted another formal written petition the next day. KOH also filed an agency appeal in the Circuit Court of the First Circuit[1] seeking remand to BLNR for a contested case hearing, a stay of the permit, and reversal of the permit. The circuit court dismissed the agency appeal for lack of jurisdiction because there had been no contested case hearing. The circuit court also concluded that KOH's appeal was mooted by the fact that BLNR had subsequently granted KOH's request for a contested case hearing subject to a preliminary hearing on KOH's standing. KOH appealed the circuit court's decision to the ICA, and the ICA affirmed on the ground that, under HRS § 91-14, the circuit court did not have jurisdiction because no contested case hearing had been held.

[1] The Honorable Rhonda A. Nishimura presided.

Now before this court, KOH maintains that BLNR's decision to grant the permit was "a final decision and order in a contested case" pursuant to HRS § 91-14; as a result, a separate contested case hearing was not required for it to appeal and for the circuit court to have jurisdiction over the appeal pursuant to HRS § 91-14. Although BLNR did grant KOH's request for a contested case hearing subsequent to the board meeting at which it issued the permit, BLNR has not ever stayed or vacated the permit. Thus, KOH's position is that it may still seek those remedies and therefore that this appeal is not moot. Based on the discussion herein, we agree that the case is not moot, that a contested case hearing should have been held prior to the vote, and that the circuit court erred in dismissing KOH's appeal. Because BLNR voted to grant the permit without having held a contested case hearing as requested by KOH prior to taking that vote, BLNR effectively rendered a final decision and order within the meaning of HRS § 91-14, and KOH at that point had the right to appeal to circuit court.

I. BACKGROUND

A. Factual and Procedural Background

On March 10, 2010, UH submitted an application to DLNR for its Advanced Technology Solar Telescope (ATST or telescope) project at Haleakalā on the island of Maui. The telescope

project "involves the construction, installation and operation of a solar telescope and associated infrastructure near the summit of Haleakalā." KOH, which "is an organization dedicated to the protection of the sacredness of the summit of Haleakalā[,]" submitted a written petition to DLNR on May 24, 2010 for a contested case hearing on the application. "On June 10, 2010, Sam Lemmo of DLNR rejected the petition for a contested case hearing, stating that a hearing was not required by law[.]" Subsequently, on July 8, 2010, KOH "re-submitted its petition for a contested case hearing on the ATST project because Mr. Lemmo did not have authority to reject the petition." DLNR did not take any action on the July 8 resubmission. On August 26, 2010, DLNR held a public hearing on the application in Pukalani, Maui, KOH "testified in opposition to the project, citing its impacts on resources in the conservation district, and orally requested a contested case hearing." DLNR persisted in taking no action on KOH's requests for a contested case hearing.

On November 22, 2010, at a regularly scheduled board meeting, BLNR considered UH's application for the telescope project but deferred any decisions on the application until the next scheduled meeting. At the next regularly scheduled board meeting on December 1, 2010, BLNR again considered UH's application; at that meeting, BLNR voted to grant the application

and thereafter issued a permit to UH. Immediately after the vote, KOH, through counsel, again orally requested a contested case hearing. The next day, December 2, 2010, KOH again submitted a written petition for a contested case hearing pursuant to Hawaiʻi Administrative Rules (HAR) § 13-1-29.[2]

On December 13, 2010, KOH filed an appeal in circuit court, pursuant to HRS § 91-14,[3] "from the final decision of BLNR

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[2] HAR § 13-1-29 provides, in pertinent part:

> (a) . . . An oral or written request for a contested case hearing must be made to the board no later than the close of the board meeting at which the subject matter of the request is scheduled for board disposition. An agency or person so requesting a contested case must also file [a] written petition with the board for a contested case no later than ten calendar days after the close of the board meeting at which the matter was scheduled for disposition.

[3] HRS § 91-14 (Supp. 2010) provided then, as it does now:

> (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[.]
>
> . . . .
>
> (b) Except as otherwise provided herein, proceedings for review shall be instituted in the circuit court within thirty days after the preliminary ruling or within thirty days after service of the certified copy of the final decision and order of the agency pursuant to rule of court, except where a statute provides for a direct appeal to the intermediate appellate court, subject to chapter 602.
>
> . . . .
>
> (c) The proceedings for review shall not stay enforcement of the agency decisions or the confirmation of any fine as a judgment pursuant to section 92-17(g); but the reviewing court may order a stay if the following criteria have been met:

(continued...)

on December 1, 2010 (1) effectively denying the timely request of [KOH] for a contested case hearing and (2) granting [UH]'s conservation district use application (CDUA MA 3542)."[4] In its statement of the case filed with the notice of appeal, KOH indicated that it was asking the circuit court to:

> A. Remand the case with instructions to the Chairperson, BLNR and DLNR to:
>
> > (i) properly apply the criteria set forth in HAR § 13-5-30;
> > (ii) provide [KOH] with a contested case hearing with all the procedural protections provided in HAR §§ 13-1-28 [to] 13-1-39 and HRS §[§] 91-9 [to] 91-13.
>
> B. Stay the decision granting the conservation district use permit.
>
> C. Reverse the decision granting the conservation district use permit.

