IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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KILAKILA ʻO HALEAKALĀ, Petitioner/Appellant-Appellant,

vs.

BOARD OF LAND AND NATURAL RESOURCES, DEPARTMENT OF LAND AND NATURAL RESOURCES, SUZANNE CASE, in her official capacity as Chairperson of the Board of Land and Natural Resources, and UNIVERSITY OF HAWAIʻI,
Respondents/Appellees-Appellees.

SCWC-13-0003065

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-13-0003065; CIV. NO. 12-1-3070)

OCTOBER 6, 2016

DISSENTING OPINION BY WILSON, J.

The strength of the law resides in its fair application. Fair application of the law justifies faith in judicial decision-making. The decision in this case as to whether a $298 million dollar telescope providing unique benefits to scientific knowledge should be built in a location sacred to the Hawaiian community is one of great consequence

deserving a fair decision——a decision arising from a process of fairness that the parties and our community can trust. The conservation district use permit (CDUP) sought by the University of Hawai‘i Institute for Astronomy (UHIfA) is subject to decision-making based on evidence presented at a contested case hearing——an adjudicative proceeding. A hallmark of due process to which all parties are entitled in this case is an impartial decision-maker who receives evidence subject to public view——an impartial decision-maker equally accessible to all parties, whose decision is based on the evidence and law, with no regard to which party may be the most powerful politically or economically.

The decision-makers of the Advanced Technology Solar Telescope (ATST) contested case proceedings were not equally accessible to all the parties involved in the contested case; instead, the decision-makers engaged in undisclosed communications with government officials who sought issuance of the permit: the offices of the Governor and the senior United States senator for the State of Hawai‘i. Under the weight of the political pressure being applied, the hearing officer initially selected by the Board of Land and Natural Resources (Board) rendered an incomplete report——a report recommending that the conservation district use permit for construction of the telescope on Haleakalā be granted. Due to the ex parte

political pressure he received, the hearing officer publicly disavowed his initial report. He was discharged by the Board because he attempted to engage in ex parte communication with UHIfA to determine whether those government officials were acting on behalf of UHIfA when they applied ex parte pressure upon him. The day after the hearing officer's public disclosure of the ex parte pressure placed upon him by government officials, the Chairman of the Board participated in an undisclosed ex parte meeting with the same government officials whose pressure upon the hearing officer caused him to declare his initial report untrustworthy. When Kilakila ʻO Haleakalā (Kilakila) learned of the undisclosed meeting, it sought to obtain the communications that occurred. The Board refused to produce any documentation in its possession showing the extent of undisclosed ex parte communications that occurred with the decision-makers while they deliberated. Having rejected Kilakila's request for discovery, the Board granted the CDUP notwithstanding the conclusion of the Final Environmental Impact Statement that construction and operation of the ATST telescope would cause major, adverse, and long-term direct impacts on traditional cultural resources.

Disclosure by the Board is required in this case. Kilakila contends that the Board engaged in prejudgment of the ATST project, that ex parte communications undermined the

integrity of the contested case hearing and also contributed to an appearance of impropriety, and that the decision-makers were subjected to political pressure. Each of these issues independently warrant vacatur of the permit and remand for discovery. Considering the seriousness of the collective issues, remand to the Board to grant the requested discovery would ensure the next contested case hearing is fair both in appearance and actual decision-making. The absence of a reasonably clear factual analysis explaining the Board's departure from the conclusion of the Final Environmental Impact Statement also constitutes a basis for remand with instructions to provide such a rationale.

I. Facts

A. UHIfA Applies for a Conservation District Use Permit to Develop the ATST Project on Haleakalā

Haleakalā is a resource of seminal importance to Hawaiʻi. Its significance to science is such that it was chosen from 72 potential sites as the best location to meet a world-wide need for a telescope capable of taking high-resolution images of the sun to study its solar magnetic fields and its relation to solar energy, sunspots, and flares. The ATST would consist of a 142.7-foot tall telescope observatory structure, a support and operations building, a utility building, a parking lot, and a wastewater treatment plant. In addition to its

scientific importance, the observatory project represents significant economic development.

The summit of Haleakalā is also of great cultural significance to Hawaiʻi. The summit was traditionally used by Native Hawaiians as a place for religious ceremonies, for prayer to the gods, to connect to ancestors, and to bury the dead. Native Hawaiians continue to engage in some of these practices at the summit. Cultural assessments performed for the ATST project determined that the Haleakalā summit is one of the most sacred sites on Maui, and the Haleakalā Crater is known as "where the gods live."

The ATST cannot be built if it will cause a substantial adverse cultural impact. Hawaiʻi Administrative Rules (HAR) § 13-5-30(c)(4) (2011). This is because the summit of Haleakalā is within the conservation district.[1] As such, the

[1] To evaluate a proposed land use in the conservation district, the Board must apply the following criteria:

> (1) The proposed land use is consistent with the purpose of the conservation district;
> (2) The proposed land use is consistent with the objectives of the subzone of the land on which the use will occur;
> (3) The proposed land use complies with provisions and guidelines contained in chapter 205A, HRS, entitled "Coastal Zone Management", where applicable;
> (4) The proposed land use will not cause substantial adverse impact to existing natural resources within the surrounding area, community, or region;
> (5) The proposed land use, including buildings, structures, and facilities, shall be compatible with the locality and surrounding areas, appropriate to the physical conditions and capabilities of the specific parcel or parcels;

(continued . . .)

site of the ATST is recognized by our state legislature as containing important natural resources—including cultural resources—"essential to the preservation of the State's fragile ecosystems." Hawaiʻi Revised Statutes (HRS) § 183C-1 (2011); see also Hawaiʻi Administrative Rules (HAR) § 13-5-2 (1994) (defining natural resources as including "cultural, historic, recreational, geologic, and archaeological sites"). Accordingly, to construct the ATST, UHIfA must obtain from the Board of Land and Natural Resources a CDUP establishing that the ATST does not have a substantial adverse impact on natural resources, including cultural resources. HAR § 13-5-30(b)(2),(c)(4) (1994); HAR § 13-5-2 (1994).

UHIfA began the application process for a CDUP for the ATST by filing a conservation district use application (CDUA) with the Department of Land and Natural Resources (DLNR) on March 1, 2010. In support of its CDUA, UHIfA attached to its CDUA the final environmental impact statement (FEIS) for the project that concluded the ATST would have a major adverse

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(. . . continued)

> (6) The existing physical and environmental aspects of the land, such as natural beauty and open space characteristics, will be preserved or improved upon, whichever is applicable;
> (7) Subdivision of land will not be utilized to increase the intensity of land uses in the conservation district; and
> (8) The proposed land use will not be materially detrimental to the public health, safety, and welfare.

HAR § 13-5-30(c)(1)-(8) (1994).

effect on cultural resources. Based on the finding of the FEIS and other concerns, Kilakila opposed granting a CDUP for the ATST, maintaining there was no evidence upon which the Board could refute the findings of the FEIS and conclude the ATST would not have a substantial adverse impact on cultural resources.

B. Kilakila Successfully Asserts its Right to a Contested Case Hearing

Kilakila began its challenge less than three months after UHIfA filed its CDUA with the DLNR. On May 24, 2010, Kilakila submitted to the DLNR a petition for a contested case hearing. Kilakila ʻO Haleakalā v. Bd. of Land & Nat. Resources, 131 Hawaiʻi 193, 196, 317 P.3d 27, 30 (2013) (hereinafter Kilakila I). This petition was wrongfully rejected by a DLNR staff member and Kilakila re-filed its petition for a contested case hearing. Id. However, the Board took no action on Kilakila's request for a contested case hearing. Id. Rather than institute a contested case hearing on the CDUA, the Board held a public hearing in August 2010, during which Kilakila presented evidence in opposition. Id. At its regularly scheduled board meeting on December 1, 2010, the Board granted a permit to UHIfA, CDUP MA-3542, to build the ATST. Id. Immediately following the vote, Kilakila again requested a contested case hearing, followed by a written petition the next

day. Id. Kilakila thereafter argued in its appeal to the circuit court that the Board's vote to grant the CDUP was effectively a denial of Kilakila's request for a contested case hearing.[2] Id. at 197, 317 P.3d at 31. The circuit court dismissed Kilakila's complaint. Id. at 198, 317 P.3d at 32.

Kilakila appealed the circuit court's dismissal of its complaint to the ICA, and the ICA affirmed the circuit court's dismissal. Id. On December 13, 2013, this court vacated the decisions of the ICA and circuit court concluding that the circuit court had jurisdiction to hear Kilakila's appeal and that Kilakila's right to a contested case hearing had been violated. Id. at 206, 317 P.3d at 40.

Meanwhile, prior to the issuance of the ICA's decision, the Board reconsidered its denial of a contested case hearing and granted Kilakila's request. The Board did not address, however, Kilakila's request that the Board void the already granted permit, CDUP MA-3542, prior to commencing the contested case hearing.

This permit, which was formally issued on December 1, 2010, was granted subject to eighteen conditions. In a December 20, 2010 letter to UHIfA, a DLNR staff member set forth the conditions upon which the Board had based its grant of CDUP MA-

[2] The Honorable Rhonda A. Nishimura presided.

3542. The letter stated that the Board conditioned the permit upon sixteen conditions.

Pursuant to Condition No. 4 of the conditions for CDUP MA-3542, which required UHIfA to inform the DLNR in writing when construction activity is initiated, UHIfA informed the Board on April 10, 2012—during the second hearing officer's deliberations of the contested case—of its intent to begin construction.[3] After learning of the planned construction, Kilakila filed objections with the Board[4] and also filed a motion for a preliminary injunction with the circuit court to stay UHIfA's construction activities. Subsequently, UHIfA informed Kilakila and the Board that it chose not to commence construction on Haleakalā "at this time" as UHIfA sought to avoid the expense of a preliminary injunction hearing.

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[3] UHIfA summarized its construction activities as:

> (1) site work to remove Reber Circle, which is one of the obligations of the Programmatic Agreement and the CDUP, and to address other previously disturbed sites, and (2) site work associated with utility corridors on the Haleakalā Observatories site that will connect to the existing Pan-STARRS and Mees facilities.

[4] Kilakila objected to any construction pursuant to CDUP MA-3542. Kilakila moved to "(a) void the approval of the construction plans, (b) bar all construction and land alteration pursuant to CDUP MA-3542 until and unless the contested hearing concludes and the BLNR issues a conservation district use permit for the ATST project; and (c) disqualify all members of the BLNR that have prejudged the University's conservation district use application for the ATST."

C. During Deliberations, the First Hearing Officer Encounters Ex Parte Pressure from Government Officials Aligned with the University of Hawai'i Institute for Astronomy

Though it was authorized to conduct the contested case hearing on the CDUA, the Board elected to delegate its authority to a hearing officer who was to conduct the hearing and make a recommendation to the Board. The hearing officer appointed by the Chairman of the Board of Land and Natural Resources was Steven Jacobson (Jacobson). In July and August of 2011, Jacobson conducted four days of contested case hearings, during which he heard 7 witnesses and received more than 5,000 pages of evidence. After the conclusion of the contested case hearing on August 26, 2011, and during Jacobson's deliberations process, Jacobson experienced pressure from the offices of the Governor and the senior United States senator for the State of Hawai'i.

On January 30, 2012, UHIfA Associate Director for External Relations (UHIfA associate director) Mike Maberry received assistance from both the Governor's office and the senior senator's office to contact the decision-makers during the deliberation phase of the contested case proceedings. The UHIfA associate director acknowledged in his January 30, 2012 email to the senior senator's chief of staff that previous ex parte communication between the Chairman and the senator's chief of staff occurred: "I know you've talked with [the Board Chairman] but as previously mentioned, Steve Jacobson doesn't

work for [the Board Chairman], he works for [the director of the Department of Health (DOH)]." The UHIfA associate director asked the senator's chief of staff if it "[w]ould [] be possible for you or someone" to speak with Jacobson's superior, the DOH director, to clarify that Jacobson's priority was the ATST project. In the same email, the UHIfA associate director expressed to the senator's chief of staff UHIfA's fears of losing funding if the permit was not timely granted: "By mid-March, the project will have burned through $4M and will bleed $.5M each month after that." To assist the UHIfA associate director, the senator's chief of staff enlisted the Governor's chief of staff to speak to the DOH director on UHIfA's behalf.[5] This communication is reflected in a January 30, 2012 email from the senator's chief of staff to the Governor's chief of staff. In response to the request of the senator's chief of staff, the Governor's chief of staff demonstrated his commitment to UHIfA's cause by speaking with the DOH director and the Board Chairman: "I will speak with [the DOH director]. I also spoke with [the Board Chairman] and asked to please help."

[5] The senator's chief of staff also conveyed UHIfA's fears of losing funding to the Governor's chief of staff, stating in her January 30, 2012 email, "uh and my feds [sic] are getting really really nervous about losing money for the atst [sic]." She reiterated this fear in her following email, sent later that day, to the Governor's chief of staff, stating "[t]his will be bad if we lose it."

The senator's and Governor's chiefs of staff further acted to support UHIfA by deciding to organize a meeting between UHIfA, the senator's chief of staff, DLNR, and DOH. When UHIfA learned of the meeting that the office of the senior senator and the office of the Governor were organizing to discuss the ATST project with the DLNR, the UHIfA associate director explained in a January 31, 2012 email: "UH can't meet with DLNR until after the Board acts on the Hearing Officers [sic] recommendation or it could jeopardize the Contested Case." The senator's chief of staff offered to "carry the uh message" for UHIfA, as stated in her January 31, 2012 email to the UHIfA associate director. The senator's chief of staff thus specifically offered a means for UHIfA to bypass the prohibition on ex parte communication with DLNR via the senior senator's office, and by extension the Governor's office, to do what UHIfA believed it could not do: make contact with Jacobson and the Board Chairman.

The impact of the pressure on Jacobson was substantial. Less than two months after the January 2012 emails had been sent, Jacobson publicly revealed the effects of the ex parte communications and political influences on his deliberations.[6] He explained that while there was no explicit statement from the senior senator or Governor instructing him to

[6] As discussed infra, Jacobson filed a document titled "Hearing Officer's Response to Minute Order No.14" on March 20, 2012 in response to the Board's review of his ex parte communication with UHIfA's counsel.

rule in favor of granting the conservation district use permit, the desired result was obvious: "I was not asked to recommend a particular result, although the result [United States] Senator [Daniel K.] Inouye's office wanted from the Board was clear." He noted that the pressure he experienced was "generated by a staffer in [United States] Senator Inouye's office and applied through the Governor's office." The pressure required Jacobson to make daily reports to DOH and the Board Chairman "as to how soon I contemplated finishing, what else I thought I needed to do, [and] why I thought I had to do it." Jacobson experienced what he characterized as "or else" pressure during his deliberations to file an initial report and recommended decision. He states, "considerable ex parte pressure was placed upon me to simply spit out a recommended decision quickly[.]" He further notes that this initial report did not "include[] any suggested conditions to granting of the CDUA." The undisclosed communications he received thus culminated in his decision to issue a report and recommendation granting the permit that was, in his view, invalid. Jacobson disavowed the report, specifically requesting that his "initial report and recommendations [be] ignored."

The political pressure upon Jacobson and the extent of the ex parte communications exchanged during Jacobson's deliberations process are also apparent from the February 21,

2012 email sent by the deputy director of environmental health of DOH (DOH deputy director). The DOH deputy director emailed the Governor's chief of staff and cc'd the DOH director, the Board Chairman, and the senator's chief of staff informing them that Jacobson "will serve the Haleakala ATST contested case recommended decision today." The DOH deputy director's email demonstrates that Jacobson had provided him updates throughout his deliberations process:

> This morning he is adding some photos to illustrate the location of historic sites and ahupuaa boundaries. He tells me that so long as the approximately 200 page document is in the mall by midnight it will be considered served today. He is confident it will be done. I have seen the document and discussed it briefly with him. He has been keeping me informed every day over the weekend of his progress.

