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IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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KIAʻI WAI O WAIʻALEʻALE, an unincorporated association;
FRIENDS OF MĀHĀʻULEPŪ, a nonprofit corporation,
Petitioners and Respondents/Plaintiffs-Appellants/Appellees,

vs.

BOARD OF LAND AND NATURAL RESOURCES, STATE OF HAWAIʻI,
Respondent and Petitioner/Defendant-Appellee/Appellant,

and

KAUAʻI ISLAND UTILITY COOPERATIVE,
a domestic cooperative association,
Respondent/Defendant-Appellee/Appellee.

SCWC-23-0000383

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-23-0000383; CASE NO. 1CCV-22-0000015)

SEPTEMBER 30, 2025

PART II: DISSENTING OPINION BY GINOZA, J.

In this case, the Circuit Court of the First Circuit (**Environmental Court**) not only held that the Board of Land and

Natural Resources (**Board** or **BLNR**) improperly denied Petitioners' requests for contested case hearings, but also held that the BLNR's "failure to enter findings of fact or conclusions of law resulted in an inability to determine whether the Board properly exercised the discretion vested in it by the constitution and the statutes in approving the permits." The Environmental Court's Final Judgment stated:

> The Court REVERSES and VACATES the [BLNR's] decisions at its public meetings on December 11, 2020, under Item D-5, and December 10, 2021, under Item Nos. D-1 and D-2, to: (1) deny [Petitioners'] requests for contested case hearings; and, (2) reissue RP S-7340 [(**RP**)] for rights to use State of Hawai'i water resources to KIUC.

(Emphases added.) Thus, the Environmental Court addressed both the denial of Petitioners' requests for contested case hearings and the merits of the BLNR's continuation of the permits.

The Environmental Court's ruling as to the continuation of the permits sought to impose requirements discussed in Carmichael v. Bd. of Land & Nat. Res., 150 Hawai'i 547, 567, 506 P.3d 211, 231 (2022). Carmichael was a declaratory action lawsuit.

In the context of this secondary agency appeal, over which the courts had jurisdiction under Hawai'i Revised Statutes (**HRS**) § 91-14 (2012 & Supp. 2022), the Intermediate Court of Appeals (**ICA**) held the Environmental Court lacked jurisdiction to reach the merits of the Board's decision to continue the

permits. Given the circumstances of this secondary agency appeal, I agree with the ICA on this point.

HRS § 91-14(a) states in relevant part: "Any person aggrieved by a final decision and order in a contested case or by a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief is entitled to judicial review thereof under this chapter[.]" (Emphases added.)

Under this court's case law, discussed below, the BLNR's action denying the Petitioners' requests for a contested case hearing was the "final decision" for purposes of HRS § 91-14. Further, because the other requirements for jurisdiction were met, the Environmental Court had jurisdiction to determine if the BLNR's denial of contested case hearings was improper, and if so, to vacate the permits for having been issued under improper procedure. However, in my view, the Environmental Court did not have jurisdiction to reach the merits of the BLNR's decision to continue the permits which were not made in a contested case.

I therefore respectfully part ways with the majority on this issue. Contrary to the majority's view that the Environmental Court was simply addressing "further procedural deficiencies rather than the merits of BLNR's decisions approving the permit," the Environmental Court's Final Judgment

reversing the continuance of the permits indicates otherwise. To the extent the majority relies on the Environmental Court's dismissal of Petitioners' HRS chapter 343 (2010) claims, the Environmental Court explained the dismissal of those claims was because "the actions upon which they were predicated are void." In other words, the BLNR's actions were already void, so the Environmental Court did not need to reach that issue.

This case is a secondary agency appeal by Petitioners pursuant to HRS § 91-14, which provides the requirements for judicial review of "final decision[s]" stemming from contested cases. In Pub. Access Shoreline Haw. v. Haw. Cnty. Plan. Comm'n, 79 Hawai'i 425, 903 P.2d 1246 (1995) (**PASH**), this court discussed the requirements for jurisdiction under HRS § 91-14:

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

Id. at 431, 903 P.2d at 1252.

This court has further recognized that, for an appeal under HRS § 91-14, denial of a request for a contested case hearing constitutes a "final decision and order" by an administrative agency from which an aggrieved party may appeal.

Kilakila 'O Haleakala v. Bd. of Land & Nat. Res., 131 Hawai'i 193, 195, 317 P.3d 27, 29 (2013); Kaleikini v. Thielen, 124 Hawai'i 1, 26, 237 P.3d 1067, 1092 (2010); PASH, 79 Hawai'i at 431–33, 903 P.2d at 1252–54.

Regarding the requirements for jurisdiction under HRS § 91-14, the Board has only asserted that Petitioners lack standing, which we have rejected. It is also clear from the record that the other aspects of the PASH requirements are met for jurisdiction under HRS § 91-14. Hence, the question now before us is whether jurisdiction under HRS § 91-14 allowed the Environmental Court to reach the merits of the Board's decision to continue the permit, when that decision was rendered in a public meeting and not a contested case hearing.