On January 4, 2011, UH filed a motion to dismiss KOH's notice of appeal in the circuit court. In support of the motion, UH argued

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[3](...continued)

> (1) There is likelihood that the subject person will prevail on the merits of an appeal from the administrative proceeding to the court;
> (2) Irreparable damage to the subject person will result if a stay is not ordered;
> (3) No irreparable damage to the public will result from the stay order; and
> (4) Public interest will be served by the stay order.
>
> . . . .

[4] On November 22, 2010, KOH also filed an original complaint in circuit court seeking declaratory relief. On January 11, 2011, KOH filed a motion to consolidate the declaratory action with the agency appeal. On February 7, 2011, a hearing on the motion to consolidate was held before the Honorable Virginia L. Crandall; Judge Crandall took the motion under submission pending Judge Nishimura's ruling on UH's motion to dismiss the agency appeal. Because the motion to dismiss was granted, the motion to consolidate was denied as moot.

that the appeal had to be dismissed for lack of jurisdiction and on ripeness grounds because no contested case hearing had been held, and further that KOH's request for such a hearing had not yet been decided. On January 11, 2011, BLNR filed a joinder to UH's motion to dismiss.

In its February 10, 2011 memorandum in opposition to the motion to dismiss, KOH argued that Hawaiʻi case law does not require a formal contested case hearing as a necessary condition precedent to a chapter 91 appeal when the appellant has done all it can to participate in the agency proceedings and preserve its right to appeal; accordingly, in this case, KOH argued that the circuit court had jurisdiction to determine whether the permit was properly granted even in the absence of a formal contested case hearing. KOH therefore argued that the appeal was ripe because even without a formal contested case hearing, BLNR's decision to grant the permit at the December 1, 2010 meeting constituted final agency action that was therefore appealable. KOH further argued that BLNR's granting of the permit had the mark of finality because once granted, a permit can only be revoked if BLNR is ordered to do so by a court or if the permit applicant fails to comply with a condition of the permit. KOH also noted that a contested case hearing on a matter, when such a hearing is required, must take place before an agency's decision

on that matter; in this case, therefore, "[t]he granting of a permit to develop in the face of a [pending] request for a contested case hearing effectively denies the request for the hearing." Furthermore, as KOH argued, "[n]othing in BLNR's rules would allow it to: first, grant a conservation district use permit; second, conduct a formal contested case hearing; and then revoke the conservation district use permit if the party challenging the conservation district use application prevailed."

Meanwhile, on February 11, 2011, BLNR granted KOH's request for a contested case hearing and authorized the appointment of a hearing officer to conduct all hearings regarding UH's application, subject to a preliminary hearing to determine whether KOH had standing to participate in a contested case hearing. On February 15, 2011, UH replied to KOH's memo in opposition, arguing that KOH's appeal was now moot because BLNR's February 11 grant of KOH's contested case hearing request afforded KOH the relief it was seeking from the circuit court.

On February 18, 2011, the circuit court held a hearing on the motion to dismiss. Before ruling, the court expressed concerns regarding the implementation of the permit in light of the pending contested case hearing. BLNR's counsel asserted that the contested case hearing would be the appropriate venue for pursuing a possible stay of the permit. The circuit court then

granted the motion to dismiss, but it encouraged BLNR to stay the permit until the contested case hearing concluded. KOH timely appealed to the ICA.

B. The ICA's June 28, 2012 Memorandum Opinion

On appeal to the ICA, KOH raised one general point of error: that the circuit court erred in dismissing its agency appeal for lack of jurisdiction. In support of that point of error, KOH argued, adhering to its position in circuit court, that a party can appeal pursuant to HRS chapter 91 even when a formal contested case hearing has not been held, and that the circuit court had jurisdiction to rule on whether BLNR properly granted the permit even in the absence of a formal contested case hearing; that the case was ripe and not moot; that KOH had exhausted the administrative remedies that were available to it; and that BLNR could not grant a permit before holding a contested case hearing.

