*** * * FOR PUBLICATION * * ***
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IN THE SUPREME COURT OF THE STATE OF HAWAI I

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PAULETTE KA ANOHIOKALANI KALEIKINI, Petitioner/
Appellant-Appellant,

vs.

LAURA H. THIELEN,[1] in her official capacity as Chairperson of the Board of Land and Natural Resources, BOARD OF LAND AND NATURAL RESOURCES, and the DEPARTMENT OF LAND AND NATURAL RESOURCES, Respondent/Appellees-Appellees.

NO. 28491

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CIV. NO. 07-1-0068-01)

AUGUST 18, 2010

MOON, C.J., NAKAYAMA, and DUFFY, JJ.; ACOBA, J., and RECKTENWALD, J., CONCURRING SEPARATELY

OPINION OF THE COURT BY MOON, C.J.

On November 4, 2009, this court accepted a timely application for a writ of certiorari filed by petitioner/appellant-appellant Paulette Ka anohiokalani Kaleikini on September 28, 2009, requesting that this court review the Intermediate Court of Appeals (ICA) July 9, 2009 order dismissing as moot the appeal from the Circuit Court of the First Circuit s[2] March 16, 2007 order and April 4, 2007 final judgment.

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[1] During the pendency of this action, Laura H. Thielen succeeded Peter Young as chairperson of the Board of Land Natural Resources (BLNR). Thus, pursuant to Hawai i Rules of Appellate Procedure Rule 43(c)(1) (2009), Thielen has been substituted automatically for Young in this case.

[2] The Honorable Eden E. Hifo presided.

Therein, the circuit court dismissed Kaleikini s notice of agency appeal on the basis that it lacked subject matter jurisdiction. Oral argument was held on December 17, 2009.

Briefly stated, the O ahu Island Burial Council (OIBC) approved a burial treatment plan submitted by developer General Growth Properties (GGP), involving the disinterment of Native Hawaiian burial remains or iwi discovered at GGP s project site at the Ward Village Shops. Thereafter, Kaleikini, pursuant to Hawai i Revised Statutes (HRS) § 6E-43 (1993), quoted infra, requested a contested case hearing, which was denied by respondents/appellees-appellees Peter Young, in his official capacity as Chairperson of the BLNR,[3] the BLNR, and the Department of Land and Natural Resources (DLNR) [hereinafter, collectively, DLNR]. Kaleikini then sought judicial review of DLNR s denial; however, the circuit court dismissed, sua sponte, her agency appeal and an accompanying motion for stay, ruling that it lacked subject matter jurisdiction. Although the circuit court recognized that Kaleikini was seeking review of DLNR s denial of her request for a contested case hearing, it seemingly felt constrained by existing case law to rule that it lacked jurisdiction under HRS chapter 91 because no agency contested case had occurred. Kaleikini appealed, and the ICA, thereafter, dismissed her appeal as moot, reasoning that the remedy sought by Kaleikini -- [i.e.,] a determination that the circuit court had jurisdiction to review the denial of Kaleikini s request for

[3] See supra note 1.

a contested-case hearing -- [was] no longer necessary[.] ICA s Order at 3.

On application, Kaleikini essentially argues that the ICA erred in dismissing her appeal as moot. As discussed more fully infra, we agree with the ICA that Kaleikini s direct appeal was moot; however, unlike the ICA, we hold that Kaleikini s appeal falls within the public interest exception to the mootness doctrine. Additionally, in addressing the merits of Kaleikini s appeal, we hold that the circuit court erred in dismissing Kaleikini s agency appeal for a lack of subject matter jurisdiction because Kaleikini met the requirements of HRS § 91-14 (1993 and Supp. 2008), quoted infra. Accordingly, we vacate the ICA s order dismissing Kaleikini s appeal for mootness and remand the case to the circuit court for further proceedings consistent with this opinion.