The senator's chief of staff then forwarded this email to the UHIfA associate director with the message "Hopefully . . . " Kilakila's counsel declared months later, upon learning of these February 2012 emails, that "[u]ntil the day that the hearing officer's report was actually released, I was never given a 'heads up' that the report was about to be released that day. I never received emails that the hearing officer would submit his recommendation on . . . February 21, 2012." The February 2012 emails thus compound the appearance of extensive ex parte communications and political pressure surrounding the deliberations process for the ATST project.

D. The Deputy Attorney General Concludes that Disclosure of Ex Parte Communications with the Deliberating Hearing Officer Is Not Required

Throughout the deliberations process, Jacobson repeatedly sought counsel from the deputy attorney general because it appeared to him that the deputy attorney general for the Board "was overlooking important issues relating to fairness." The deputy attorney general for the Board opined that pressure on Jacobson from government officials was permissible because UHIfA's counsel was not involved in generating the pressure on him; the deputy attorney general also informed Jacobson that "no disclosures were required."

Left essentially on his own to contend with his ethical dilemma, Jacobson contacted UHIfA's counsel on March 15, 2012 to inquire "whether any [of UHIfA's counsel] had anything to do with what the Senator's and Governor's offices were doing." Lacking knowledge of cooperation between UHIfA, the Governor's office, and the senator's office in the ATST case, Jacobson sought to discover whether an alliance existed.[7] Jacobson explained that the pressure would not cause him to commit an ethical transgression: "I am not about to sacrifice my

[7] Jacobson explains that he made the decision to contact UHIfA based on his analysis of HAR § 13-1-39 (2009) and the Hawaiʻi Revised Code of Judicial Conduct. Jacobson, at the time of his discharge as hearing officer, had 38 years of legal experience, having graduated from Harvard Law School in 1973. Jacobson never received a response to his query as to whether UHIFA aligned with the Senator's and Governor's office to place pressure upon him.

integrity or breach my ethical responsibilities to make a Senator or Governor happy."

The next day, March 16, 2012, counsel for UHIfA informed the Board of Jacobson's email. The Board responded on March 19, 2012 with "Minute Order No. 14 - Order Re: Ex Parte Communication." In Minute Order No. 14, the Board found that "the communication from the Hearing[] Officer to UHIfA was an unpermitted ex parte communication" and that the communication "calls into question the Hearing Officer's impartiality with regards to his [February 2012 initial report] and the [March 2012 final report]." Due to Jacobson's unpermitted ex parte communication, the Board explained in its order that it was considering the following actions:

> 1. Striking the [February 2012] Report and [March 2012] Final and Amended Report from the record;
> 2. Discharging the Hearing Officer, Steven Jacobson, as the hearing officer in this case; and
> 3. Retaining a new hearing officer to review the record of the proceedings in this case and to issue a new hearing officer's report and proposed findings of fact, conclusions of law, and decision and order. The new hearing officer would be authorized to conduct additional fact finding as necessary.

The Board also informed the parties they could file comments or objections and that a hearing on the matter would be held on March 23, 2012.

On March 20, 2012, Jacobson responded to the Board's order in his "Hearing Officer's Response to Minute Order No. 14." As discussed supra, Jacobson publicly disclosed the ex

parte communications and political pressures that affected his recommendations on the ATST project's CDUA. Jacobson further disclosed that the deputy attorney general for the Board expressed the opinion that no disclosures of the ex parte communications or pressures were required.

E. The Board Chairman, the Governor's Chief of Staff, and the Senator's Chief of Staff Engage in an Ex Parte Meeting

The day after Jacobson's March 20, 2012 public disclosure, the Board Chairman, who was also the presiding decision-maker of the contested case hearing, met with representatives of the same government officials who had applied the inordinate pressure upon the hearing officer that resulted in his public disclosure. Specifically, the Chairman met with the chief of staff for the Governor, the chief of staff for the senior United States senator, and the Attorney General for the State of Hawaiʻi. A March 21, 2012 email[8] from the Governor's staff scheduling the March 21, 2012 meeting explains that the purpose of the meeting was "to discuss the telescope, hearing[] officer and funding issue"—which were significant substantive matters pertaining to the CDUA.[9]

[8] Kilakila was provided emails regarding the March 21, 2012 meeting pursuant to its government records request filed with the Office of the Governor on March 30, 2012. The Governor's office disclosed the emails on April 27, 2012.

[9] The funding issue in particular was of paramount importance to UHIfA. On January 30, 2012, the UHIfA associate director, informed the (continued . . .)

As with all other ex parte communications between the Board Chairman, the Governor's office, and the senior senator's office, Kilakila was not informed of the March 21, 2012 meeting (hereinafter "ex parte meeting") and did not learn of its existence until approximately five weeks later. It is noteworthy that the ex parte meeting was held while deliberation of the CDUP was underway and the remedy for the hearing officer's ex parte communication with UHIfA was under consideration by the Board.

F. Kilakila Responds to the Ex Parte Communications and the Board's Silencing of the Record and Discharge of Jacobson

Jacobson's March 20, 2012 declaration, discussed supra, was the first time Kilakila discovered that during the deliberation phase of the contested case hearing, undisclosed ex parte political pressure was being imposed upon the hearing officer by representatives of the Governor's office and Hawaii's senior senator's office.

In response to the hearing officer's March 20, 2012 public disclosure, on March 22, 2012, Kilakila filed its "Response of Kilakila ʻO Haleakalā to Minute Order No. 14" (Response) seeking to discover "ex parte communications with the

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senior senator's chief of staff that due to funding concerns, "to keep from losing the project, we may have to start construction." In an email dated January 31, 2012, the UHIfA associate director described the financial situation as "dire."

hearing[] officer . . . so that their impact on this case going forward can be minimized." However, without knowledge of the March 21, 2012 ex parte meeting at the time of this filing, Kilakila was deprived of the opportunity to request information regarding the ex parte meeting.

Kilakila noted in its Response that it could not adequately judge the proper remedy for violation of its constitutional right to a fair hearing absent disclosure. Kilakila explained that "[g]iven that neither Kilakila ʻO Haleakalā nor this Board has a complete understanding of what happened here, Kilakila ʻO Haleakalā cannot expect to know what the full remedy would be at least until full disclosure is made." Kilakila expressed its concern that without full disclosure "the specter of external political pressure being exerted on this proceeding remains." To discover "what happened here," Kilakila specifically requested "any communications tending to show that external political pressure was applied to affect the outcome of this proceeding."[10] Kilakila's request was for disclosure of ex parte communications by or to the hearing officer and UHIfA.

[10] At the time of Kilakila's March 22, 2012 filing, the January 2012 and February 2012 emails discussed supra had not yet been disclosed to Kilakila.

Kilakila identified in its Response particular issues that arose due to the ex parte communications with and political pressure upon the hearing officer. Kilakila maintained that its "basic constitutional right to a fair hearing" was in question; Kilakila wanted "[a]ll the facts . . . disclosed," particularly "when these ex parte communications began, whether they were initiated by the University[,] or what they were precisely"; it sought full disclosure of any improper external political pressure; it wanted the Board to "consider how to prevent any such improper communications, if they occurred, from continuing with the next hearing officer"; it sought to remove the deputy attorney general who advised the hearing officer that the communications need not be disclosed to Kilakila; and, tellingly, Kilakila expected to assert its interest in presenting additional live witnesses:

> Kilakila ʻO Haleakalā should have the right to present live witnesses as it deems necessary for the hearing officer to judge their credibility. The new hearing officer must also be required to make a site visit. Kilakila ʻO Haleakalā is entitled to a fair process.[11]

Kilakila also noted in its Response that a remedy greater than replacement of the hearing officer might be necessary once

[11] These particular requests were recognized by the Board. The Board authorized the new hearing officer to "hold additional evidentiary hearings, as deemed necessary by the hearing officer, to receive testimony from those witnesses that provided oral testimony during the prior evidentiary hearings." But, the Board limited the additional testimony to "the scope of each witnesses' prior testimony." The Board also authorized the hearing officer to schedule a site visit.

discovery was received: "If this threat persists, simply replacing the Hearing Officer will not cure that problem."

At the March 23, 2012 hearing, which was scheduled to address Jacobson's ex parte communication with UHIfA's counsel and potential discharge, Kilakila was not permitted to make a record of the issues it sought to raise at the hearing.[12] Despite the objection of Kilakila, the Board refused to permit a secretary to take notes. The hearing was Kilakila's first opportunity to make a record regarding the ex parte communications with the deliberating hearing officer; the Board denied that opportunity. The Board provided no explanation for its silencing of the record.

Kilakila was compelled to subsequently file a written objection to the Board's silencing of the record. In its written objection, filed March 27, 2012, Kilakila attempted to memorialize what occurred by providing a list of issues that were raised at the hearing.[13] Kilakila further noted the Board's

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[12] In preventing any record of the proceedings to be made, the Board acted in direct contravention of its rules. HAR § 13-1-32(d) (2009) ("The presiding officer shall provide that a verbatim record of the evidence presented at any hearing is taken unless waived by all the parties." (Emphases added)).

[13] Kilakila stated that the following issues were raised at the hearing:

- Kilakila ʻO Haleakalā began by objecting to the absence of a court reporter and the Board's secretary.
- Kilakila ʻO Haleakalā renewed its objection to the BLNR's counsel Linda Chow's further participation in this matter.

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silencing of the record would shield the actions of the Board from appellate review. "The record in this case will not be complete if the reviewing court is denied an opportunity to review substantive proceedings." As predicted, this court is without a record of the representations made by counsel for UHIfA, Kilakila, the Attorney General's office, or Board members at the March 23, 2012 hearing.

Six days after the March 23, 2012 hearing in which the record was silenced, the Board discharged Jacobson. In its March 29, 2012 Minute Order No. 15, "Order Discharging the Hearing Officer and Appointing a New Hearing Officer," the Board explained that although Jacobson denied that the ex parte communication affected his decision, the single communication to UHIfA was reason to question his impartiality:

> The communication from the Hearing Officer to UHIfA was an unpermitted ex parte communication in violation of Hawaii Administrative Rules (HAR) § 13-1-37.
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> Despite the assertions by the Hearing Officer that the pressure that was put on him to issue a decision did not influence the outcome of his decision, the Board finds that

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- Kilakila O Haleakala asked that all rulings made by the Hearing Officer that were integral to his reports also be striken [sic]. The University conceded that the December 29, 2011 Supplemental Order and Notice Re Judicial Notice should be struck from the record.
- Kilakila O Ha1eakala asked that a site visit to Haleakala be part of the fact-finding that the hearing officer is required to do and the University did not object to this request.
- Kilakila O Haleakala asked the Board to install safeguards to protect the integrity of this process, including selecting a new hearing office who can be independent.

> the totality of the circumstances gives rise to a question regarding the impartiality of the Hearing Officer in arriving at his recommended decision.

Further, to "avoid even the appearance of impropriety," the Board ordered Jacobson discharged and his filings, including the February 2012 initial report and March 2012 final report, "stricken from the record and . . . not be referred to in any future filings or arguments in this case." Notwithstanding its authority to conduct the hearing, the Board ordered a new hearing officer to be appointed.

G. The Board Refuses to Disclose Any Ex Parte Communications Within Its Possession

As stated, Kilakila immediately took steps to obtain information critical to determining the extent of the undisclosed ex parte communications after receipt of Jacobson's March 20, 2012 disclosure and again, after the silencing of the record at the March 23, 2012 hearing.

In the Board's March 29, 2012 order, in which it discharged Jacobson, the Board did not address Kilakila's requests for disclosure from Jacobson and UHIfA nor did the Board provide information as to why the Board refused to create a record of the silenced hearing. The order also failed to address Kilakila's request that the Board lay out a process to limit potential political pressure on the second hearing officer.

However, the March 29, 2012 order does contain the Board's pivotal determination that parties in a contested case hearing may urge a non-party to engage in undisclosed ex parte communications with the Board with respect to "procedural" matters. The Board concluded:

> Even assuming the communications from the non-parties were initiated at the urging of a party in this case, such communications would be considered permitted ex parte communications under Hawaii Administrative Rules (HAR) section 13-1-37(b)(2) which permits requests for information with respect to the procedural status of a proceeding.

Thus, the Board determined the parties were free to "urge" others to communicate with deliberating decision-makers, apparently without the Board or the party having to disclose the nature of the "procedural" communication or its existence.

After the Board's March 29, 2012 order, Kilakila centered its next request for disclosure directly on evidence of ex parte communications with the Board. Kilakila filed its first motion for disclosure of communications to and from Board members regarding the ATST project on March 30, 2012. In its motion, Kilakila requested

> each member of the BLNR disclose any and all communication (written, electronic and oral) that mentioned or related to the University's proposed Advanced Technology Solar Telescope with anyone—except for (a) communications between board members; (b) communications between any board member and the Board's counsel; (c) any board meeting when the ATST was a subject matter on the agenda.

Kilakila specifically explained that the request "includes any and all communication with Senator Inouye or his staff, the

Governor or his staff, . . . that mentioned or related to the University's proposed Advanced Technology Solar Telescope." In support of its motion for disclosure, Kilakila provided evidence that the senior senator had previously exerted pressure on officials involved in the ATST project.[14] On the same day that it filed its motion for disclosure, Kilakila filed a government records request with the Governor's office for "[a]ll emails, memoranda and correspondence that mention or relate to the Advanced Technology Solar Telescope (ATST) created after December 1, 2010 that were received or generated by anyone in the Governor's Office." The Governor responded and the documents were received by Kilakila on April 27, 2012. The documents contained the emails discussed supra regarding the March 21, 2012 ex parte meeting. On May 10, 2012, Kilakila—having learned for the first time of the occurrence of the ex parte meeting—supplemented its April 9, 2012 motion for

[14] The former superintendent of Haleakalā National Park testified in the contested case hearing,

> While serving as superintendent, I was well aware of Senator Inouye's displeasure with my statements/comments against the construction of the ATST. His staff assistant, James Chang placed heavy pressure on me to mute objections that [t]he National Park Service had regarding the impacts of the ATST. For example, in a meeting with Mr. Chang, he strongly encouraged me to go along with the construction of the ATST project. When I stated it was my job to guard against such extreme impacts to this majestic national park, he indicated that he would go to the Secretary of the Interior to override my objections.

disclosure seeking, inter alia, communications pertaining to the meeting.

The Board replied to Kilakila's March 30, 2012 motion for disclosure in its June 4, 2012 Minute Order No. 23. In its order, the Board denied the request for other communications but granted Kilakila's motion "with regard to the meeting held on March 21, 2012," determining that the matter was "suitable for disposition without the need for oral argument."[15] The Board stated that the sole topic of discussion was when Jacobson would release his report:

> a. A meeting occurred on March 21, 2012, at which [the] Chairperson [] was in attendance. No party to the contested case was present during the meeting.
>
> b. During the meeting the sole topic of discussion was when the recommended decision in this contested case would be issued by the hearing officer, Steven Jacobson.
>
> c. There was no discussion of any substantive issues involved in this contested case hearing.

The Board also determined

> Inasmuch as no party was present during the meeting, there was no ex parte communication with the hearing officer or any member of the Board. Even if a party were present, the discussion referred to above comes within the purview of Hawaii Administrative Rule (HAR) § 13-1-37 as a permitted communication related to requests for information with respect to the procedural status of a proceeding. No further action is required regarding this communication.