In response, UH argued that the circuit court did lack jurisdiction because KOH was not a "person aggrieved by a final decision and order in a contested case" pursuant to HRS § 91-14. Specifically, UH noted that "[a]mong its prerequisites, [HRS § 91-14(a)] requires that a contested case must have occurred before appellate jurisdiction may be exercised." UH also argued that the agency appeal was moot because a contested case hearing

was in fact granted. Similarly, UH argued that the appeal was not ripe because at the time of its filing, no contested case hearing had been held; moreover, because a contested case hearing had been granted, the appeal would remain unripe until BLNR issued a final decision and order from which KOH could then appeal.

In a memorandum opinion, the ICA affirmed the final judgment of the circuit court dismissing KOH's agency appeal for lack of jurisdiction. The ICA's brief analysis focused on the following passage explaining the requirements that an appellant must meet in an HRS § 91-14 appeal from an agency to the circuit court:

> first, the proceeding that resulted in the unfavorable agency action must have been a contested case hearing -- i.e., a hearing that was (1) required by law and (2) determined the rights, duties, and privileges of specific parties; second, the agency's action must represent a final decision and order, or a preliminary ruling such that deferral of review would deprive the claimant of adequate relief; third, the claimant must have followed the applicable agency rules and, therefore, have been involved in the contested case; and finally, the claimant's legal interests must have been injured -- i.e., the claimant must have standing to appeal.

Kilakila ʻO Haleakalā v. Bd. of Land & Natural Res., No. CAAP-11-0000353, 2012 WL 2476802, at *2 (Haw. App. June 28, 2012) (mem. op.) (emphasis in original) (quoting Kaleikini, 124 Hawaiʻi at 16-17, 237 P.3d at 1082-83 (quoting Pub. Access Shoreline Haw. v. Haw. Cnty. Planning Comm'n (PASH), 79 Hawaiʻi 425, 431, 903 P.2d

1246, 1252 (1995))) (internal quotation marks omitted).

The ICA relied solely on the first requirement in its disposition of the case. It stated that "[b]ecause KOH does not meet the first criteria [sic] -- that the agency action stemmed from a contested case hearing -- we look no further and conclude [that the] circuit court did not err when it dismissed the case for lack of jurisdiction." Id. KOH timely filed its application for writ of certiorari on September 27, 2012.

II. STANDARD OF REVIEW

A. Jurisdiction

"'The existence of subject matter jurisdiction is a question of law that is reviewable de novo under the right/wrong standard.'" Kaniakapupu v. Land Use Comm'n, 111 Hawaiʻi 124, 131, 139 P.3d 712, 719 (2006) (quoting Aames Funding Corp. v. Mores, 107 Hawaiʻi 95, 98, 110 P.3d 1042, 1045 (2005)).

III. DISCUSSION

On certiorari review in this court, KOH makes the same arguments with regard to the jurisdiction of the circuit court to hear its initial HRS § 91-14 agency appeal from BLNR and adds that the ICA has erred in affirming the circuit court's judgment.

Nevertheless, UH maintains in this court that KOH's appeal is moot. Because mootness is a matter of justiciability and implicates the question of whether this court may validly

render a decision on appeal, we consider this issue first.

A. This case is not moot

UH argues, as it did below, that because BLNR ultimately granted KOH a contested case hearing, the reviewing court can not grant effective relief. UH submits that "[KOH] asked the [c]ircuit [c]ourt to remand the case with instructions to [BLNR] to provide [KOH] with a contested case hearing." UH thus concluded that because "[KOH] received the relief it requested on February 11, 2011 when [BLNR] granted its request for a contested case hearing . . . the instant appeal falls squarely within the definition of moot."

KOH responds, as it also did below, that the case is not moot. In fact, it responded to UH's argument to this court by noting that it "requested not only that a contested case be provided, but also that the [permit] be stayed and reversed." KOH further notes that "'[a]s long as all of the construction authorized under the . . . permit is not completed, the appeal presents an adversity of interests and possibly affords the appellant an effective remedy.'"

Crucially, BLNR has neither stayed nor revoked the permit, not even when KOH appealed or BLNR granted KOH a contested case hearing on the already-issued permit. Because the permit remains in effect despite BLNR's failure to hold a

contested case hearing before voting to grant the permit, UH can still build on Haleakalā and KOH can still seek effective relief against UH. Consequently, we agree with KOH's position and conclude that this case is not moot. As a result, we now turn to the substance of KOH's appeal.