I. BACKGROUND

To understand the context of the instant appeal, including the ICA s reasoning, we took judicial notice of a separate, but closely related appeal, i.e., Kaleikini v. Thielen, No. 29675. See State v. Kotis, 91 Hawai i 319, 341 n.25, 984 P.2d 78, 100 n.25 (1999) (stating that an appellate court may, in its discretion, take judicial notice of files or records of a case on appeal) (citations and original brackets omitted). We recognize, however, that, although a [c]ourt may take judicial notice of each document in the [c]ourt s file,it may . . . take judicial notice of [only] the truth of facts asserted in

documents[,] such as orders, judgments[,] and findings of fact [(FOFs)] and conclusions of law [(COLs)] because of the principles of collateral estoppel, res judicata, and the law of the case. Id. at 342, 984 P.2d at 101 (emphasis added) (format altered) (original brackets omitted). Thus, for purposes of this opinion, the factual and procedural background presented below has been drawn from the record on appeal in the instant case (i.e., Civ. No. 07-1-0068) and, to the extent allowed by this court s holding inKotis, emphasized above, the record on appeal in the related case (i.e., Civ. No. 07-1-0067).

A. Factual and Procedural Background

On September 13, 2006, a public hearing was held before the OIBC, pursuant to HRS chapter 92 (governing public agency meetings and records) and Hawai i Administrative Regulations (HAR) § 13-300-33 (2009),[4] on a proposed burial treatment plan

[4] HAR § 13-300-33 states in relevant part that:

> (a) The council shall have jurisdiction over all requests to preserve or relocate previously identified Native Hawaiian burial sites.
>
> (b) The applicant shall submit a request to preserve in place or relocate a Native Hawaiian burial site to [DLNR] in the form of a burial treatment plan. . . .
>
> (c) The applicant shall consult with [DLNR] in the development of the burial treatment plan. Once approved by [DLNR], the applicant shall submit requisite copies of the completed burial treatment plan for distribution to the council, accompanied by a simple written request to be placed on the council agenda for a determination of burial site treatment.
>
> . . . .
>
> (f) The council shall render a determination to preserve in place or relocate previously identified Native Hawaiian burial sites in accordance with section 13-300-38

(continued...)

submitted to OIBC by GGP, seeking permission to remove iwi discovered by GGP at the Ward Village Shops project area. According to the minutes of the meeting, GGP indicated that it was seeking to relocate the iwi into an area where they would be safe and that the construction plans for the project [did] not allow for a lot of redesign. Kaleikini, who was present at the meeting, is a recognized cultural descendant to the iwi found at the Ward Village Shops project.[5] Kaleikini maintained that, as a Native Hawaiian cultural practitioner, one of the critical tenets of Native Hawaiian traditional and customary practices is to ensure that iwi remain undisturbed and that they receive proper care and respect.

Kaleikini presented testimony against the proposed burial treatment plan at the OIBC meeting. More specifically, the meeting minutes indicate that Kaleikini asserted that GGP

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[4](...continued)

> within forty-five days of referral by [DLNR], unless otherwise extended by agreement between the landowner and [DLNR].

[5] The HAR recognizes two types of descendants -- cultural and lineal. Under HAR § 13-300-2 (2009), cultural descendant means, with respect to non Native Hawaiian skeletal remains, a claimant recognized by the [island burial] council after establishing genealogical connections to Native Hawaiian ancestors who once resided or are buried or both, in the same ahupua a or district in which certain Native Hawaiian skeletal remains are located or originated from.

Under the same rule, lineal descendant means,

> with respect to Native Hawaiian skeletal remains, a claimant who has established to the satisfaction of the council, direct or collateral genealogical connections to certain Native Hawaiian skeletal remains, or with respect to non Native Hawaiian skeletal remains, a claimant who has established to the satisfaction of [DLNR], direct or collateral genealogical connections to certain non Native Hawaiian skeletal remains.

should have made a better attempt to redesign the project so that the iwi could be preserved in place. Ultimately, the OIBC approved the burial treatment plan by a vote of 6-3 with one knalua (an undecided vote or a vote to abstain).