On the one hand, the Board indicated that no party was present at the meeting. On the other hand, even if a party were

[15] The Board concluded in each of its orders denying Kilakila's requests for disclosure that "this matter [is] suitable for disposition without the need for oral argument."

present, the Board concluded that the discussion that occurred at the March 21, 2012 ex parte meeting was "permitted communication related to requests for information with respect to the procedural status of a proceeding" (hereinafter "procedural explanation"). No documentation was produced to substantiate that the meeting discussed only when the recommended decision in the contested case would be issued by the hearing officer. In addition to its procedural explanation, the Board further explained that "[w]hen carrying out their duties as Board members, the members of the Board interact with numerous people in various situations." As to Kilakila's motion for disclosure for ex parte communications other than the ex parte meeting, the Board determined the motion "does not provide a time frame or context for the requested disclosures" and the motion "is based, at most, upon mere speculation." According to the Board, Kilakila did not demonstrate that the Board "acted in any manner other than as an impartial adjudicator in this case." Additionally, the Board concluded that "any prejudice that may have occurred as a result of communications with the former hearing officer has been remedied by the Board's discharge and replacement of the hearing officer."

Approximately a week after the Board issued its June 4, 2012 Minute Order No. 23, Kilakila informed the Board of the impossibility of its procedural explanation for the meeting. In

its June 8, 2012 "Motion of Kilakila ʻO Haleakalā to Reconsider Minute Order No. 23," Kilakila explained that the Board's justification for the meeting could not be true because the hearing officer's report was already issued by the time of the ex parte meeting:

> In granting the motion of Kilakila ʻO Haleakalā for disclosure of all communications to and from members of the BLNR, in part, this Board disclosed that the "sole topic of discussion" at the March 21, 2012 meeting was "when the recommended decision in the contested case would be issued by the hearing officer, Steven Jacobson." With all due respect, this statement cannot be true.
>
> Steven Jacobson had already produced his first decision on February 23, 2012 - a month before this meeting. His recommendation had received media coverage. His second and final decision was produced on March 12, 2012, over a week before this meeting took place – a meeting that had only been hastily called on March 21, 2012 itself according to the documents produced by the Governor's office. In fact, on March 19, 2012, this Board announced through Minute Order 14 that it was considering "[s]triking the Report and Final Amended Report from the record." Thus, it strains credulity to assert that the discussion was "when the recommended decision in this contested case would be issued by the hearing officer, Steven Jacobson." He had already done so. Everyone already knew that fact by the time that the meeting had been called.

Having informed the Board that its explanation of the purpose of the ex parte meeting was not accurate, Kilakila reasserted in its June 8, 2012 motion its request for the Board to disclose its ex parte communications relating to the ATST. Kilakila requested the Board to

> respond definitively as to whether or not there were any communications (oral, written or electronic) between any member of the Board and anyone else that mentioned or related to the University's proposed Advanced Technology Solar Telescope with anyone (except for (a) communications between board members; (b) communications between any board member and the Board's counsel; (c) any board meeting when the ATST was a subject matter on the agenda) from the time

> that Kilakila ʻO Haleakalā requested a contested case hearing.

The Board refused to disclose the extent of the ex parte communications that occurred during the ex parte meeting. The Board also offered no explanation of how it composed its original inaccurate account of the ex parte meeting. Instead, on July 13, 2012, the Board issued a one-page order providing another "procedural" explanation of the ex parte meeting. The Board amended Minute Order No. 23 to state that the purpose of the ex parte meeting was to discuss when the Board would issue its final decision:[16]

> During the meeting, the sole topic of discussion was when the final decision in this contested case would be issued, in light of Minute Order No. 14, filed on March 19, 2012.

The Board's amended explanation was contradicted by the March 21, 2012 email disclosed by the Governor's office wherein the purpose of the meeting was stated to be discussion of "the telescope, hearing[] officer and funding issue"——all issues of current import.

Kilakila filed its final motion on September 27, 2012 requesting disclosure from the Board, entitled "Second Motion of

[16] The Board's explanation raises more questions than it answers inasmuch as on the date of the undisclosed Chairman meeting, March 21, 2012, the final report of the hearing officer had not been stricken, the hearing officer had not been discharged, and a Board decision had yet to be made regarding its announcement that it was considering striking Jacobson's initial and final reports. Yet, per the second explanation for the meeting, "the sole topic of discussion was when the final decision in this contested case would be issued."

Kilakila ʻO Haleakalā to Reconsider Minute Order No. 23." Kilakila filed this motion based on new evidence it had received from UHIfA, which produced records pursuant to an order by the circuit court referencing the Hawaiʻi Uniform Information Practices Act, HRS chapter 92F.[17] The disclosed documents consist of the January 2012 and February 2012 emails, discussed supra, between the senator's chief of staff, the Governor's chief of staff, the UHIfA associate director, and the DOH deputy director.

Based on the disclosed emails, Kilakila raised additional questions in its September 27 motion for disclosure that further suggest substantial ex parte communications occurred.[18] For example, Kilakila inquires as to the means

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[17] Kilakila received this new evidence after obtaining summary judgment on its motion for compelling disclosure of the records in circuit court on September 7, 2012. On September 25, 2012, UHIfA produced the documents.

[18] Kilakila, in its memorandum in support of the September 27, 2012 "Second Motion of Kilakila ʻO Haleakalā to Reconsider Minute Order No. 23," stated:

> E. Inexplicable Conduct
>
> - How did the applicant come to learn that the hearing officer would submit his recommendation on January 27, 2012 when this information was never provided to Kilakila ʻO Haleakalā?
> - How did the applicant receive information that the hearing officer would submit his recommendation on February 21, 2012 when this information was never provided to Kilakila ʻO Haleakalā?
> - Why did . . . the deputy director of environmental health[,] a political appointee[,] have an opportunity to see the hearing officer's report and discuss it with

(continued . . .)

through which UHIfA could have knowledge of when the hearing officer would file his initial and final recommendations. The questions posed by Kilakila also sought an explanation for the Board's decision to engage in communications with government officials favoring the permit without disclosing the communications to Kilakila.

Kilakila's September 27 motion for disclosure also noted the emails received from UHIfA revealed that the Board's justification for denying Kilakila's request for disclosure was misleading. Kilakila noted that while the Board previously disclosed only the ex parte meeting of March 21, 2012 in response to Kilakila's March 30 request for disclosure of ex parte communications, the emails subsequently obtained from UHIfA contained evidence of "more ex parte communication than ha[d] previously been reported."[19]

(. . . continued)

> the hearing officer before the report was provided to the parties? . . . . Why is [the deputy director of environmental health] even involved and why were his comments fed directly to the applicant?
>
> - The hearing officer also previously claimed that "the Board's counsel opined that no disclosures" of the ex parte communications to Kilakila ʻO Haleakalā was required.

[19] On January 30, 2012, the UHIfA associate director emailed the senator's chief of staff and referred to her prior conversation with the Chairman: "I know you've talked with Aila." The Governor's chief of staff also stated that he "spoke with Bill [Aila] and asked to please help." The senator's chief of staff and the Governor's chief of staff began planning a meeting with DLNR on January 30, 2012. The senator's chief of staff asked the Governor's chief of staff to "call a meeting with uh, me, and your depts [sic] – dlnr, health and ag" if they could not get in contact with Jacobson.

The Board denied Kilakila's September 27 motion for disclosure in its November 9, 2012 order, ending Kilakila's unsuccessful seven-month effort to obtain access to the Board's records of its ex parte communications. The Board based its denial of the motion on the conclusion that Kilakila failed to show that any unpermitted ex parte communications occurred:

> Kilakila's Motion fails to show that any unpermitted ex parte communications occurred between the former hearing officer or any of the Board members and one of the parties in this case that would be a basis to reconsider this Board's prior Order[.]

That same day—November 9, 2012—the Board accepted the recommendation of the second hearing officer and granted the second conservation district use permit in favor of UHIfA, titled CDUP MA-11-04, for construction of the ATST on Haleakalā.

H. The Board Grants UHIfA the Conservation District Use Permit for the ATST Project

The Board's November 9, 2012 Findings of Fact, Conclusions of Law, and Decision and Order, granted CDUP MA-11-04 (hereinafter "2012 permit") with conditions that are substantially similar to the conditions required by the initial permit, CDUP MA-3542, granted on December 1, 2010 (hereinafter "2010 permit"). The December 20, 2010 letter informing UHIfA that the Board granted the first permit contained 18 conditions addressing construction activities, mitigation, and statutory requirements. The first 16 conditions listed in the Board's

2010 permit are virtually the same[20] as the first 16 conditions listed in the subsequently granted 2012 permit. The 2012 permit contains two additional conditions that are not listed in the prior 2010 permit. Thus the two permits are the same, except for two conditions contained in the latter permit: access to the previously constructed ahu and allowance of a new ahu.

I. ICA Appeal

Following the Board's decision granting the CDUP for development of the ATST telescope, Kilakila unsuccessfully appealed to the Circuit Court of the First Circuit (circuit court) seeking a stay and reversal of the Board's order granting the 2012 permit. Having lost its appeal in the circuit court, Kilakila appealed to the Intermediate Court of Appeals (ICA). In a memorandum opinion, the ICA affirmed the circuit court's August 20, 2013 Final Judgment and its "Order Affirming the Board of Land and Natural Resources' Findings of Fact, Conclusions of Law, Decision and Order in DLNR File No. MA-11-04." The ICA explained that although Jacobson engaged in improper ex parte communication, because Jacobson's report was stricken and the Board appointed a new hearing officer, Kilakila was not prejudiced. The ICA held that because Kilakila "does

[20] The December 20, 2010 letter and the Board's November 9, 2012 Decision and Order differ slightly in their reference to UHIfA. The letter refers to UHIfA as "the applicant," while the Decision and Order specifically references "the UHIfA."

not contend [the second hearing officer] was subject to any ex parte communication or political pressure," "any impropriety was cured when the Board discharged Jacobson and appointed [the second hearing officer]." The ICA thus adopted the Board's position that any prejudice to Kilakila was remedied by the appointment of the second hearing officer. The ICA's opinion does not explain how appointment of a new hearing officer remedied any prejudice arising from undisclosed ex parte communication with the Chairman during the deliberation period of the first contested case hearing.

II. Discussion

The location of Haleakalā's summit within the conservation district affords it certain protections. HAR § 13-5-1 (1994). As the stewards of the conservation district, the members of the Board of Land and Natural Resources are charged with the duty to implement the protections enumerated by the Hawaiʻi State Legislature. HRS § 183C-3 (2011). The signature legal procedure administered by the Board to assure that the protections of the conservation district are effectuated is the contested case hearing. HAR § 13-5-34(d) (1994). After a contested case hearing, it is the Board that determines whether a conservation district use permit is granted.

Kilakila asserts that the Board prejudged the 2012 permit, that ex parte communication "undermined the integrity of

the contested case hearing" and raised an appearance of impropriety, and that external political pressure was directly placed on the adjudicating decision-makers. Each of these issues presents a distinct legal issue as to whether the proceedings comported with due process.

Kilakila also contends the Board did not provide a reasonably clear explanation for its departure from the conclusion of the FEIS that the ATST would cause major adverse impacts to important cultural resources.

A.

1. The Board's Grant of a Conservation District Use Permit Prior to the Contested Case Hearing Constitutes Actual Prejudgment or the Appearance of Prejudgment

Kilakila raises the question, "[d]id the BLNR prejudge the issue by granting the CDUP before the contested case was held and then authorizing some construction activities to proceed pursuant to that permit prior to completion of the post hoc contested case hearing?" This court recently examined a similar issue in Mauna Kea Anaina Hou v. Board of Land & Natural Resources, 136 Hawaiʻi 376, 363 P.3d 224 (2015). In Mauna Kea, the Board voted to grant a CDUP to the applicants prior to, and despite repeated calls for, a contested case hearing. Id. at 381-82, 363 P.3d at 229-30. The Board subsequently granted a contested case hearing, assigned it to a hearing officer, and issued findings of fact, conclusions of law, and a decision and

order granting the conservation district use permit for construction of the Thirty Meter Telescope (TMT) on Mauna Kea. Id. at 384-87, 363 P.3d at 232-35. This court held that, under the facts of Mauna Kea, the appearance of prejudgment rendered the contested case hearing an inauthentic exercise of the contested case process. Accordingly, the conservation district use permit was vacated and the case remanded for a new contested case hearing. Id. at 399, 363 P.3d at 247.

The series of events in this case that culminated in the contested case hearing likewise suggest the reality or appearance of prejudgment. Although Kilakila repeatedly requested a contested case hearing through both written and oral requests, the Board took no action on Kilakila's requests for a contested case hearing. Kilakila I, 131 Hawaiʻi at 196, 317 P.3d at 30. Instead, the Board held public hearings—rather than a contested case hearing—in November 2010, and voted to grant the application at the final public hearing. Id. Thus, as in Mauna Kea, the Board issued the 2010 permit to UHIfA without a contested case hearing. Id. Also, as it did in Mauna Kea, the Board in the instant case granted the request for a contested case hearing after the permit had been issued. Id. at 198, 317 P.3d at 32. Accordingly, the Board's actions in this case—granting the 2010 permit and subsequently holding a contested

case hearing—are substantially similar to the agency actions that caused the appearance of prejudgment in Mauna Kea.

In Mauna Kea, this court held that the approval of the CDUP prior to the contested case hearing demonstrated that the Board appeared to have prejudged the permit and thus violated due process. Mauna Kea, 136 Hawaiʻi at 396-9, 363 P.3d at 244-7. "[S]imply stated, sequence matters." Id. at 393, 363 P.3d at 241. The sequence of events in which a permit is granted prior to a contested case hearing—"whether events were separated by two minutes or two months—plainly gives rise to the appearance of prejudgment[.]" Id.

Prejudgment and the appearance of prejudgment is a form of bias that is "constitutionally unacceptable" and prohibited as a violation of due process. Id. at 389, 363 P.3d at 237. There are few situations that "more severely threaten trust in the judicial process than the perception that a litigant never had a chance due to some identifiable potential bias." Id. at 390, 363 P.3d at 238. Where "there exists any reasonable doubt about the adjudicator's impartiality at the outset of a case, provision of the most elaborate procedural safeguards will not avail to create [an] appearance of justice." Sussel v. Honolulu Civil Service Comm'n, 71 Haw. 101, 108, 784 P.2d 867, 870 (1989) (citation omitted).

This case presents greater evidence of an appearance of prejudgment than the record in Mauna Kea. The Board, in deciding whether to grant a permit for the TMT project, included a condition in its approval of the permit that anticipated the permit would be revoked during a subsequent contested case hearing: "[i]f a contested case proceeding is initiated, no construction shall occur until a final decision is rendered by the Board in favor of the applicant or the proceeding is otherwise dismissed." Mauna Kea, 136 Hawaiʻi at 385, 363 P.3d at 233. The Board's grant of the permit for the ATST project contained no such condition. Rather, the 2010 permit for the ATST project remained in effect even though the Board later granted the contested case hearing.[21] As this court explained in Kilakila I, "[b]ecause 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[.]"[22] Kilakila I, 131 Hawaiʻi at 199, 317 P.3d at 33 (emphasis added). Thus, unlike the revoked CDUP in Mauna Kea, the ATST CDUP remained in

[21] In Mauna Kea, the court clarified "it does not matter whether or not the permit was stayed. BLNR should not have issued the permit prior to holding a contested case hearing." Mauna Kea, 136 Hawaiʻi at 393, 363 P.3d at 241.