Petitioners rely on Cmty. Ass'ns of Hualalai, Inc. v. Leeward Plan. Comm'n, 150 Hawai'i 241, 500 P.3d 426 (2021) (**Hualalai**), PASH and Kilakila to make the general argument that the Board's approval of the RPs and the denial of contested case hearings "constituted final decisions ripe for judicial review pursuant to HRS § 91-14(g)." However, none of the cited cases support the entirety of Petitioners' assertion. Rather, under these cases, where the "final decision" for HRS § 91-14 jurisdiction was denial of a contested case hearing, the court could review that agency decision, *i.e.*, the denial of a request for a contested case hearing. However, these cases do not hold

that a court with such jurisdiction can also review the merits of an agency's substantive decision to issue a permit.

In Hualalai, this court held there was HRS § 91-14 jurisdiction for judicial review where the Leeward Planning Commission had allowed an applicant to withdraw a request for a special permit while the appellant's petition for a contested case was still undecided. 150 Hawai'i at 254-59, 500 P.3d at 439-44. We held there was a "final decision" for purposes of HRS § 91-14 jurisdiction based on the agency's decision to withdraw the application, which ended the proceeding without disposing of the appellant's petition for a contested case. Id. at 256-57, 500 P.3d at 441-42. Having further concluded that the other requirements for jurisdiction were met, this court ultimately held that the withdrawal of the application was improper and we remanded the case to the Leeward Planning Commission for further proceedings. Id. at 262, 500 P.3d at 447. Thus, this court reviewed the agency action -- withdrawal of the permit application -- that constituted the "final decision" under HRS § 91-14 where the request for a contested case had not been decided by the agency.

In PASH, the Hawai'i County Planning Commission (**HPC**) denied the appellants' requests for a contested case hearing on an application for a special management area (**SMA**) use permit to develop a resort complex. 79 Hawai'i at 429, 903 P.2d at 1250.

After denying the requests for a contested case hearing, HPC issued the SMA use permit. Id. Appellants sought judicial review under HRS § 91-14 and this court determined there was jurisdiction as to the PASH appellant, including because there was finality based on denial of a contested case hearing. Id. at 433, 903 P.2d at 1254. This court ultimately affirmed lower court rulings that **vacated** the SMA use permit because it was granted under **flawed procedures**, and we also remanded the case to the HPC with instructions to hold a contested case hearing. Id. at 429, 452, 903 P.2d at 1250, 1273. The judicial review in PASH did not review the merits of the HPC's decision in issuing the SMA use permit.

In Kilakila, BLNR granted a conservation district use permit without deciding the petitioner's request for a contested case hearing. 131 Hawaiʻi at 195-96, 317 P.3d at 29-30. In other words, the request for a contested case hearing was ignored and the BLNR issued the permit. In that context, this court held that BLNR was required to hold a contested case hearing, and the decision to grant the permit, without deciding the request for a contested case hearing, effectively rendered a final decision under HRS § 91-14. Id. at 203, 205-06, 317 P.3d at 37, 39-40. The circuit court had dismissed petitioner's HRS § 91-14 appeal for lack of jurisdiction because there had been no contested case hearing, and the ICA had affirmed. This court

held the dismissal was in error. Id. at 196, 317 P.3d at 30. Ultimately, this court concluded that "BLNR should have held a contested case hearing as required by law and requested by [petitioner] prior to decision making on [the permit application], and that the circuit court had jurisdiction to hear [petitioner's] HRS § 91-14 agency appeal." Id. at 205-06, 317 P.3d at 39-40. The lower court judgments were vacated and the case was remanded to the circuit court "for further proceedings consistent with this opinion regarding [petitioner's] request for stay or reversal of the conservation district use permit granted by BLNR[.]" Id. at 206, 317 P.3d at 40. Although the remand to the circuit court allowed it to consider whether to stay or reverse the permit that had been issued, there is nothing to suggest the circuit court was to substantively address the merits of BLNR's decision in issuing the permit. Rather, it appears the court's intent was to allow the circuit court to address pending requests by the petitioner that the circuit court had not addressed because it had dismissed the case. Based on the full context of the opinion in Kilakila, the court clearly indicated that a contested case hearing should have been held and not that the courts should decide the merits of granting the permit.

In the context of the current case, the final agency decision for purposes of jurisdiction under HRS § 91-14 was the

Board's denials of Petitioners' requests for contested case hearings. Unlike in Kilakila, we need not rely on the issuance of the permit as the final agency decision, and even that context doesn't confer jurisdiction to reach the merits of issuing a permit. The decisions to issue the 2021 RP and 2022 RP were made in public meetings and not in contested case hearings. Thus, I would hold the Environmental Court exceeded its jurisdiction by reviewing the merits of the Board's decision to continue the permit in 2021 and 2022. I would instead respectfully hold that, because contested case hearings should have been held, the Environmental Court properly should have limited its ruling to vacating the 2021 and 2022 RPs, rather than reversing them.

/s/ Lisa M. Ginoza