B. The circuit court erred in dismissing, and the ICA erred in affirming the dismissal of, KOH's agency appeal based strictly on the absence of a formal contested case hearing

KOH argues to this court that although it requested and petitioned for a contested case hearing prior to BLNR's vote on UH's application and although BLNR did not hold a contested case hearing before conducting the vote at the December 1, 2010 regularly scheduled board meeting, the proceedings that did take place before the BLNR nevertheless did constitute a contested case from which KOH can appeal to the circuit court pursuant to HRS § 91-14. Moreover, KOH maintains that pursuant to HRS chapter 91, as well as PASH and Kaleikini, an appeal may be taken even in the absence of a formal contested case hearing if the appellant has followed the procedures necessary for it to preserve its right to appeal. Indeed, much of KOH's argument follows the test this court has previously applied in PASH and Kaleikini, and it is to that test which we must now turn.

To determine whether a circuit court can exercise jurisdiction over an appeal brought pursuant to HRS § 91-14, we

consider whether the following requirements have been met:

> first, the proceeding that resulted in the unfavorable agency action must have been a contested case hearing -- i.e., a hearing that was (1) required by law and (2) determined the rights, duties, and privileges of specific parties; second, the agency's action must represent a final decision or order, or a preliminary ruling such that deferral of review would deprive the claimant of adequate relief; third, the claimant must have followed the applicable agency rules and, therefore, have been involved in the contested case; and finally, the claimant's legal interests must have been injured -- i.e., the claimant must have standing to appeal.

Kaleikini, 124 Hawaiʻi at 16-17, 237 P.3d at 1082-83 (emphases, brackets, and internal quotation marks omitted) (quoting PASH, 79 Hawaiʻi at 431, 903 P.2d at 1252).

1. The BLNR proceedings were a contested case hearing within the meaning of HRS § 91-14

a. "Required by law"

In order for an administrative agency hearing to be "'required by law, it may be required by (1) agency rule, (2) statute, or (3) constitutional due process.'" Id. at 17, 237 P.3d at 1083 (quoting Kaniakapupu, 111 Hawaiʻi at 132, 139 P.3d at 720) (some internal quotation marks omitted).

At the outset, we note that no statute mandates that BLNR conduct public hearings as part of its permitting procedures. See, e.g., HRS § 171-3 (2011); HRS § 171-6 (2011); HRS § 26-15(b) (2009). HRS § 183C-6 (2011), located in the chapter of HRS dealing specifically with conservation district lands, provides, in pertinent part:

> (a) The department shall regulate land use in the conservation district by the issuance of permits.
>
> (b) The department shall render a decision on a completed application for a permit within one-hundred-eighty days of its acceptance by the department. If within one-hundred-eighty days after acceptance of a completed application for a permit, the department shall fail to give notice, hold a hearing, and render a decision, the owner may automatically put the owner's land to the use or uses requested in the owner's application. When an environmental impact statement is required pursuant to chapter 343, or when a contested case hearing is requested pursuant to chapter 91, the one-hundred-eighty-days may be extended an additional ninety days at the request of the applicant. Any request for additional extensions shall be subject to the approval of the board.

Although HRS § 183C-6(b) does reference the "hold[ing] [of] a hearing" as part of the permitting process for uses in the conservation district, it does not mandate one. The sentence that contains the phrase "hold a hearing" is written as a negative conditional; in other words, if, within 180 days of accepting an application, DLNR does not give notice, does not hold a hearing, and does not render a decision on the application, then the applicant may proceed to use the land in the manner requested. Because some hearings may not be required by law but may nevertheless be held voluntarily, we cannot read the statute to require a hearing for all permit applications in the absence of mandatory language directing the agency to do so.

Indeed, the statutes in HRS chapter 171 governing DLNR and BLNR speak in general terms and delegate rulemaking authority to the agency to devise and promulgate the rules that will govern the agency's procedures in specific situations. We thus next

look to those administrative rules for a requirement that a public hearing be held as part of the process of considering an application for a conservation district use permit.

In this particular case, UH seeks through its application to build astronomy facilities near the summit of Haleakalā, an area which is classified as being in the general subzone of the conservation district. HAR § 13-5-25, "Identified land uses in the general subzone," provides, in pertinent part:

> (a) In addition to the land uses identified in this section, all identified land uses and their associated permit or site plan approval requirements listed for the protective, limited, and resource subzones also apply to the general subzone, unless otherwise noted.
>
> . . .
>
> (c) Identified land uses in the general subzone and their required permits (if applicable), are listed below:
>
> (1) Identified land uses beginning with the letter (A) require no permit from the department or board;
> (2) Identified land uses beginning with the letter (B) require site plan approval by the department;
> (3) Identified land uses beginning with the letter (C) require a departmental permit; and
> (4) Identified lang uses beginning with the letter (D) require a board permit and where indicated, a management plan.