[22] UHIfA informed the Board of its construction plans pursuant to the conditions of its December 20, 2010 letter. After Kilakila filed a motion for a preliminary injunction to stay UHIfA's construction activities, UHIfA responded to the motion in a letter to Kilakila's counsel and the Board's counsel, stating that it decided not to commence construction.

effect during the contested case hearing that followed the Board's initial approval of the permit. See Mauna Kea, 136 Hawaiʻi at 398, 363 P.3d at 246.

The appearance of prejudgment in a contested case hearing violates due process. To reach that conclusion in Mauna Kea the court analyzed whether the appellants "were given an opportunity to be heard at a meaningful time and in a meaningful manner." Mauna Kea, 136 Hawaiʻi at 390, 363 P.3d at 238. The procedures of a contested case hearing "are designed to ensure that the record is fully developed and subjected to adversarial testing." Id. at 391, 363 P.3d at 239. But, "that purpose is frustrated if. . . the decisionmaker rules on the merits before the factual record is even developed." Id. The Board's approval of the 2010 permit before the contested case hearing indicates that the hearing officer for the contested case hearing knew "BLNR's position on the permit before the first witness [was] sworn in." Id. The Board members are also susceptible to the appearance of prejudgment as they are aware of their earlier vote when they act on the hearing officer's recommendation. Such a process "does not satisfy the appearance of justice, since it suggests that the taking of evidence is an afterthought and that proceedings were merely 'mov[ing] in predestined grooves.'" Id. (emphasis added) (citation omitted).

The similarity between the conditions of the 2010 permit initially granted without a contested case hearing and the conditions of the 2012 permit granted after the contested case hearing also creates the appearance of prejudgment. The majority noted in Mauna Kea that "the high level of detail" that the Board provided in its findings, conclusions, decision and order was not sufficient to mitigate an appearance of prejudgment. Id. at 398, 363 P.3d at 246. The 2011 permit and the 2013 decision for the TMT project that the Board issued were "virtually indistinguishable documents." Id. This similarity indicated that "none of the testimonies, arguments, or evidence submitted to BLNR" during the contested case proceedings "were seriously considered." Id.

In this case, as in Mauna Kea, the two sets of conditions upon which the Board granted the permits are "virtually indistinguishable." Id. Sixteen of the conditions are exactly the same with language mirroring each other. The post-contested case hearing 2012 permit does contain two additional conditions that solely affect the use of the area by Native Hawaiian practitioners. These two additional conditions were the only conditions added after months of deliberation, hundreds of pages of briefing, and four days of contested case hearings. Thus, the Board's 2012 permit contains all but two of the same conditions contained in the previous decision of the

Board granting the 2010 permit without a hearing. The similarity suggests "less than full consideration was given to the voluminous legal and factual arguments and materials presented in the contested case hearing." Mauna Kea, 136 Hawai'i at 393, 363 P.3d at 241.

The concurrence contends that the first permit was "invalid" and that the second permit "superseded" the first permit. **Concurrence at 3**. This is not reflected in the record. Kilakila I remanded to the circuit court to stay or reverse the permit, but the permit was not invalidated prior to the commencement of the contested case hearing. Kilakila I, 131 Hawai'i at 206, 317 P.3d at 40. Rather, the first and second permits were both issued prior to this court's 2013 decision in Kilakila I. The Board failed to invalidate the first permit, the 2010 permit, prior to the contested case hearing despite requests from Kilakila beginning on February 11, 2011.

Additionally, the stipulation by the parties rendering the first permit void did not occur until January 30, 2014, and was not approved by the circuit court until February 7, 2014. The parties and the Board stipulated that the initial conservation district use permit, the 2010 permit that was

granted by the Board in December 2010, was void.[23] Although generally the invalidation of the first permit might ensure that Kilakila's due process rights were adequately protected in the contested case hearing on the second permit application, this is not the case here. The first permit was not rendered void until more than one year after the second permit——the 2012 permit at issue in this case——was granted by the Board on November 9, 2012. Thus, the first permit was valid throughout the course of the contested case hearing. Any suggestion that, prior to the Board's second approval of the permit, a stipulation rendering the 2010 permit void between Kilakila, UHIfA, and the Board removed the possible appearance of prejudgment is not persuasive. And the proposition that our Kilakila I decision invalidated the first permit before the Board's decision granting the second permit of November 9, 2012 is not possible given that the Kilakila I decision was not filed until 2013.

The concurrence also appears to suggest that the Board did not engage in prejudgment in granting the second permit. **Concurrence at 3.** The concurrence states that the second permit

[23] The stipulation was not included in the record for this case, but it is in the record for a related case currently on appeal, Kilakila ʻO Haleakalā v. Univ. of Hawaiʻi, 134 Hawaiʻi 86, 332 P.3d 688 (App. 2014), cert. granted, No. SCWC-13-0000182 (Sept. 12, 2014). I take judicial notice of the stipulation pursuant to Hawaiʻi Rules of Evidence Rule 201(b), which provides that a judicially noticed fact "must be one not subject to reasonable dispute" and must be "capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned."

was issued "after a contested case hearing and report by the second hearing officer, and a new vote by a reconstituted BLNR, which had several new members, including a new Chair." **Concurrence at 3.** Although a new hearing officer issued a new report, the new hearing officer did not hold new hearings.[24] The facts addressed in the original hearings were considered and incorporated into the Board's Findings of Facts, Conclusions of Law, Decision and Order. In addition, the 2012 permit was voted on by substantially the same board members as had reviewed the 2010 permit.[25] To consider the composition of the Board is to acknowledge that like the Board in Mauna Kea,[26] the composition of the Board is substantially the same. However, unlike in Mauna

[24] The Board authorized the new hearing officer "to hold additional evidentiary hearings, as deemed necessary by the hearing officer, to receive testimony from those witnesses that provided oral testimony during the prior evidentiary hearings," but limited the testimony to "the scope of each witnesses' prior testimony." Although the new hearing officer could have held additional evidentiary hearings, the record does not reflect that such hearings were held. The new hearing officer did conduct a site visit to the Haleakala High Altitude Observatories site on May 25, 2012. Oral argument by the parties was held before the Board on September 14, 2012.

[25] In 2012, the Board's Findings of Fact, Conclusions of Law, Decision and Order was signed by Chairman William Aila, Sam M. Gon III, Jerry Edlao, Robert Pacheco, and David Goode. The Findings of Fact, Conclusions of Law, Decision and Order provided to the court was not signed by John Morgan. On December 1, 2010, the first permit was orally approved with amendments by all board members except for Member Gon. The Board members present on December 1, 2010 were Chairperson Laura Thielen, Sam M. Gon III, Jerry Edlao, Ron Agor, John Morgan, and David Goode. Thus, the 2012 composition of the Board only differed from the 2010 composition by two members, one of whom was the Chair.

[26] I take judicial notice of the Board's composition in 2011 and 2013 during the proceedings in Mauna Kea pursuant to HRE Rule 201(b). From 2011 to 2013, the Board's composition differed by only one Board member. Compare this composition with that of the Board between 2010 and 2012, discussed supra, which varied by only two Board members.

Kea, one of the new members to the Board—the Chair—engaged in ex parte communication.

This court indicated in Mauna Kea that because the Board granted the permit before holding the contested case hearing, "[a]ppellants were denied the most basic element of procedural due process—an opportunity to be heard at a meaningful time and in a meaningful manner." Mauna Kea, 136 Hawaiʻi at 391, 363 P.3d at 239. As stated in Mauna Kea, the justice system must "be fair and must also appear to be fair." Id. at 389, 363 P.3d at 237. The assignment of the conservation district use application to a hearing officer to conduct a contested case hearing does not cure any appearance of prejudgment arising from the issuance of the permit prior to the contested case hearing. Id. at 393, 363 P.3d at 241.

Due to the Board's grant of the 2010 permit prior to commencing the contested case hearing and the Board's subsequent refusal to void the 2010 permit upon the commencement of the contested case proceedings, the 2010 permit was valid and operative throughout the deliberations process of both hearing officers and the Board. The existence of a valid permit during the contested case hearing for the second permit renders the instant record more replete with evidence of prejudgment than that in Mauna Kea. Moreover, unlike Mauna Kea, this case raises issues of ex parte communication and political pressure that may

constitute further due process violations of the contested case hearing process. And, unlike Mauna Kea, discovery was improperly denied the permit opponent who sought to understand the extent of ex parte communications with the Board by those who favored the permit. Thus, the due process infirmity in Mauna Kea that necessitated a new hearing is surpassed by the infirmity apparent in the instant record. No less a remedy is due Kilakila. The conservation district use permit should be vacated and a new hearing ordered.

2. Undisclosed Ex Parte Communications Raise the Significant Concern that Kilakila's Due Process Right to a Fair Tribunal Was Violated

The Board and UHIfA argue that no ex parte communications occurred in this case;[27] and if such

[27] UHIfA asserted in its Answering Brief to the ICA when discussing the ex parte meeting: "As no party was present, there was no ex parte communication." This novel position taken by counsel for UHIfA was shared by the Board. Per its counsel--the Attorney General's office for the State of Hawaiʻi--the Board likewise claimed in its Answering Brief that "[n]one of the communications identified or alleged by Kilakila are ex parte communications under HAR 13-1-37." The Board offered the proposition that the alleged communications with Jacobson did not constitute ex parte communications because: 1) "the communication did not come from a party" and 2) "the communication concerned the procedural status of the hearing, an exception to the ex parte prohibition." With this analysis, the Attorney General for the State of Hawaiʻi rejected settled jurisprudence defining communications between deliberating agency officials acting in a quasi-judicial capacity and nonparties interested in the outcome of the case as "ex parte" communication. Whether procedural or not, it is beyond cavil that any communication by an interested person with a judicial decision-maker about the matter under consideration without counsel for the parties present is ex parte communication. See, e.g., Portland Audubon Soc. v. Endangered Species Committee, 984 F.2d 1534, 1544 (9th Cir. 1993) (noting that an interested person need not "be a party to, or intervenor in, the agency proceeding" to be covered by the ban on ex parte communication); Prof'l Air Traffic Controllers Org. v. Fed. Labor Relations Auth., 685 F.2d 547, 570 (D.C. Cir. 1982) (discussing ex parte contact and concluding that "[i]t is simply (continued . . .)

communications did occur, those communications were permissible. Kilakila asserts that the contested case hearing was tainted by ex parte communication and the Board's refusal to disclose the extent of the ex parte communication. Kilakila raises two distinct issues as to the "taint" of the ex parte communication between government officials and the Board: first, ex parte communications undermine the integrity of the contested case hearing, and second, such communications suggest an appearance of impropriety.

a. The Decision-makers Engaged in Ex Parte Communications in Violation of HAR § 13-1-37

The Board and UHIfA claim that no impermissible ex parte communications occurred between the Board, Jacobson, the Governor's office, or the senior senator's office. The Board states that "[n]either the Governor, or his staff, nor Senator Inouye, or his staff, were parties to the administrative hearing." In response to Kilakila's argument that the senator's chief of staff was UHIfA's "agent," the Board stated "Kilakila ignores Senator Inouye's role as a politician representing the State of Hawaiʻi and the responsibility of the late senator to support his constituents." UHIfA likewise stated, "[t]here is

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(. . . continued)
unacceptable behavior for any person directly to attempt to influence the decision of a judicial officer in a pending case outside of the formal, public proceedings").

nothing improper about the Senator's office following up on a priority project identified by the science community and a decade in the making." According to the Board, the communications were permissible ex parte communications because the communications "were limited to when the decision would be forthcoming and the communications were not related to a particular result[.]" The arguments of the Board and UHIfA that no impermissible ex parte communications occurred lack merit.

i. The alignment of the government officials with a party.

The Hawaiʻi Administrative Rules prohibit communications between Board members and "representatives or agents" of a party. HAR § 13-1-37 provides

> No party or person petitioning to be a party in a contested case, nor the party's or such person's to a proceeding before the board nor their employees, representatives or agents shall make an unauthorized ex parte communication either oral or written concerning the contested case to the presiding officer or any member of the board who will be a participant in the decision-making process.

HAR § 13-1-37(a) (2009) (emphasis added). The term "representatives" of a party is undefined in the Hawaiʻi Administrative Rules, Title 13, chapter 1, which "governs practice and procedure before the board of land and natural resources." HAR § 13-1-1 (2009). This court has previously defined "representative" as "agent, deputy, substitute, or delegate usually being invested with the authority of the principal." ʻOlelo v. Office of Info. Practices, 116 Hawaiʻi 337,

350, 173 P.3d 484, 497 (2007) (citing Webster's Third New International Dictionary to analyze the language of HRS § 92F-3 (1993)). Accordingly, an entity or individual is a representative of a party "when it substitutes for the [party]." Id.

At a minimum, the evidence indicates that the senior senator's and the Governor's staff acted with UHIfA to serve as UHIfA's substitutes with the Chairman during the hearing process. The senator's chief of staff specifically offered to help UHIfA by "carry[ing] the uh message" for UHIfA to DLNR in her January 31, 2012 email to the UHIfA associate director.

The record of this cooperation between UHIfA, the senior senator's staff, and the Governor's staff offers insight into the March 21, 2012 ex parte meeting. Although UHIfA and Kilakila were not at the meeting, the senator's chief of staff and the Governor's chief of staff attended. The purpose of the meeting expressed in the March 21, 2012 email disclosed by the Governor's office, "to discuss the telescope, hearing[] officer and funding issue," is consistent with UHIfA's prior concerns regarding the ATST project. Specifically, the UHIfA associate director had explained in his January 30, 2012 email to the senator's chief of staff that "[b]y mid-March, the project will have burned through $4M and will bleed $.5M each month after that." The project's funding was a key concern for UHIfA and,

given the senior senator's and Governor's previous attempts to protect UHIfA's interests, the decision to call and participate in the March 21, 2012 ex parte meeting appears to be another example of the Governor and senior senator acting on behalf of UHIfA to engage in undisclosed ex parte communications with the contested case adjudicative officers. At the time of the March 21, 2012 email requesting the meeting, the senator's chief of staff intended to discuss the loss of funding——as she sought to do in January 2012 when she offered to "carry the . . . message" for UHIfA regarding the loss of funding if the permit were denied.

Accordingly, the record indicates that the offices of the senior senator and the Governor acted as substitutes for UHIfA. Thus, without the possible clarification of further discovery, an appearance arises that the ex parte communications by the senator's chief of staff and the Governor's chief of staff with the deliberating decision makers were as representatives of UHIfA.

ii. The nature of the communications was not procedural.

Although communications between a representative of UHIfA and the Board occurred, the communications, if disclosed, may be permissible if the nature of the communications was procedural. HAR § 13-1-37(b)(2) provides an exception to ex

parte communication where the communication is for: "[r]equests for information with respect to the procedural status of a proceeding."

The Board describes the months of undisclosed ex parte communications with those who contacted the hearing officer and the Chairman of the Board of Land and Natural Resources as solely "procedural."[28] The refutations in the record of the proposition that the undisclosed ex parte communications were merely procedural have been recounted. The Board offers no explanation how this record supports its argument that the ex parte communications with Jacobson were merely procedural and gave no rise to the appearance of impropriety. Instead, the Board simply declared there to be no appearance of impropriety—while refusing Kilakila's requests for documents pertaining to the communications. Without the benefit of additional discovery, the instant record renders unlikely the proposition that the ethical concern that Jacobson experienced as a result of the undisclosed ex parte communications was based upon mere procedural inquiries. In addition, although Jacobson's discharge may have cured the effect of the ex parte

[28] The Board described the communications as procedural in its March 29, 2012 Minute Order No. 15, titled "Order Discharging the Hearing Officer and Appointing a New Hearing Officer."

communications with him, it does not address the impropriety of ex parte communications with Board members.