On October 12, 2006, Kaleikini sent a letter to DLNR, requesting that a contested case hearing be held, pursuant to HRS chapter 91, to review the OIBC s September 13, 2006 decision to relocate the iwi at the Ward Village Shops Project. Therein, Kaleikini alleged that she was entitled to a contested case hearing pursuant to, inter alia, HRS § 6E-43[6] and HAR

[6] HRS § 6E-43 provides in relevant part that:

> (a) At any site, other than a known, maintained, actively used cemetery where human skeletal remains are discovered or are known to be buried and appear to be over fifty years old, the remains and their associated burial goods shall not be moved without [DLNR] s approval
>
> (b) All burial sites are significant and shall be preserved in place until compliance with this section is met, except as provided in section 6E-43.6. The appropriate island burial council shall determine whether preservation in place or relocation of previously identified native Hawaiian burial sites is warranted, following criteria which shall include recognition that burial sites of high preservation value, such as areas with a concentration of skeletal remains, or prehistoric or historic burials associated with important individuals and events, or areas that are within a context of historic properties, or have known lineal descendants, shall receive greater consideration for preservation in place. The criteria shall be developed by [DLNR] in consultation with the councils, office of Hawaiian affairs, representatives of development and large property owner interests, and appropriate Hawaiian organizations, such as Hui Malama I Na Kupuna O Hawai i Nei, through rules adopted pursuant to chapter 91. A council s determination shall be rendered within forty-five days of referral by [DLNR] unless otherwise extended by agreement between the landowner and [DLNR].

(continued...)

§§ 13-300-51 (2009)[7] and 13-300-52 (2009).[8] Additionally,

[6](...continued)

> (c) Council determinations may be administratively appealed to a panel composed of three council chairpersons and three members from [BLNR] as a contested case pursuant to chapter 91. In addition to the six members, the chairperson of [BLNR] shall preside over the contested case and vote only in the event of a tie.

(Emphases added.) We note that there are five burial councils statewide, each of which has a chairperson. See HAR §§ 13-300-21 and -24.

[7] HAR § 13-300-51 provides that:

> Appeal of council determination. (a) **When required by law, the appeals panel shall hold a contested case hearing upon timely written petition of any person who is aggrieved by a council determination to preserve in place or relocate Native Hawaiian skeletal remains and any burial goods** from a previously identified burial site and who is properly admitted as a party pursuant to section 13-300-54.
>
> (b) Unless specifically prescribed in this chapter or by chapter 91, HRS, the appeals panel may adopt procedures that in its opinion will best serve the purposes of the hearing.

(Underscored emphasis in original.) (Bold emphasis added.)

[8] HAR § 13-300-52 states:

> Request for hearing. (a) **A written petition for a contested case hearing shall be filed**, i.e. mailed and postmarked, **within forty five days** following receipt of written notification of the council determination except that where a request for reconsideration of a council determination is made, the forty five day period to file a petition shall commence following action by the council to either deny the request for reconsideration or reaffirm its original decision following reconsideration.
>
> (b) **A petition** requesting a contested case hearing **shall contain concise statements of:**
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> (1) The legal authority by which appeal is requested;
> (2) The council determination being appealed and the date of the determination;
> (3) The nature of the interest that may be adversely affected by the council determination;
> (4) The relevant facts and issues raised;
> (5) The relief being sought; and
> (6) Any other information deemed applicable.

(continued...)

Kaleikini stated that the [OIBC] s determination adversely affected her because she was a recognized cultural descendant . . . and a possible lineal descendant to the previously identified [iwi] at the Ward Village [Shops] project site and that the OIBC did not (1) consult with [Kaleikini] and ohana (recognized descendants), as [required pursuant to HAR § 13-300-36 (2009) (governing the criteria for evaluating requests to preserve or relocate Native Hawaiian burial sites)] and (2) adequately evaluate, consider[,] and apply the criteria set forth in HAR [§] 13-300-36[.] Kaleikini also asserted that she believe[d] that certain [OIBC] members [did] not meet the criteria required to become a member of the [OIBC] as listed in HAR [§] 13-300-22(b)(2) [(2009) (requiring that Council members