HAR § 13-5-24 identifies "astronomy facilities" as an identified land use in the resource subzone:

> R-3 ASTRONOMY FACILITIES
>
> (D-1) Astronomy facilities under a management plan approved simultaneously with the permit, is also required.

By virtue of HAR § 13-5-25(a), astronomy facilities are also a permissible land use in the general subzone. Further, as a letter (D) land use, HAR § 13-5-25(c)(4) requires submission of an application for a board permit and simultaneous approval of the permit and a management plan.

Board permits are governed by HAR § 13-5-34, which provides in full:

> (a) Applications for board permits shall be submitted to the department in accordance with section 13-5-31.
> (b) A public hearing, if applicable, shall be held in accordance with section 13-5-40.
> (c) The application for a board permit shall be accompanied by:
> (1) The application fee which is equal to 2.5 per cent of the total project cost, but no less than $250, up to a maximum of $2,500; and
> (2) A public hearing fee of $250 plus publication costs, if applicable.
> (d) Contested case hearings, if applicable, and as required by law, shall be held as provided in chapter 13-1. The aggrieved appellant or person who has demonstrated standing to contest the board action may request a contested case hearing pursuant to chapter 13-1.

Finally, with respect to public hearings, HAR § 13-5-40 provides:

> (a) Public hearings shall be held:
> (1) On all applications for a proposed use of land for commercial purposes, (excluding site plan approvals);
> (2) On changes of subzone or boundary, establishment of a new subzone, changes in identified land use, or any amendment to this chapter;
> (3) On applications requiring a board permit in the protective subzone; and
> (4) On all applications determined by the chairperson that the scope of proposed use, or the public interest requires a public hearing on the application.

Under this rule, the BLNR chairperson determined that, pursuant to HAR § 13-5-40(a)(4), the public interest required a public hearing on UH's application; this was the public hearing that took place on August 26, 2010 in Pukalani, Maui. While subsection (4), as written, does seem to indicate an amount of discretion on the chairperson's part, subsection (4) is also no less valid a prerequisite for the holding of a public hearing than any of the other subsections. Accordingly, if the chairperson determines that the scope of the project or the public interest requires a public hearing on the application, then BLNR shall hold a public hearing.

Accordingly, based on the foregoing discussion, we conclude that UH's application necessitated a hearing required by law -- i.e., by the administrative rules governing DLNR and BLNR.[5]

b. "Rights, duties, and privileges"

In this case, no formal contested case hearing was actually held before the BLNR voted to grant the permit in this

[5] As discussed in the Concurrence, KOH also argued to the circuit court, to the ICA, and to this court that a hearing was required by law on the ground of constitutional due process, under the provisions of the Hawaiʻi Constitution protecting Native Hawaiian rights and the right to a clean and healthful environment. See Haw. Const. art. XI, § 9, art. XII, § 7. Because we conclude that the administrative rules required that a hearing be held, we need not reach this argument. Nevertheless, we do discuss KOH's Native Hawaiian and environmental interests with regard to their standing to appeal. See infra Part III.B.4.

case, so the question becomes whether a formal hearing would have determined -- or whether the proceedings that did take place determined -- the "rights, duties, and privileges of specific parties." Kaleikini, 124 Hawaiʻi at 17, 237 P.3d at 1083 (quoting PASH, 79 Hawaiʻi at 431, 903 P.2d at 1252) (internal quotation marks omitted). The inquiry here is "directed at the party whose application was under consideration." Id. at 24, 237 P.3d at 1090 (quoting PASH, 79 Hawaiʻi at 432, 903 P.2d at 1253) (internal quotation marks omitted). Thus, we focus on the rights, duties, and privileges of UH.

As discussed supra in Part III.B.1.a, UH's proposed project involves construction of a substantial complex of astronomy facilities on conservation district land. Accordingly, as provided for in the statutes and rules concerning land use in the conservation district, UH could not legally commence that construction without first submitting an application for a permit and having that application reviewed and approved by BLNR. Approval, including any conditions attached thereto, or denial of the application clearly implicates whether UH would or would not be able to engage in the requested use of building astronomy facilities at the telescope project site. Thus, a formal contested case hearing approving of denying UH's application would have determined UH's rights, duties, or privileges with

regard to the project. Even in the absence of a formal contested case hearing, we point out that the proceedings that otherwise took place, including the vote to grant the permit, in fact did determine UH's rights, duties, and privileges.