The Board also applies its procedural explanation to justify the ex parte communications at the undisclosed meeting with the Chairman. The Board's two justifications of the meeting as procedural are unpersuasive. The first justification gave a procedural status explanation for the communications at the meeting that was not possible. The group assembled at the ex parte meeting could not have discussed "when the recommended decision in this contested case would be issued by the hearing officer, Steven Jacobson," because Jacobson had issued his report more than a week before the March 21, 2012 ex parte meeting. The second justification——that only the release of the final report of the Board was discussed——is unpersuasive for two primary reasons: the senator's chief of staff's email regarding the agenda of the meeting and the timing of the meeting itself. The email from the senator's chief of staff, which stated that the purpose of the March 21, 2012 ex parte meeting was "to discuss the telescope, hearing[] officer and funding issue," provides a more likely description of the topics discussed at the March 21, 2012 meeting given the timing of the meeting. The meeting occurred one day after Jacobson's public disclosure of the ex parte communications and pressure imposed on him, and two days prior to the March 23, 2012 hearing in which the Board and

the parties addressed Jacobson's ex parte communication with UHIfA's counsel. In the face of the issues immediately before the Board, it thus seems unlikely that the senator's chief of staff would call what appears to be an emergency meeting to only discuss when the Board's final decision would be filed. Indeed, the March 21, 2012 email sent by the Governor's office to the Attorney General's office one hour and forty minutes before the meeting confirmed the meeting was called to discuss the Haleakalā telescope;[29] no mention was made that it was about procedural matters.[30] The Board's procedural explanation further erodes in light of the evidence of the meeting and conversations involving the Chairman of the Board that occurred in January 2012——nearly two months before Jacobson exposed the ex parte

[29] The March 21, 2012 email from staff at the Governor's office to the Attorney General's office stated, "Now that I spoke with [the Governor's chief of staff], I think [the meeting will discuss] Haleakala, not Big Island."

[30] The concurrence suggests that, as attorneys, the Attorney General and the senator's chief of staff are to be accorded a presumption that all ex parte matters discussed were proper. However, there is no authority for such a presumption. To the contrary, based on the March 21, 2012 email referencing the ex parte meeting, the Attorney General and the senator's chief of staff intended to engage in ex parte communication with an adjudicative official about substantive matters before the official. The email plainly stated that the meeting was to discuss "the telescope, hearing[] officer and funding issue"——all substantive issues pertaining to the merits of the case. As attorneys, the Attorney General and the senator's chief of staff are mandated not to "seek to influence a . . . decision maker" nor "communicate as to the merits of the cause with a judge or an official before whom the proceeding is pending." Hawai'i Rules of Professional Conduct Rule 3.5(a), (d); see also HAR § 13-1-37 (providing no party or their representatives "shall make an unauthorized ex parte communication either oral or written concerning the contested case to the presiding officer or any member of the board who will be a participant in the decision-making process").

political pressure placed upon him. As noted supra, the emails describe cooperation between UHIfA, the Governor's office, and the senior senator's office intent on gaining approval of the permit in a timely manner that would preserve funding for the telescope.

The Board's refusal to produce documents in its possession describing the ex parte meeting further detracts from acceptance of its procedural explanation.[31] Whether documents in the Board's possession substantiate that the meeting was purely of a procedural nature remains unknown due to the Board's refusal to produce documentary evidence of its ex parte communications.

Notwithstanding the Board's denial of Kilakila's request for documentary evidence of ex parte communications with the Board Chairman in the possession of the Board of Land and Natural Resources,[32] the instant record of ex parte communications is not susceptible to a convincing

[31] The Board's staff emailed staff from the Governor's office on March 21, 2012 stating "Chairman Aila will attend todays [sic] 3 p.m. meeting on the Maunakea [sic] Telescope." Given the scheduling of the meeting it is evident that the Board's staff incorrectly stated the meeting was "on the Maunakea Telescope," rather than the ATST project. At the time of the ex parte meeting, the conservation district use application for the Thirty Meter Telescope on Mauna Kea was under review by a hearing officer appointed by the Board Chairman. Mauna Kea, 136 Hawai'i at 385-87, 363 P.3d at 233-35 (explaining a hearing officer was appointed in August 2011, and following a contested case hearing, the hearing officer issued his findings of fact, conclusions of law, and decision and order on November 30, 2012).

[32] For example, the March 21, 2012 email sent by the Chairman's office to the Governor's office confirming the Chairman's attendance at the March 21, 2012 meeting was withheld by the Board.

characterization as "procedural." Ex parte communications regarding procedural matters by their very nature may affect the merits of a case. For example, the United States Circuit Court for the D.C. Circuit noted that an ex parte communication from the United States Secretary of Transportation to a member of the Federal Labor Relations Authority (FLRA) acting in a judicial capacity may have been impermissible notwithstanding that the communication was of a procedural nature. Prof'l Air Traffic Controllers Org. v. Fed. Labor Relations Auth., 685 F.2d 547, 568 (D.C. Cir. 1982) (hereinafter PATCO II)(discussing ex parte contact without deciding impropriety because the communications "did not taint the proceedings or prejudice [the plaintiff]"). The Secretary of Transportation stated that he was not calling about the "substance" of the case, but expressed the desire of the Department of Transportation for an "expeditious handling of the case." Id. at 595 (Robinson, C.J., concurring). The court noted that the "procedural inquiry may be a subtle effort to influence an agency decision" and that it "would have been preferable" for the FLRA member to have reported the contact on the public record. Id. at 568. The concurring opinion expressed greater concern, stating, "I find these calls exceedingly troubling; equally disturbing is the lingering uncertainty as to how much influence they exerted on the voting

to expedite the case." Id. at 596-97 (Robinson, C.J., concurring).

Even assuming the scope of the ex parte meeting only concerned the timing of the Board's issuance of its final decision on the permit application, that communication was relevant to the merits of this case. Given that a primary focus of the ex parte communications sought by Kilakila was the possible loss of funding for the ATST project, any discussions of the decision's release dates were relevant to the substantive issue of loss of funding if the permit was not timely granted. The importance of the ATST project's funding is repeatedly mentioned throughout the January 2012 emails between the UHIfA associate director and the senator's chief of staff.[33] The funding concern was also ongoing throughout the initial hearing officer's deliberation process. Indeed, one of the specific purposes of the March 21, 2012 ex parte meeting identified in the March 21, 2012 email from the Governor's staff to the Governor's chief of staff was to discuss the "funding issue."

Because the ATST's funding would potentially be lost if the decision was not made quickly, any discussion as to the

[33] On January 30-31, 2012, the UHIfA associate director explained via email that the situation was so "dire" that "to keep from losing the project, we may have to start construction." The senator's chief of staff then explained the issue to the Governor's chief of staff, stating in her emails dated January 30, 2012 that the Governor's involvement was necessary because "uh and my feds [sic] are getting really really nervous about losing money for the atst [sic]" and "[t]his will be bad if we lose it."

timing of the report inexorably raises the appearance of a substantive discussion. The pressing issue was not only that a decision must be made quickly, but that it must also be made in favor of UHIfA. Thus, the ex parte communications cannot be relegated to mere inquiries of the procedural status unconnected to an attempt to encourage a decision in UHIfA's favor. Had the Governor or senior senator been solely interested in merely learning from Jacobson or the Board the timing of when the final decision would be issued—rather than pressuring the adjudicatory decision-makers to grant the permit in time to preserve funding—they could have done so in a manner free of ex parte communication that protected the integrity of the proceedings by including Kilakila. As the concurrence in PATCO II explained,

> Agencies, like courts, promulgate rules of practice to assist outsiders in communicating in proper fashion with decisionmakers. These channels are quite adequate to accommodate any information that legitimately could be sought from or provided to those who will judge the case. For a high government officer to bypass established procedures and approach, directly and privately, members of an independent decisionmaking body about a case in which he has an official interest and on which they will be called to rule suggests, at the minimum, a deplorable indifference toward safeguarding the purity of the formal adjudicatory process.

685 F.2d at 597 (emphasis added). The concurrence in PATCO II further observed that one call to an agency—even if the conversation involved a discussion of timing—could be felt as political pressure and "regardless of its actual effect, such a call could be perceived by the public as political pressure."

Id. Notwithstanding any evidence of as-yet-undiscovered ex parte communications concerning the conservation district use permit, the evidence of undisclosed ex parte communications with the Board uncovered by Kilakila far eclipses the phone call in PATCO II. At least one, perhaps two, face-to-face meetings and at least two conversations, one involving the Governor's office and one the senior senator's office, occurred with the Chairman during the Board's deliberation on whether to grant the permit.

In the March 21, 2012 ex parte meeting with both the Governor's office and the senior senator's office, it would have been difficult for the subject matter of the meeting to have been restricted solely to when the Board's final decision would be filed, as that date depended on numerous other substantive issues that would have to be addressed by the Board in order to provide a likely date for the Board's final decision. These include: whether the hearing officer would be removed; if so, what would happen with his report and recommendation; the process and timing of the appointment of a new hearing officer, including if the officer would again be an employee from another state agency; whether a new contested case hearing would be held; whether additional evidence would be considered; and whether new findings would be required. All of these substantive matters would require consideration by the Board in order to provide an anticipated date of its final decision.

The chorus of issues discussed at the March 21, 2012 ex parte meeting, or even the single "procedural" timing issue, viewed in the context of the matters under deliberation, were substantive. Accordingly, the communications between the senior senator's office, Governor's office, Jacobson, and the Board Chairman were impermissible ex parte communications.

b. The Undisclosed Ex Parte Communications Are Not Condoned

An ex parte communication with deliberating judicial officers[34] may lead to injustice during adjudicative proceedings. To allow those interested in the outcome of a proceeding to communicate with the adjudicative officer privately, without the opposing party present, is to invite distrust and the possibility of decisions made on grounds unknown to the opposing

[34] Although not defined in Title 13 of the Hawai'i Administrative Rules, which sets forth the rules for DLNR, other agency boards have defined "unauthorized ex parte communications" as:

> private communications or arguments with members of the commission, or its hearings officer as to the merits of a proceeding with a view towards influencing the outcome of the petition or proceeding.

HAR § 15-15-03 (2013) (providing Land Use Commission rules); see also HAR § 12-42-8(g)(19) (1981) (providing Hawai'i Public Employment Relations Board rules). The federal government has set forth a similar definition of ex parte communication. The federal Administrative Procedure Act defines ex parte communication broadly as including all communication not on the public record except for requests for status reports:

> "[E]x parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.

5 U.S.C. § 551(14) (2011).

party and the public. "At worst, an ex parte communication is an invitation to improper influence if not outright corruption." Moran v. Guerreiro, 97 Hawaiʻi 354, 373, 37 P.3d 603, 622 (App. 2001)(quoting J. Shaman, et al, Judicial Conduct and Ethics, at 159-60 (3d Ed. 2000).

The Hawaiʻi Revised Code of Judicial Conduct (HRCJC) provides helpful insight into the duty of adjudicative officers to abstain from undisclosed ex parte communication. See Sussel, 71 Haw. at 108-09, 784 P.2d at 870-71 (considering the code of judicial conduct in the context of administrative agencies that adjudicate). The HRCJC provides persuasive authority because in a contested case hearing, the presiding officer, who is the hearing officer or the Board, is authorized to perform judicial functions. Mauna Kea, 136 Hawaiʻi at 380, 363 P.3d at 228 ("A contested case hearing is similar in many respects to a trial before a judge: the parties have the right to present evidence, testimony is taken under oath, and witnesses are subject to cross-examination."). For example, the presiding officer of a contested case hearing has the power to "administer oaths, compel attendance of witnesses and the production of documentary evidence, . . . issue subpoenas, [and] rule on offers of proof . . . [and] on objections or motions." HAR § 13-1-32(c) (2009). In this sense, the two hearing officers and the members of the Board in this case performed judicial functions.

The HRCJC provides guidance in defining the parameters of ex parte communication with an adjudicative officer.[35] Specifically, a judge "shall not initiate, permit, or consider ex parte communications." HRCJC Rule 2.9(a). A judge may engage in non-substantive ex parte communication "for scheduling, administrative, or emergency purposes," but a judge must nonetheless "make[] provisions promptly to notify all other parties of the substance of the ex parte communication and give[] the parties an opportunity to respond." HRCJC Rule 2.9(a)(1)(B). Prohibition of all non-substantive ex parte communications and the requirement of immediate disclosure of all ex parte communications are important safeguards of the impartiality required of "administrative agencies which adjudicate as well as courts." Mauna Kea, 136 Hawaiʻi at 396, 363 P.3d at 244 (citation omitted). "[I]f we were to condone direct attempts to influence decisionmakers through ex parte contacts," then there "would be no way to protect the sanctity of the adjudicatory process." Portland Audubon Soc'y v. Or. Lands Coal., 984 F.2d 1534, 1543 (9th Cir. 1993) (citation omitted). Permitting undisclosed ex parte communications with adjudicating officials legitimizes private communication through which interested parties can impose fear of reprisal upon an

[35] Jacobson properly referred to the HRCJC to define his ethical duty; his review caused him to conclude "the Board's counsel was overlooking important issues relating to fairness."

adjudicative officer for a decision that, though not in favor of the powerful, is nonetheless following the rule of law.

The legal shield from undisclosed ex parte communication is a necessary protection for the parties in a contested case as well. This shield guarantees the most fundamental right due every citizen who becomes a party in the judicial system of Hawaiʻi: the right to a fair tribunal. A basic requirement of due process in both agency adjudication and court proceedings is a "fair trial in a fair tribunal." In re Water Use Permit Applications, 94 Hawaiʻi 97, 120, 9 P.3d 409, 432 (2000) (hereinafter Waiāhole) (citation omitted); see also Orangetown v. Ruckelshaus, 740 F.2d 185, 188 (2nd Cir. 1984) ("[T]he insulation of the decisionmaker from ex parte contacts is justified by basic notions of due process to the parties involved."). Recently, in Mauna Kea, we noted the axiom that fundamentals of just procedure require impartiality of "administrative agencies which adjudicate as well as courts[,]" and concluded that there is "no reason why an administrative adjudicator should be allowed to sit with impunity in a case where the circumstances fairly give rise to an appearance of impropriety and reasonably cast suspicion on his impartiality." Mauna Kea, 136 Hawaiʻi at 396, 363 P.3d at 244 (citing Brown, 70 Haw. at 467 n. 3, 776 P.2d at 1188 n. 3). The circumstances of

the Chairman in this case stands as an example of the jeopardy to due process posed by departure from the fundamental requirement that deliberating adjudicatory officials not engage in undisclosed ex parte communications about the matter before them. If disclosed, the ex parte meeting of March 21, 2012 and the ex parte conversations with the Governor's chief of staff and the senior senator's chief of staff in January 2012 would have offered far less reason for concern regarding the adjudicators' impartiality and the appearance of impropriety. And were the communications done in a manner cognizant of accepted practice allowing all sides to be present for communications with adjudicating officials, no specter of partiality and impropriety would attach to the decision of the Board to grant the CDUP for the ATST project. If, as suggested by the concurrence, the role of the Chairman is to be the ex parte point of contact for parties, their representatives, the Governor, other elected officials, and other interested entities who wish to discuss—without disclosure—contested case issues deemed to be procedural, future contested case decisions will continue to be haunted by misgivings about both the appearance and reality of fair decision-making.[36] **Concurrence at 5.**

[36] Commonly, in state and federal jurisdictions, it is the attorney general or an agency lawyer acting as the trained legal representative of the adjudicating agency who protects the integrity of the proceedings by communicating on behalf of the adjudicators with those who seek private (continued . . .)

The Board's employment of undisclosed "procedural" ex parte communication with politically influential interests during contested hearings appears to be an accepted policy. The Board's counsel informed Mr. Jacobson over the two months that he consulted with her that the undisclosed ex parte political pressure he experienced was permissible. She opined that as long as the pressure was not placed on Mr. Jacobson by a party, "no disclosures were required." The Board reiterated this conclusion in its Minute Order No. 23 explaining that the March 21, 2012 Chairman's meeting did not involve ex parte communication: "Inasmuch as no party was present during the meeting, there was no ex parte communication with the hearing officer or any member of the Board." The Board further legitimized the Chairman's ex parte communication by stating, "[w]hen carrying out their duties as Board members, the members of the Board interact with numerous people in various situations."

In Scott v. N.D. Workers Comp. Bureau, 587 N.W.2d 153 (N.D. 1998), the Supreme Court of North Dakota considered the

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(. . . continued)
access to adjudicatory officials during a contested case proceeding. See HRS § 28-4 (2009) (providing the attorney general shall "give advice and counsel to the heads of departments, district judges, and other public officers, in all matters connected with their public duties, and otherwise aid and assist them in every way requisite to enable them to perform their duties faithfully"). The importance of the attorney general assuming this role to protect the Chairman and the integrity of the contested case proceeding is apparent in this case.

practice of the Worker's Compensation Bureau to allow an interested nonparty—specifically the Bureau's outside counsel—to confer ex parte with the Bureau's decision-making official without disclosure to the claimant seeking worker's compensation. The Bureau's outside counsel consulted with the Bureau's Director of Claims and Rehabilitation, advised the Director of Claims and Rehabilitation that the administrative law judge's decision should be rejected, and drafted several versions of findings, conclusions, and orders for the Director of Claims and Rehabilitation to review. The Court reversed the agency's denial of the claim following a determination that the agency's practice was to allow its outside counsel to engage in undisclosed ex parte consultation with the agency decision-maker. Id. at 157-58. As the court explained, "[w]hen a governmental agency systematically disregards the requirements of law, reversal may be required to prophylactically ensure the government acts consistently and predictably in accordance with the law." Id. at 158 (citation omitted). In fashioning an appropriate remedy, the court noted the importance of reversal of the agency decision where there was no disclosure by the Board of the extent of its ex parte communications:

> [Disqualification of the hearing officer] is an effective remedy if the agency head or hearing officer advises the parties of the improper communication prior to ruling on the case. . . . However, when the improper ex parte communications come to light only after the final agency

> decision has been issued, the "cat is out of the bag" and another remedy must be sought.

Id. at 157. The court concluded, "there has been a clear showing of institutional noncompliance which constitutes a systemic disregard of the law, and the Bureau's conduct has been prejudicial to the integrity of the system, thereby warranting reversal." Id. at 158 (internal quotation marks omitted).

Similarly, the policy of the Board and Attorney General regarding the Board's use of undisclosed ex parte communications with politically influential interests during the contested case hearings requires that the Board's decision be vacated. Any less remedy would insufficiently address prejudice "to the integrity of the system" caused by institutionalized disregard of the law. To determine otherwise would perpetuate a culture of agency decision-making that promotes confidential ex parte communication with judicial officers while they deliberate. Indeed, the policy endorsed here would permit deliberating judicial officials to receive—without disclosure—ex parte communications from influential nonparties interested in the outcome of the proceedings. Such a policy allowing undisclosed ex parte communications between influential special interests and deliberating judicial decision-makers jeopardizes the due process rights of citizens—particularly politically powerless citizens.

c. The Degree of Prejudice Arising from Ex Parte Communications Between Government Officials and the Board Warrants Vacatur and Further Discovery

Although ex parte communication is not condoned, the sole fact that ex parte communication occurred does not require vacatur of an agency's decision. But, ex parte communication can rise to the level of prejudicial error, thus requiring vacatur of an agency's decision. See Found. Int'l, Inc. v. E.T. Ige Constr., Inc., 102 Hawai'i 487, 503, 78 P.3d 23, 39 (2003) (considering whether ex parte communication would appear "to a reasonable onlooker . . . [to be] prejudicial, providing the State with an advantage or depriving Foundation of the opportunity to argue its case"); Town v. Land Use Comm'n, 55 Haw. 538, 549, 524 P.2d 84, 91-2 (1974) (holding prejudicial error was committed where appellant "was not given the opportunity to present argument or rebuttal evidence of his own to counter the ex parte arguments presented by petitioner"). To consider the due process ramifications of the Board's ex parte communications and its policy of endorsing such communications, the factors considered by the United States Court of Appeals for the District of Columbia in PATCO II are instructive. The court considered the following factors:

> the gravity of the ex parte communications; whether the contacts may have influenced the agency's ultimate decision; whether the party making the improper contacts benefited from the agency's ultimate decision; whether the contents of the communications were unknown to opposing parties, who therefore had no opportunity to respond; and

> whether vacation of the agency's decision and remand for new proceedings would serve a useful purpose.

PATCO II, 685 F.2d at 564; see also Duffy v. Berwick, 82 A.3d 148, 156 (Me. 2013); Idaho Historic Pres. Council v. City Council of Boise, 8 P.3d 646, 652 (Idaho 2000). The court explained that these factors are considered to determine whether "the agency's decisionmaking process was irrevocably tainted so as to make the ultimate judgment of the agency unfair, either to an innocent party or to the public interest that the agency was obliged to protect." PATCO II, 685 F.2d at 564. But, because "the principal concerns of the court are the integrity of the process and the fairness of the result," these factors should not be mechanically applied. Id. at 565. Rather, a determination whether ex parte communications void an agency decision "must of necessity be an exercise of equitable discretion." Id. Sussel is instructive as to the discretion applied in reviewing the PATCO II factors in this case. The Sussel court explained that there is "no reason why an administrative adjudicator should be allowed to sit with impunity in a case where the circumstances fairly give rise to an appearance of impropriety and reasonably cast suspicion on his impartiality" and determined that a "showing of actual bias" was not necessary to disqualify an administrative adjudicator. Sussel, 71 Haw. at 110, 784 P.2d at 871. Thus, in considering the PATCO II factors, the court should consider whether the

facts demonstrate "an appearance of impropriety," rather than whether a showing of "actual bias" exists.

The first factor in considering the impact of the ex parte communications is the gravity of the communications. Though the Board's written orders condone the ex parte communications that occurred between the Board Chairman, senior senator's office, and the Governor's office by defining them as discussions relating to procedural matters, documentary evidence of undisclosed ex parte communications with the Chairman produced by Kilakila evince communications of a substantive nature supporting the need to grant the permit in a timely manner to avoid loss of funding for the ATST project. The refusal of the Board to produce any documentary evidence of its ex parte communications during its deliberations makes unknown whether there are additional ex parte communications with the Board or with the second hearing officer. Nonetheless, as noted supra, based on the instant record, the gravity of the known undisclosed ex parte communications is significant.

As to the second factor, "whether the contacts may have influenced the agency's ultimate decision," the timing of the ex parte communications suggests that the communications may have affected the Board's decision. PATCO II, 685 F.2d at 565. Ex parte communications occurring in the "crucial period between the close of oral argument . . . and the adoption of the

[order]" particularly calls into question the extent to which the adjudicating official considered the ex parte communications in making its decision. Home Box Office, Inc. v. Fed. Comm. Comm'n, 567 F.2d 9, 53 (D.C. Cir. 1977). Here, the impermissible ex parte communications occurred during the deliberations period of the first hearing officer and prior to the Board's grant of the 2012 permit. The record as it stands shows that pressure from undisclosed ex parte communications was so severe it compelled Jacobson to issue a public disavowal of his initial report and recommendation. Clearly, undisclosed ex parte communications also occurred with the Chairman during the deliberation period that followed the contested case hearing. However, in light of the incomplete record, the extent of the effect of additional ex parte communications on the Board cannot be ascertained.

PATCO II's third factor is whether the party making the improper contacts benefited from the agency's ultimate decision. PATCO II, 685 F.2d at 565. Here, the senior senator's and Governor's staff contacted the Chairman on UHIfA's behalf from January to March 2012. The Board subsequently granted the 2012 permit in favor of UHIfA in November 2012.

In considering the fourth factor, whether the contents of the ex parte communications were known to the opposing party, and whether the opposing party had an opportunity to respond to

the ex parte communications, significant questions of prejudice arise. PATCO II, 685 F.2d at 565. The ability of an opposing party to respond to arguments is a necessary component to a fair hearing. The ICA has explained that undisclosed communications from parties and non-parties "deprive[s] the absent party of the right to respond and be heard." Moran, 97 Hawaiʻi at 373, 37 P.3d at 622 (quoting J. Shaman, et al., Judicial Conduct and Ethics at 159-60 (3d Ed. 2000)). Further, undisclosed meetings or communication are inconsistent "'with the ideal of reasoned decisionmaking on the merits which undergirds all of our administrative law.'" Home Box Office, 567 F.2d at 56. Jacobson's disclosure and Kilakila's requests for disclosure have produced evidence that the Board adopted a policy wherein Kilakila was not informed of ex parte meetings and communications between decision-makers and government officials appearing to act in concert with UHIfA to achieve timely approval of the conservation district use application for construction of the ATST.

Here, the Board's denial of Kilakila's discovery requests precluded Kilakila from responding to any undisclosed statements made to the Chairman by the staff of the Governor or senior senator on UHIfA's behalf. The Board did so both by refusing to produce the documents and by rendering a decision without releasing any documentation of the undisclosed

communications. In so doing, not only did the Board shield itself from scrutiny by Kilakila of its undisclosed ex parte communications, the Board prevented appellate review of its actions depicted in any withheld documents. As a result, this court cannot know the extent of the ex parte communications' effect on the Board's decision.

PATCO II's fifth factor is whether vacatur and remand would serve a useful purpose. PATCO II, 685 F.2d at 565. Courts faced with a similar lack of a record have required evidentiary hearings to be held and additional discovery to be provided. For example, prior to its decision in PATCO II, the D.C. Circuit was faced with an incomplete record indicating that ex parte communications occurred. Prof'l Air Traffic Controllers Org. v. Fed. Labor Rels. Auth., 672 F.2d 109 (D.C. Cir. 1982) (hereinafter PATCO I). The court's review of the record left it "with a number of important but unanswered questions" and it was "not satisfied that the factual picture [the parties] assemble is yet complete." Id. at 112-13. Of additional concern to the court was that the parties detrimentally affected by the ex parte communication had not had "any opportunity to explore the effect that the newly discovered events may have had on [the Federal Labor Relations Authority's] decision." Id. at 113. The court thus ordered an evidentiary hearing "to determine the nature, extent, source, and effect of any and all ex parte

contacts and other approaches that may have been made to any member or members of the [Federal Labor Relations Authority] while the appeal . . . was pending before them[.]" Id. at 110. The court explained the evidentiary hearing was necessary due to the grave significance of impermissible ex parte communication on a proceeding:

> This shadow on the integrity of the administrative process cannot be summarily dismissed. Consequently, we are today initiating procedures to ensure a thorough probe.
>
> . . . .
>
> We regard the portents of improper communications with an administrative decisionmaker as grave; particularly in an adjudicatory proceeding in which the stakes were so high and on which national attention was focused with much concern, the suggestion of behind-the-scenes machinations is intolerable.

Id. at 111-113. As evidenced by the initial appeal in this case establishing Kilakila's right to a contested case hearing, placement of the ATST on Haleakalā is a protracted issue in which stakes are high. Because the Board did not consider undisclosed ex parte communications by non-parties on "procedural" matters improper, such communications may have been ongoing following the appointment of the second hearing officer and during the deliberation period of the Board. The behind-the-scenes communications subsequent to the contested case hearing but before the decision warrant vacatur of the CDUP and completion of the discovery begun by Kilakila to determine the extent and nature of the communications.

3. The Appearance of Impropriety Created by the Ex Parte Communications with the Chairman and the Board's Refusal to Disclose the Ex Parte Communications Require Vacatur and Further Discovery

The potential prejudice to the proceedings caused by the Chairman's ex parte communications and the Board's subsequent refusal to grant Kilakila's requests for disclosure constitute an appearance of impropriety sufficient to require that the Board's decision to grant the 2012 permit be vacated with instructions to the Board to grant Kilkila's discovery request for ex parte communications. Few situations "'more severely threaten trust in the judicial process than the perception that a litigant never had a chance' due to 'some identifiable potential bias.'" Mauna Kea, 136 Hawai'i at 390, 363 P.3d at 238 (citation omitted). Thus, "justice can perform its high function in the best way only if it satisfies the appearance of justice." Id. at 389, 363 P.3d at 237 (citation omitted). In other words, "justice must not only be done but must manifestly be seen to be done[.]" Sifagaloa v. Bd. of Trs. Of Emps. Ret. Sys., 74 Haw. 181, 190, 840 P.2d 367, 371 (1992). In the case of administrative agencies that perform adjudicative duties, such as the Board in this case, agencies must likewise demonstrate an appearance of justice and refrain from an appearance of impropriety. See Sussel, 71 Haw. at 109, 784 P.2d at 871 (explaining there is "no reason why an

administrative adjudicator should be allowed to sit with impunity in a case where the circumstances fairly give rise to an appearance of impropriety and reasonably cast suspicion on his impartiality").

Appearance of impropriety means "conduct that reasonable minds, with knowledge of all the relevant circumstances, would perceive as materially impairing the judge's independence, integrity, impartiality, temperament, or fitness to fulfill the duties of judicial office." HRCJC Terminology. The determination of whether an appearance of impropriety exists is "an objective one, based not on the beliefs of the petitioner or [adjudicator], but on the assessment of a reasonable impartial onlooker apprised of all the facts." Waiāhole, 94 Hawaiʻi at 122, 9 P.3d at 434 (citation omitted)(alteration in original). In other words, "[t]he test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired[.]" Office of Disciplinary Counsel v. Au, 107 Hawaiʻi 327, 338, 113 P.3d 203, 214 (2005) (citation omitted).

The action taken by the Board in response to Jacobson's single ex parte contact with a representative of a party is an instructive insight as to the need to permit

discovery and remand this case to the Board to allow Kilakila to address the appearance of impropriety. The single ex parte email communication between Jacobson and counsel for UHIfA created an appearance of impropriety sufficient to warrant Jacobson's discharge and invalidation of his decision. The ex parte communication by Jacobson to UHIfA was not related to the substance of the conservation district use permit; its purpose was to discover whether ex parte communication with the hearing officer had been initiated by UHIfA. In contrast, the number of ex parte communications with the Chairman far outnumber the single communication between UHIfA and Jacobson. The known ex parte communications with the Chairman involved one, and possibly two, meetings with the Governor's office and the senator's offices, at least two personal conversations with the Governor's office and the senator's office, and at least one email; all communications were with government officials who supported UHIfA's application. The impropriety of hearing officer Jacobson contacting a party one time to discuss whether it encouraged public officials to engage in ex parte communication created an appearance of partiality so significant as to warrant dismissal of the hearing officer and the striking of his decision. The multiple undisclosed ex parte communications with the Chairman in addition to the one involving hearing officer Jacobsen warrant a remand to the Board

to permit discovery of evidence of ex parte communications and determine the safeguards necessary to ensure the propriety of the next contested case hearing.