2. BLNR's decision to approve the permit without either granting or denying KOH's contested case hearing request was a "final decision and order" within the meaning of HRS § 91-14

We must next "examin[e] whether the agency's action represents 'a final decision or order,' or 'a preliminary ruling' such that deferral of review would deprive the claimant of adequate relief." Kaleikini, 124 Hawaiʻi at 26, 237 P.3d at 1092 (ellipses and some internal quotation marks omitted) (quoting PASH, 79 Hawaiʻi at 431, 903 P.2d at 1252). Again, our decisions in PASH and Kaleikini provide the most useful guidance for our analysis.

In PASH, an organization (PASH) and an individual (Pilago) opposed a developer's application to the Hawaiʻi County Planning Commission (HCPC) for a special management area (SMA) use permit and requested contested case hearings. 79 Hawaiʻi at 429, 903 P.2d at 1250. HCPC denied the requests on the ground that PASH and Pilago did not have standing to participate in a contested case and subsequently issued the permit. Id. This court affirmed the ICA's decision affirming the circuit court's order (with respect to PASH, but reversing the circuit court's

order as to Pilago) to remand to HCPC for the purpose of holding a contested case hearing in which PASH would be allowed to participate. Id.

In Kaleikini, the discovery of iwi, or Native Hawaiian burial remains, at a construction site in Honolulu necessitated submission of a burial treatment plan by the developer. 124 Hawaiʻi at 5-7, 237 P.3d at 1071-73. After the Oʻahu Island Burial Council approved the plan, Kaleikini wrote a letter to DLNR requesting a contested case hearing. Id. at 6-7, 237 P.3d at 1071-72. DLNR denied her request, and Kaleikini filed a notice of agency appeal in circuit court to seek review of that denial. Id. at 7, 237 P.3d at 1072. The circuit court dismissed the appeal because no contested case hearing had been held, but recognized that it would be impossible for an appellant to obtain judicial review if an agency improperly denies the request for a contested case hearing. Id. at 7-8, 237 P.3d at 1073-74. Although the ICA then dismissed Kaleikini's secondary appeal as moot, this court held that it could consider the case pursuant to the public interest exception to the mootness doctrine. Id. at 12-13, 237 P.3d at 1078-79. On the merits, this court noted that the relevant administrative rule provided Kaleikini with a procedural vehicle to obtain a contested case and that she had followed the applicable procedures to request a contested case

hearing; therefore, this court's inquiry focused on whether Kaleikini met the requirements of HRS § 91-14 under the test we set out in PASH. Id. at 16, 237 P.3d at 1082. With respect to this prong of the test, we concluded that DLNR's decision to deny Kaleikini's request for a contested case hearing constituted a "final decision and order" of the agency because "it ended the litigation." Id. at 26, 237 P.3d at 1092.

Here, KOH's oral and written requests for a contested case hearing prior to the December 1, 2010 vote were neither granted nor denied by the agency. However, the absence of a formal denial is not dispositive of the issue. While in PASH and Kaleikini we concluded that the formal denial of the contested case hearings provided the requisite finality to enable the respective appellants to appeal to the circuit court pursuant to HRS § 91-14, we note here that the failure to either grant or deny KOH's requests for a contested case hearing became an effective denial when BLNR proceeded to render a final decision by voting to grant the permit to UH at the December 1, 2010 board meeting. Accordingly, we conclude that BLNR's vote to grant the permit in the face of a valid pending request for a contested case hearing satisfies this prong of the test.

3. KOH followed all applicable agency rules in requesting a contested case hearing

The third part of the PASH/Kaleikini test "requires a determination [of] whether the claimant followed the applicable agency rules and, therefore, was involved in the contested case." Id. at 26, 237 P.3d at 1092 (ellipses, brackets, and internal quotation marks omitted) (quoting PASH, 79 Hawaiʻi at 431, 903 P.2d at 1252).

The applicable agency rules, HAR §§ 13-1-28 and 13-1-29, provide as follows:

> § 13-1-28 Contested case hearings.
> (a) When required by law, the board shall hold a contested case hearing upon its own motion or on a written petition of any government agency or any interested person.
> (b) The contested case hearing shall be held after any public hearing which by law is required to be held on the same subject matter.
> (c) Any procedure in a contested case may be modified or waived by stipulation of the parties.
>
> § 13-1-29 Request for hearing.
> (a) On its own motion, the board may hold a contested case hearing. Others must both request a contested case and petition the board to hold a contested case hearing. An oral or written request for a contested case hearing must be made to the board no later than the close of the board meeting at which the subject matter of the request is scheduled for board disposition. An agency or person so requesting a contested case must also file (or mail a postmarked) written petition with the board for a contested case no later than ten calendar days after the close of the board meeting at which the matter was scheduled for disposition. For good cause, the time for making the oral or written request or submitting a written petition or both may be waived.
> (b) Except as otherwise provided in section 13-

> 1-31.1,[6] the formal written petition for a contested case hearing shall contain concise statements of:
>
> (1) The nature and extent of the requestor's interest that may be affected by board action on the subject matter that entitles the requestor to participate in a contested case;
> (2) The disagreement, if any, the requestor has with an application before the board;
> (3) The relief the requestor seeks or to which the requestor deems itself entitled;
> (4) How the requestor's participation would serve the public interest; and
> (5) Any other information that may assist the board in determining whether the requestor meets the criteria to be a party pursuant to section 13-1-31.