The degree to which the undisclosed ex parte communications give rise to an appearance of impropriety is also reflected in the decision of the Board to deny the requests for disclosure of documentary evidence of ex parte communications. The D.C. Circuit in PATCO II emphasized the importance of disclosing ex parte communications to prevent the appearance of impropriety:

> The disclosure of ex parte communications serves two distinct interests. Disclosure is important in its own right to prevent the appearance of impropriety from secret communications in a proceeding that is required to be decided on the record. Disclosure is also important as an instrument of fair decisionmaking; only if a party knows the arguments presented to a decisionmaker can the party respond effectively and ensure that its position is fairly considered. When these interests of openness and opportunity for response are threatened by an ex parte communication, the communication must be disclosed. It matters not whether the communication comes from someone other than a formal party or if the communication is clothed in the guise of a procedural inquiry.

PATCO II, 685 F.2d at 563 (emphases added). In this case, the Board refused to provide any disclosure of documentary evidence; and in its only attempt to address undisclosed ex parte communication the Board gave an inaccurate initial explanation of its March 21, 2012 meeting followed by one that was not

persuasive.[37] The Board's denial of discovery and its characterization of the purpose of the March 21, 2012 meeting could lead a reasonable onlooker to determine that the Board's "ability to carry out [its adjudicative] responsibilities with integrity, impartiality and competence [was] impaired." Au, 107 Hawaiʻi at 338, 113 P.3d at 214 (citation omitted).

In addition to the Board's initial inaccurate justification for the ex parte meeting, the Board's reasoning in denying Kilakila's requests for disclosure[38] could lead a reasonable person to question the impartiality of the Board in this case. Three reasons underlie the Board's refusal:[39] (1) Kilakila failed to establish that the Board's actions were improper; (2) Kilakila's request was overly broad; and (3) even if the Board's actions were improper, they were cleansed by the appointment of a new hearing officer. Each of these reasons lacks merit.

[37] The Board initially stated the purpose of the ex parte meeting was to determine when the recommended decision would be issued by the first hearing officer. However, the Board subsequently amended its explanation when it became aware that this asserted purpose was not possible as the first hearing officer's decision was already issued.

[38] Kilakila requested disclosure in its motions dated April 9, June 12, and September 27, 2012. Kilakila also requested disclosure in its March 22, 2012 response to Minute Order No. 14.

[39] The Board's rebuff of Kilakila's requests for disclosure is contained in three orders issued by the Board: its June 4, 2012 order, its July 13, 2012 order, and its November 9, 2012 order.

First, the Board contended Kilakila failed to provide sufficient evidence of ex parte communications to constitute an appearance of impropriety by the Board. A court can require "significant evidence of wrongdoing before allowing [a plaintiff] to conduct extra-record discovery," but it "cannot require them to come forward with conclusive evidence of political improprieties at a point when they are seeking to discover the extent of those improprieties." Sokaogon Chippewa Community v. Babbitt, 961 F. Supp. 1276, 1281 (W.D. Wis. 1997). The Board rejected Kilakila's motion for disclosure despite Kilakila's specific demonstration of undisclosed ex parte communications: the declaration from the hearing officer that he had experienced political pressure; emails disclosing the March 21, 2012 ex parte meeting involving the Governor's chief of staff, the senator's chief of staff, the Board Chairman, and the Attorney General; and emails between the senator's chief of staff and the UHIfA associate director, as well as between the senator's chief of staff and the Governor's chief of staff. Despite this panoply of evidence of ex parte communications, the Board continuously refused to disclose any documentation of its ex parte communications, including an email from the Chairman's office, obtained by Kilakila from the Governor's office, in which the Chairman's office confirms he will attend the ex parte meeting on March 21, 2012. Rather than recognizing the growing

appearance of impropriety, the Board refused Kilakila's requests by characterizing the evidence it received from Kilakila as mere evidence of permissible ex parte communications.

Second, contrary to the Board's position that Kilakila's request for disclosure was overly broad,[40] Kilakila's motion for disclosure did provide a time frame and context for the requested disclosure. Kilakila provided a time frame by limiting its request to communications related to the ATST project. This limitation inherently sets a time frame from UHIfA's CDUA submission in 2010 to the filing of Kilakila's first motion for disclosure. Kilakila also provided a context for the disclosure. In support of its requests for disclosure, Kilakila provided memoranda and documentation recounting specific examples of undisclosed ex parte communications that included the Chairman of the Board and influential government officials acting with UHIfA. The Board's denial of Kilakila's request as overly broad and speculative stands in contrast to the Governor's ready release of documents in response to Kilakila's request for "[a]ll emails, memoranda and correspondence that mention or relate to the Advanced Technology Solar Telescope (ATST) created after December 1, 2010 that were

[40] The Board asserted Kilakila's motions do not "provide a time frame or context for the requested disclosures and the motion may encompass communications that occurred long before this matter was the subject of a contested case."

received or generated by anyone in the Governor's office." In other words, the Governor's release of records encompassed documents involving the same time frame as documents requested from the Board, yet which the Board characterized as overbroad.

Third, in denying Kilakila's request for production of documents from the Board, the Board reasoned that no disclosure is necessary because it "remedied" the situation by replacing the first hearing officer with a second hearing officer:

> [A]ny prejudice that may have occurred as a result of communications with the former hearing officer has been remedied by the Board's discharge and replacement of the hearing officer.

However, there is no accompanying guidance in the Board's order as to how the replacement of Jacobson would remedy improper ex parte communications with the Board. Further, in making the decision to replace Jacobson, the Board held a hearing on March 23, 2012 but refused to create a record of the hearing. In preventing any record of the proceedings to be made, the Board acted in direct contravention of its rules. HAR § 13-1-32(d) (2009) ("The presiding officer shall provide that a verbatim record of the evidence presented at any hearing is taken unless waived by all the parties." (Emphases added)).

Under the circumstances of this case wherein evidence of ex parte communications between the Board and government officials favoring the ATST conservation district use permit was produced and a reasonable request for disclosure was made, the

Board's denial of disclosure of its undisclosed ex parte communications cannot redound to its benefit. As noted by the California Supreme Court "because the [agency] has refused to make copies of the reports of [the] hearing part of the record, . . . whether their contents are as innocuous as the [agency] portrays them to be is impossible to determine." Dep't of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd., 145 P.3d 462, 472 (Cal. 2006); see also Home Box Office, 567 F.2d at 54 ("[W]here, as here, an agency justifies its actions by reference only to information in the public file while failing to disclose the substance of other relevant information that has been presented to it, a reviewing court cannot presume that the agency has acted properly[.]"). This lack of disclosure, in part, led the California Supreme Court to reverse the agency's order. Dep't of Alcoholic Beverage Control, 145 P.3d at 472. Here, although the Board had an opportunity to demonstrate through disclosure the extent of the communications with the decision-makers, it refused to do so. The evidence of proven ex parte communications and the Board's unwillingness to allow access to documents demonstrating the extent of undisclosed ex parte communications compels the conclusion that the decision-making process suffers an appearance of impropriety.

Remand for further discovery is thus necessary to determine whether additional documentation of ex parte communication exists and to craft a commensurate remedy if necessary for a subsequent hearing. The concurrence raises the issue that Kilakila was aware of the ex parte meeting and of the communications between the Chairman and the governmental interests, yet did not request that the Chairman be disqualified. **Concurrence at 6.** As Kilakila stated in its response to Minute Order No. 14 regarding the ex parte communications with Jacobson, "[g]iven that neither Kilakila ʻO Haleakala nor this Board has a complete understanding of what happened here, Kilakila ʻO Haleakala cannot expect to know what the full remedy would be at least until full disclosure is made." Kilakila never received full disclosure from the Board despite repeated requests to the Board. Further discovery was necessary to apprise Kilakila of the extent of undisclosed ex parte communications with the Board from the Governor's office, the Senator's office, or the UHIfA. Only after a full understanding of the extent of ex parte communication would Kilakila be equipped to request an appropriate remedy, including disqualification of the Chairman or a request for an additional hearing to counter any information provided to the Board ex parte.

4. The Effect of Political Pressure on the Contested Hearing Process

Kilakila also contends that the contested case hearing for the ATST project was tainted by political pressure on the decision-makers. The pressure upon Jacobson is evident from the consequences of such pressure—namely, Jacobson was forced to release an incomplete report that he subsequently disavowed. The degree of pressure on the Board is as yet undetermined in view of the lack of discovery. However, it is known that the Chairman participated in at least one, perhaps two, undisclosed meetings with government officials in person and engaged in at least two additional undisclosed ex parte communications—one with the Governor's office and one with the senior senator's office—that concerned their interest in the ATST project.

"Where an agency performs its judicial function, external political pressure can violate the parties' right to procedural due process, thereby invalidating the agency's decision." Waiāhole, 94 Hawaiʻi at 123, 9 P.3d at 435. The due process right at stake when outside political influence is exerted upon a decision-maker is the right to an impartial decision. See Sussel, 71 Haw. at 103, 784 P.2d at 868 (An "impartial tribunal is an essential component of due process in a quasi-judicial proceeding[.]"); Mauna Kea, 136 Hawaiʻi at 389, 363 P.3d at 237 (explaining "a biased decisionmaker [is]

constitutionally unacceptable" (citation omitted)). This due process right to an impartial decision-maker free of outside political influence has been described as "the sine qua non of American judicial justice." Waiāhole, 94 Hawaiʻi at 124, 9 P.3d at 436 (quoting Pillsbury Co. v. Fed. Trade Comm'n, 354 F.2d 952, 964 (5th Cir. 1966)). Where a sufficient nexus exists between the conduct of the government official and the decision-maker, an appearance of impropriety exists that would warrant reversal. Id. at 126, 9 P.3d at 438.

a. A nexus may exist between the political pressure exerted by the senior senator and the Governor on the Board decision-makers.

Whether political influence is sufficient to invalidate an agency's decision requires an examination of "the nexus between the pressure and the actual decision maker." Waiāhole, 94 Hawaiʻi at 124, 9 P.3d at 436 (quoting ATX, Inc. v. U.S. Dept. of Transp., 41 F.3d 1522, 1527 (D.C. Cir. 1994)). In Waiāhole, this court considered "[t]he relation between the communications and the adjudicator's decisionmaking process." Id. (citation omitted). For example, "congressional actions not targeted directly at the decision makers—such as contemporaneous hearings—do not invalidate an agency decision." ATX, 41 F.3d at 1528; see also Waiāhole, 94 Hawaiʻi at 124-25, 9 P.3d at 436-37 (holding requisite nexus did not exist where governor's statements regarding his view of the case "arose in public

forums apart from the instant proceeding and reached the Commission indirectly"). The court applied this analysis in Waiāhole to determine whether public comments by the Governor regarding his opinions on the merits of the case constituted political pressure sufficient to violate due process. Our court declined to invalidate the decision of the agency on the basis of the Governor's comments because the comments were publicly expressed and not directed personally to the agency decision-makers. Waiāhole, 94 Hawaiʻi at 124-25, 9 P.3d at 436-37. Similarly, in ATX, the pressure was insufficient to invalidate the adjudication because the alleged political pressure, exerted through the introduction of two bills and multiple letters, did not have a direct nexus with the decision-maker. ATX, 41 F.3d at 1528. The introduction of the bills was analogous to contemporaneous hearings not targeting a decision-maker. Id. The court held that the letters did not have a nexus with the decision-maker because the decision-making process was "insulated . . . from congressional interference." Id.; see also Peter Kiewit Sons' Co. v. U.S. Army Corps of Engineers, 714 F.2d 163, 170 (D.C. Cir. 1983) (holding no political interference where a United States senator communicated with Department of Defense officials but not with the ultimate decision-maker).

In contrast, where the nexus between the political pressure and the decision-maker has been direct, courts have invalidated agency decisions. For example, political pressure placed directly upon commissioners of the Federal Trade Commission during public hearings before a United States Senate subcommittee caused the United States Court of Appeals for the Fifth Circuit to find a violation of procedural due process rights in the pending agency hearing before a hearing officer appointed by the Federal Trade Commission. Pillsbury Co., 354 F.2d at 964. The subcommittee "focuse[d] directly and substantially upon the mental decisional processes" of the Federal Trade Commission "in a case which [was] pending before it," and therefore directly intervened in the agency's adjudicative function. Id.

Here, the offices of the senior senator and the Governor directly contacted the Chairman without disclosure. The officials chose to express their requests privately rather than publicly, as in Waiāhole and ATX. Thus, the pressure from the Governor and the senior senator was applied directly to the Chairman through private, face-to-face meetings as well as additional ex parte communications.

Although the majority acknowledges that the Chairman was in direct ex parte contact with the Governor's chief of staff and the senator's chief of staff at the ex parte meeting,

the majority concludes that improper political influences did not taint the Board's decision. Specifically, the majority states that "the communications here do not show evidence of 'direct contact' with BLNR over the 'merits of the dispute.'" **Majority at 37.** The majority reaches this conclusion by determining that "there is no evidence that [at the ex parte meeting] they discussed anything other than the timing of BLNR's final decision following the contested case hearing." **Majority at 38.** To the contrary, the record contains substantial evidence that the merits of the dispute were to be discussed at the March 21, 2012 ex parte meeting; specifically, an email sent less than three hours before the ex parte meeting confirms the topics identified for discussion were "the telescope, hearings officer and funding issue"——each of which are matters of substance. The sole basis for the majority's conclusion that the merits were not discussed at the undisclosed meeting is the Board's second explanation for the meeting, issued in its Minute Order No. 26 more than three months later, that the sole topic of discussion was the release of the Board's final decision. While this order is interpreted by the majority to mean that "the telescope, hearings officer and funding issue" were not discussed with the Chairman, the order is also subject to a contrary interpretation as an acknowledgement by the Board that the matters identified in the March 21, 2012 email were

discussed, but only in the context of the procedural nature of the timing of the final decision by the Board. Under this view, discussion of core substantive issues pertaining to the telescope, hearing officer, and funding are transformed from substantive to procedural matters once the Board defines the discussions as procedural.

Prior communications with UHIfA offer additional evidence that the meeting was to discuss the merits of the case, i.e. the need to grant the permit in a timely manner to prevent loss of funding. The two direct communications between the Chair, the Governor's office, and the senator's office in January 2012 were due to the need for a timely decision on the permit in order to protect funding for the telescope. Thus, all documentary evidence in the record—the March 21, 2012 email and the January 2012 emails—are consistent with discussion of the merits. A contrary interpretation that no substantive matters were discussed arises only from the declaration of the Board. Had the Board not repeatedly refused Kilakila's requests for disclosure, the Chairman's notes of what was discussed at the ex parte meeting—as well as any emails regarding the meeting—could have supported its exercise of discretion to meet privately and engage in undisclosed ex parte communications. As the United States Court of Appeals for the D.C. Circuit stated, "where, as here, an agency justifies its actions by reference only to

information in the public file while failing to disclose the substance of other relevant information that has been presented to it, a reviewing court cannot presume that the agency has acted properly[.]" Home Box Office, 567 F.2d at 54. This court cannot presume that political influence did not taint the Board's decision without full disclosure by the Board.

b. The status of the senior senator and the Governor exacerbates the political pressure imposed on the decision-maker.

To understand the significance of the nexus between the political pressure and the decision-maker, this court has considered as an additional factor the status of the individual or entity exerting pressure on the decision-maker.

The status of the entity or individual may heighten the pressure exerted on the decision-maker and may increase the pressure to "the level of interference that courts have deemed violative of due process." Waiāhole, 94 Hawaiʻi at 124, 9 P.3d at 436; see also In re Larsen, 616 A.2d 529, 562 (Pa. 1992) (noting "[t]he appearance of impropriety raised by the improper ex parte communications" was "exacerbated" when the individual exerting pressure stood in a "position of authority" over the decisionmaker). To evaluate the degree of political influence, this court has considered whether the "interference [was] by an office having superior status or some control over the salary or tenure of the decisionmaker." Waiāhole, 94 Hawaiʻi at 125, 9

P.3d at 437. Factors reflective of the power of the authority engaging in ex parte communication with the decision-maker were considered in Jarrot v. Scrivener, 225 F. Supp. 827 (D.D.C. 1964). In Jarrot, the court explained that the government officials exerting pressure on the members of the District of Columbia Board of Zoning Adjustment "possess[ed] vast power to bestow or not to bestow benefits of various kinds upon subordinate employees" and the board members "could not fail to be aware that they would incur administrative displeasure if they decided the appeal unfavorably." Id. at 834.

Both the senior senator and the Governor possessed significant status. The senior United States senator was a major political figure in Hawaiʻi. In 2012, when his staff was in contact with the Board Chairman, the senior senator was the chair of the Senate Appropriations Committee and the president pro tempore of the United States Senate, making him third in line to the presidency. Christopher M. Davis, The President Pro Tempore of the Senate: History and Authority of the Officer, Congressional Research Service 9, 21 (Sept. 16, 2015). The senior senator was also the "second-longest serving Senator in the history of the [United States Senate] chamber," representing Hawaiʻi in Congress "from the moment [Hawaiʻi] joined the [United States]." Press Release, The White House, Statement by the

President on the Passing of Senator Daniel Inouye (Dec. 17, 2012).

The Governor is the highest-ranking state official. He nominates and appoints all members of the Board of Land and Natural Resources. Haw. Const. art. V, §§ 1, 6; HRS § 171-4(a) (2011). Thus, the Governor "occupies an obvious position of influence." Waiāhole, 94 Hawaiʻi at 124, 9 P.3d at 436. Because the Governor appoints the Board members, "[w]e do not take lightly the governor's legitimate supervisory interest and role with respect to the [Board]." Id.; see also Haw. Const. art. V, § 6; HRS § 171-4(a) (2011). Accordingly, the Governor holds a substantial influence over the Chairman and the Board.

Public officials such as the senior senator and the Governor are legally empowered to provide leadership and insight commensurate with their elected offices by voicing their opinions in public forums. Nonetheless, "public officials must also be mindful of the broader public interest in the fairness and integrity of the adjudicatory process." Waiāhole, 94 Hawaiʻi at 127, 9 P.3d at 439. Undisclosed ex parte communications with deliberating decision-makers is thus not an avenue available to public officials.

Review of this record is done mindful that it is not actual unfairness or actual partiality that is required to constitute a violation of the right to an impartial tribunal.

It is the "probability of unfairness" that is at issue: "our system of [justice] has always endeavored to prevent even the probability of unfairness." Sussel, 71 Haw. at 107, 784 P.2d at 870 (citation omitted).

Given the incomplete record and the significant questions raised by Kilakila regarding the extent of political pressure on the Board, Kilakila is entitled to discover from the Board its record of ex parte communications.

B.

1. The Board's Findings of Fact, Conclusions of Law and Decision and Order Depart from the Final Environmental Impact Statement

The final environmental impact statement prepared for UHIfA in support of its conservation district use application found the project would have major, adverse, and long-term direct impacts on traditional cultural resources.[41]

> Construction and operation of the proposed ATST Project at either the Preferred Mees or Reber Circle sites would result in major, adverse, short- and long-term, direct impacts on the traditional cultural resources within the [region of influence]. No indirect impacts are expected. Mitigation measures would be implemented, and while helpful, they would not, however, reduce the impact

[41] For the ATST project, a joint federal and state FEIS was prepared by the National Science Foundation (NSF). In general, an environmental impact statement is an informational document that "discloses the environmental effects of a proposed action, effects of a proposed action on the economic welfare, social welfare, and cultural practices of the community and State, effects of the economic activities arising out of the proposed action, measures proposed to minimize adverse effects and alternatives to the action and their environmental effects." HRS § 343-2 (2010); see also Mauna Kea Power Co. v. Bd. of Land & Natural Res., 76 Hawaiʻi 259, 265, 874 P.2d 1084, 1090 (1994).

> intensity to moderate: impacts would remain major, adverse, long-term and direct.

The FEIS explained that Native Hawaiians in interviews stated the ATST project will not only cause major adverse impacts to cultural resources, but will "compound the adverse impacts of the already existing facilities." In finding that the construction activities alone will have a major, adverse direct impact on cultural resources, the FEIS noted evidence of the cultural connection of Native Hawaiians to the Mees Site. For example, the FEIS stated that "[f]or some Kanaka Maoli (Native Hawaiians), the physical excavation of the cinder, in and of itself, is seen as a desecration of the kinolau or body of Pele." "[T]here is a belief that to go forward with the proposed ATST Project would result in the desecration of a sacred site, with some equating the effects to building an observatory next to the Wailing Wall in Jerusalem or within the city of Mecca." The FEIS also noted that comments and testimony from the Native Hawaiian community indicated that "there is a necessity for many people to have an unimpeded view plane from mountain to ocean, particularly when participating in ceremonial activities." The height and color of the ATST project would "impede the view plane which is seen by some as a personal affront to their cultural beliefs." The FEIS also noted that "[r]esponses to the proposed ATST Project were deeply emotional

and, for some, the idea of an additional building atop the summit was physically painful."

To grant the CDUA, the Board was required to find that the ATST project would not cause a substantial adverse impact on cultural resources.[42] Thus, approval of conservation district permit MA-11-04 by the Board was based on a departure from the conclusion of the final environmental impact statement that the project would cause major, adverse, long-term and direct impacts on traditional cultural resources.[43] Based on the same facts

[42] Subsection (4) of HAR § 13-5-30(c) requires that a CDUP only be granted if "the proposed land use will not cause substantial adverse impact to existing natural resources within the surrounding area, community, or region." (Emphasis added). Natural resources include "resources such as plants, aquatic life and wildlife, cultural, historic, recreational, geologic, and archaeological sites, scenic areas, ecologically significant areas, watersheds, and minerals." HAR § 13-5-2.

[43] Section 13-5-30(c)(4) does not allow proposed actions that would cause a "substantial adverse impact," but does not define this term. Rather than discussing the impact in terms of "substantial" impact, the FEIS refers to the potential impact as "major adverse impact." A major adverse impact on cultural, historic, and archaeological resources is defined as:

> disturbance of a site(s) results in loss of integrity and impact(s) would alter resource conditions. There would be a block to, or great effect on, traditional access, site preservation, or the relationship between the resource and the affiliated group's body of practices and beliefs, to the extent that the survival of a group's practices and/or beliefs would be jeopardized. This is analogous to a determination of adverse effect under Section 106 of the [National Historic Preservation Act], and measures to minimize or mitigate adverse effects cannot be agreed upon that would reduce the intensity of impacts under [the National Environmental Policy Act's mitigation requirements] from major to moderate.

Given that permit applicants are required to provide an environmental assessment or environmental impact statement pursuant to HAR § 13-5-31(a)(1) (1994), it appears the FEIS's definition of "major adverse impact" would be at least the equivalent of "substantial adverse impact."

considered in the FEIS, the Board found that because other facilities were constructed on Haleakalā "the addition of the ATST Project would only slightly increase the degradation of the summit as a traditional cultural property." The Board's conclusion that the presence of previously constructed telescopes meant that the ATST would just slightly degrade Haleakalā as a cultural resource was not a determination shared by the FEIS.[44] The Board's focus on the slight increase in the

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[44] The FEIS considered the cumulative effect of the ATST Project at the Mees Site on cultural resources as incremental, but also major, adverse, long-term, and direct:

> The effects on traditional cultural resources resulting from past and present actions are major, adverse, direct long-term. The construction and operation of the proposed ATST Project within the [region of influence] for traditional cultural resources at the Preferred Mees site would continue to, cumulatively, have major, adverse, long-term, direct effects. The proposed ATST Project would have a major impact on Native Hawaiians from conducting their traditional cultural practices, in particular, because of the size and color of the proposed ATST. Also, conducting traditional cultural practices often requires an uninterrupted view of the summit area is often cited as necessary to make an emotional and physical connection to a place of importance. Therefore, because of the past construction of manmade structures on the summit and the current view, which is already interrupted, the addition of the proposed ATST Project would be incremental in the degradation of the summit as a traditional cultural property.
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> . . . .
>
> While there is no way to quantify the cumulative effects of the incremental addition on traditional cultural practices and spiritual values, in consideration of the past and present actions, the addition of the proposed ATST Project and foreseeable future actions would result in readily detectable, localized effects, with consequences at the regional level to traditional cultural practitioners within greater Hawaiʻi. Therefore, the cumulative effects on

(continued . . .)

degradation of Haleakalā ignores the FEIS's determination that the ATST project would have a major, adverse direct impact.

In support of its determination that the project would not have a substantial adverse impact, the Board also relied upon the mitigation measures discussed in the FEIS that UHIfA and the NSF committed to in order "to reduce the impact to all resources." The Board stated "[t]he impacts of the ATST Project . . . must be considered together with the proposed mitigation measures that UHIfA and NSF have already committed to put into effect as set forth in the FEIS." The Board concluded that "[t]he proposed land use, when considered together with all minimization and mitigation commitments discussed above and with the additional conditions contained in this Decision, will not cause substantial adverse impact to existing natural resources within the surrounding area, community or region." The Board's conclusion directly contradicts the FEIS's determination that "[i]mplementation of these mitigation measures would be helpful, but they would not reduce the intensity of the impacts to a lower threshold." In other words, based on a review of the same proposed mitigating measures, the FEIS rejected the position

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(. . . continued)

> traditional cultural resources of the proposed ATST Project combined with past and present and foreseeable future actions would be major, adverse, long-term, and direct[.]

that the implementation of the mitigation measures would remove the major, adverse, long-term, and direct impact of the ATST.

The final basis for the Board's determination that the ATST project would not cause a substantial adverse impact on cultural resources was its consideration of mitigation measures not discussed in the FEIS.[45] The mitigation measures included: construction of an east-facing ahu, the establishment of an ATST Native Hawaiian Working Group, the removal of unused facilities at the project site, the feasibility of a shelter for cultural practitioners at the project site, acknowledgment of the significance of Haleakalā and an expression of NSF's gratitude in all scientific publications, and the setting aside in perpetuity of an area within the project site of 0.55 acres "for the sole reverent use of [N]ative Hawaiians for religious and cultural purposes." Kilakila contends "there is . . . no nexus between the impacts . . . and the mitigation measures" and "there is no evidence in the record that the mitigation measures would actually reduce the impact of the ATST to less than substantial."

Our court has held that "where the record demonstrates considerable conflict or uncertainty in the evidence, the agency

[45] The Board stated "[m]itigation measures are intended to reduce the duration, intensity or scale of impacts or to compensate for the impact by replacing or providing substitute resources or environments. . . . UHIfA and NSF have committed to mitigation measures to reduce the impact to all resources."

must articulate its factual analysis with reasonable clarity, giving some reason for discounting the evidence rejected." Waiāhole, 94 Hawaiʻi at 163-64, 9 P.3d at 475-76; see also In Re ʻĪao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications, 128 Hawaiʻi 228, 251, 287 P.3d 129, 152 (2012) (remanding the case because the water commission did not explain its focus on amphidromous species above the evidence of other instream uses). The need for this requirement is apparent in this case, where the Board heavily relies on the mitigation measures to justify its decision to find no substantial adverse impact on natural and cultural resources.[46] In addition, the agency must also explain its proposed mitigation measures:

> While the agency is not required to develop a complete mitigation plan detailing the precise nature of the mitigation measures, the proposed mitigation measures must be developed to a reasonable degree. "A perfunctory description or mere listing of mitigation measures, without supporting analytical data, is insufficient to support a finding of no significant impact."

Malama Makua v. Rumsfeld, 163 F. Supp. 2d 1202, 1218 (D. Haw. 2001) (citations omitted). However, no explanation is provided as to how these allegedly mitigating factors—such as publications acknowledging the cultural significance of Haleakalā, construction of an additional ahu, a shelter for

[46] As discussed supra, HAR § 13-5-2 defines natural resources to include cultural resources. HAR § 13-5-30(c)(4) does not authorize a conservation district use permit unless the proposed project "will not cause substantial adverse impact[s] to existing natural resources."

cultural practitioners, or the set aside of a half-acre——would ameliorate the effects of the construction of a telescope the size of the ATST. See id. Absent such an analysis, the mitigation measures referenced by the Board lack a meaningful connection to the cultural impact identified in the FEIS. Compounding the issue of whether the Board's departure from the findings of the FEIS was an arbitrary decision constituting an abuse of discretion is the appearance of impropriety and political pressure arising from undisclosed ex parte communication by the deliberating Chairman; the appearance of prejudgment arising from the granting of the original permit without a contested case hearing that remained valid throughout the subsequent contested case hearing for the second permit; and the refusal of the Board to allow discovery of any documents in its possession reflecting ex parte communication with the Board during its deliberations.

On this record, the issue of whether the Board's decision was based upon undisclosed ex parte communications and political influence——rather than the merits——lingers. The concurrence duly notes that the Board has a duty to consider "the State's obligations" under two unique provisions of our constitution:

> Article XI, section 1:
>
> > For the benefit of present and future generations, the State and its political subdivisions shall

> conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.
>
> All public natural resources are held in trust by the State for the benefit of the people.

Article XII, section 7:

> The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by the ahupuaʻa tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.

Concurrence at 7-8 (Citing Haw. Const. art. XI, § 1; id. art XII, § 7).

However, Kilakila cannot know if the State properly considered its constitutional obligations when approving the 2012 permit.[47] It was not present for the ex parte communications that occurred in person and through emails with the Chairman. It was not informed of the communications even though they took place while the Board was deliberating. Nor, after learning about the Chair's communications with political officials whose interests aligned with its opposition, was

[47] Access to justice requires access to information. The need for access to information is apparent where, as here, indigenous people seek information supplied to deliberating judicial officials regarding their cultural lands. See U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), 46 I.L.M. 1013 (2007) (providing that indigenous peoples are entitled to "a fair, independent, impartial, open and transparent process"). These international ideals are in accord with the Hawaiʻi Constitution, which provides for the protection of "all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes." Haw. Const. art. XI, § 1; id. art XII, § 7.

Kilakila permitted to obtain documents describing the ex parte communication. Without completion of the discovery sought by Kilakila, its opportunity to know whether its cultural and environmental rights under Article XI Section 1 and Article XII Section 7 of the Hawaii Constitution were impartially considered is lost.

Under these circumstances, the record does not contain evidence sufficient to support a finding that Kilakila was accorded equal access to an impartial decision-maker. Kilakila has again not received a hearing comporting with due process—notwithstanding its successful due-process challenge to the first decision of the Board granting the Conservation District Use Permit for construction of the ATST telescope. See Kilakila ʻO Haleakalā v. Bd. of Land & Nat. Resources, 131 Hawaiʻi 193, 206, 317 P.3d 27, 40 (2013).

III. Conclusion

Prejudgment of the conservation district use permit application prior to the contested hearing, undisclosed ex parte communications with adjudicative officers during deliberations, and the failure of the Board of Land and Natural Resources to supply with reasonable clarity a factual analysis in support of its departure from the finding of the FEIS that the construction and operation of the ATST telescope would cause major, adverse, and long-term direct impacts on traditional cultural resources

require that the conservation district use permit be vacated. Also warranted is a remand of this case to the Board of Land and Natural Resources with instructions to grant Kilakila's request to the Board for production of any ex parte communications with members of the Board regarding the ATST excepting (1) communications between Board members; and (2) communications between any Board member and the Board's counsel. After discovery, Kilakila would have sufficient information to request any remedies it deems necessary to ensure its next contested case hearing would be a fair one.

/s/ Michael D. Wilson