As we noted in the factual background of this case, KOH first submitted a written petition for a contested case hearing on May 24, 2010; it resubmitted that petition on July 8, 2010 after a pro forma denial by a person at DLNR who apparently did not have authority to reject the original petition. The May 24, 2010 petition, which appears in the record, contains the "concise statements" required by HAR § 13-1-29(b). KOH also made an oral request for a contested case hearing at the August 26, 2010 public hearing in Pukalani, Maui; aside from that request, we also note that at the public hearing, KOH "testified in opposition to the project, citing its impacts on resources in the conservation district[.]"

Moreover, after the vote to grant the permit passed at the December 1, 2010 board meeting but before the close of the

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[6] HAR § 13-1-31.1 applies to hearings concerning violations of the administrative rules and does not apply to a permitting situation as in the present case.

meeting, KOH made yet another oral request for a contested case hearing pursuant to HAR § 13-1-29(a). The next day, December 2, 2010, KOH filed yet another written petition with BLNR requesting a contested case hearing, also pursuant to HAR § 13-1-29(a).

There is no question that KOH did all it could, both prior to and following BLNR's decision on the permit, to comply with the agency's rules for requesting a contested case hearing.

4. KOH has standing to appeal because it has sufficiently alleged injury to its interests

The final prong of the PASH/Kaleikini test "requires that the claimant's legal interests must have been injured -- i.e., the claimant must have standing to appeal." Kaleikini, 124 Hawaiʻi at 26, 237 P.3d at 1092 (citing PASH, 79 Hawaiʻi at 431, 903 P.2d at 1252). We evaluate standing using the "'injury in fact' test requiring: '(1) an actual or threatened injury, which, (2) is traceable to the challenged action, and (3) is likely to be remedied by favorable judicial action.'" Ka Paʻakai O Kaʻ Aina v. Land Use Comm'n, 94 Hawaiʻi 31, 42, 7 P.3d 1068, 1079 (2000) (quoting Citizens for the Prot. of the N. Kohala Coastline v. Cnty. of Haw., 91 Hawaiʻi 94, 100, 979 P.2d 1120, 1126 (1999)). However, in cases involving native Hawaiian and environmental interests, we have been especially concerned that the doctrine of standing not serve as a barrier to a plaintiff's legitimate

claims:

> With regard to native Hawaiian standing, this court has stressed that "the rights of native Hawaiians are a matter of great public concern in Hawai[ʻ]i." Pele Defense Fund v. Paty, 73 Haw. 578, 614, 837 P.2d 1247, 1268 (1992), certiorari denied, 507 U.S. 918, 113 S. Ct. 1277, 122 L. Ed. 2d 671 (1993). Our "fundamental policy [is] that Hawaii's state courts should provide a forum for cases raising issues of broad public interest, and that the judicially imposed standing barriers should be lowered when the "needs of justice" would best be served by allowing a plaintiff to bring claims before the court." Id. at 614-15, 837 P.2d at 1268-69 (citing Life of the Land v. The Land Use Comm'n [(Life of the Land II)], 63 Haw. 166, 176, 623 P.2d 431, 441 (1981)).
>
> We have also noted that, "where the interests at stake are in the realm of environmental concerns[,] 'we have not been inclined to foreclose challenges to administrative determinations through restrictive applications of standing requirements.'" Citizens, 91 Hawaiʻi at 100-01, 979 P.2d at 1126-27 (quoting Mahuiki v. Planning Commission, 65 Haw. 506, 512, 654 P.2d 874, 878 (1982) (quoting Life of the Land [II], 63 Haw. at 171, 623 P.2d at 438))). Indeed, "[o]ne whose legitimate interest is in fact injured by illegal action of an agency or officer should have standing because justice requires that such a party should have a chance to show that the action that hurts his interest is illegal." Mahuiki, 65 Haw. at 512-13, 654 P.2d at 878 (quoting East Diamond Head Association v. Zoning Board of Appeals, 52 Haw. 518, 523 n.5, 479 P.2d 796, 799 n.5 (1971) (citations omitted)). See also Mahuiki, 65 Haw. at 515, 654 P.2d at 880 (those who show aesthetic and environmental injury are allowed standing to invoke judicial review of an agency's decision under HRS chapter 91 where their interests are "personal" and "special," or where a property interest is also affected) (citing Life of the Land v. Land Use Commission [(Life of Land I)], 61 Haw. 3, 8, 594 P.2d 1079, 1082 (1979)); Akau v. Olohana Corporation, 65 Haw. 383, 390, 652 P.2d 1130, 1135 (1982) (an injury to a recreational interest is an injury in fact sufficient to constitute standing to assert the rights of the public for purposes of declaratory and injunctive relief); Life of the Land [II], 63 Haw. at 176-77, 623 P.2d at 441 (group members had standing to invoke judicial intervention of LUC's decision "even though they are neither owners nor adjoining owners of land reclassified by the Land Use Commission in [its] boundary review"); Life of the Land [I], 61 Haw. at 8, 594 P.2d at 1082 (group members who lived in vicinity of reclassified

> properties and used the subject area for "diving, swimming, hiking, camping, sightseeing, horseback riding, exploring and hunting and for aesthetic, conservational, occupational, professional and academic pursuits," were specially, personally and adversely affected by LUC's decision for purposes of HRS § 91-14).

Id. at 42-43, 7 P.3d at 1079-80; see also Mottl v. Miyahira, 95 Hawaiʻi 381, 393, 23 P.3d 716, 728 (2001) ("To date, the appellate courts of this state have generally recognized public interest concerns that warrant the lowering of standing barriers in two types of cases: those pertaining to environmental concerns and those pertaining to native Hawaiian rights.").

In its petition to BLNR requesting a contested case hearing and in its statement of the case on agency appeal to the circuit court, KOH emphasized that its members have used the Haleakalā summit area to engage in traditional and customary practices as well as enjoy the views, natural beauty, and quiet of the area and thus allege that construction of the proposed facilities will directly and adversely affect their ability to engage in traditional and customary practices and enjoy the area. Due to the procedural history of this case, in which the requested contested case hearing was not held prior to approving the permit and the circuit court granted the motion to dismiss KOH's agency appeal, we are bound, even on further appeal, to deem KOH's factual allegations as true. See, e.g., Buscher v. Boning, 114 Hawaiʻi 202, 212, 159 P.3d 814, 824 (2007) ("A trial

court's ruling on a motion to dismiss is reviewed de novo. The court must accept plaintiff's allegations as true and view them in the light most favorable to the plaintiff . . . ." (internal citations omitted)).

Because we must accept KOH's assertions as true, we must conclude that KOH had standing to pursue its HRS § 91-14 appeal based on the threatened injury to its Native Hawaiian traditional and customary practices and to its aesthetic and environmental interests in the summit area. See, e.g., Kaleikini, 124 Hawaiʻi at 26, 237 P.3d at 1092; Mottl, 95 Hawaiʻi at 393, 23 P.3d at 728; Ka Paʻakai, 94 Hawaiʻi at 42-43, 7 P.3d at 1079-80; Citizens, 91 Hawaiʻi at 100-01, 979 P.2d at 1126-27; PASH, 79 Hawaiʻi at 434 & n.15, 903 P.2d at 1255 & n.15; Pele Def. Fund, 73 Haw. at 614-15, 837 P.2d at 1268-69; Mahuiki, 65 Haw. at 515-16, 654 P.2d at 880; Life of the Land II, 63 Haw. at 176-77, 623 P.2d at 441; Life of the Land I, 61 Haw. at 8, 594 P.2d at 1082.

Accordingly, KOH has met this final requirement, and thus has met all of the requirements, of the PASH/Kaleikini test. We therefore conclude that BLNR should have held a contested case hearing as required by law and requested by KOH prior to decision making on UH's application, and that the circuit court had jurisdiction to hear KOH's HRS § 91-14 agency appeal.

IV. CONCLUSION

Based on the foregoing, we conclude that KOH's appeal is not moot and that a contested case hearing should have been held, as required by law and properly requested by KOH, on UH's application prior to BLNR's vote on the application. Accordingly, we vacate the ICA's July 30, 2012 judgment on appeal, vacate the circuit court's March 29, 2011 final judgment and March 15, 2011 order granting the motion to dismiss, and remand to the circuit court for further proceedings consistent with this opinion regarding KOH's request for stay or reversal of the conservation district use permit granted by BLNR to UH on December 1, 2010.

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