[p]ossess an understanding of Hawaiian culture, history, customs, practices, and[,] in particular, beliefs and practices relating to the care and protection of Native Hawaiian burial sites and ancestral remains and burial goods)] and [that] their decision to relocate was based on their inadequate cultural understanding of the care and protection of ancestral burials. Finally, Kaleikini contended that she was entitled to a contested case hearing because her constitutional rights as a native Hawaiian -- specifically, those rights contained in article XII,

[8](...continued)
(Underscored emphasis in original.) (Bold emphases added.)

section 7 of the Hawai i Constitution[9] were adversely affected by the relocation of [the iwi].

On December 12, 2006, DLNR denied Kaleikini s request for a contested case hearing via letter, stating that:

> The law permits an aggrieved person to administratively appeal burial council determinations. A request for a contested case will be approved when valid grounds for such requests are present. The reasons underlying your appeal of OIBC s prior determinations are neither factually nor legally sufficient to warrant a contested case proceeding. Accordingly, your request for a contested case is denied.

On January 10, 2007, Kaleikini filed a notice of agency appeal with the circuit court, seeking review of DLNR s December 12, 2006 denial of her request for a contested case hearing [hereinafter, the agency appeal case]. On the same day, Kaleikini filed a separate complaint in Civ. No. 07-1-0067-01, the previously mentioned related case, seeking declaratory relief and an injunction to prevent the imminent removal of the iwi from the Ward Village Shops project area [hereinafter, the dec action]. In her six-count complaint, brought against GGP, Young, BLNR, and DLNR, Kaleikini sought, inter alia, (1) a declaration that DLNR s denial of Kaleikini s request for a contested case hearing was without basis and invalid and (2) an order requiring that a contested case hearing be held.

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[9] Article XII, § 7 of the Hawai i Constitution provides that:

> The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua a 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.

1. Agency Appeal Case

On February 21, 2007, Kaleikini filed a motion for a stay in the agency appeal, seeking to prevent DLNR from granting final approval of GGP s [b]urial [t]reatment [p]lan, which would allow the immediate disinterment of human remains discovered on the project site, until a decision on the merits of [the] agency appeal [was] issued by [the circuit court]. [10] A hearing was held on Kaleikini s motion for a stay on February 22, 2007. At the outset of the hearing, the circuit court stated that:

> I do know and appreciate from [Kaleikini] . . . that you have filed a [dec action], which I think is the only way now that you can actually get judicial review of the relief.
>
> Because, as I have read Aha Hui Malama o Kaniakapupu v. Land Use Commission, 111 Haw[ai i] 124[, 139 P.3d 712 (2006) [hereinafter, Kaniakapupu,]] . . . affirming [the circuit c]ourt s decision that [it] lack[ed] subject matter jurisdiction because there was no contested case hearing decision appealed from, it s clear that while you re appealing the decision not to give a contested case, obviously there hasn t been one.
>
> Now, I actually remember [Kaleikini s attorney] being here on a different case where it was, if I m not mistaken, the same situation. And he was very articulate in suggesting that it s a major Catch 22, because if you re denied a contested case hearing, and the denial can t be appealed, then there is no way to get judicial review of that. And any agency could improperly deny a contested case hearing.

[10] Pursuant to HAR § 13-300-38(f) (2009), [w]here a council determination to relocate is accepted as final, the applicant shall develop the burial site component of the archaeological data recovery plan . . . and any accepted recommendations relating to burial site treatment. Within ninety days of the council determination, [DLNR] shall approve the plan following consultation with the applicant, any known lineal descendants, the appropriate council, and any appropriate Hawaiian organizations.

> Well, the Supreme Court didn t actually answer that in . . . Kaniakapupu. But the majority said . . . [ ]if the [c]ircuit [c]ourt has no jurisdiction to determine if an appellant were [sic] entitled to a contested case hearing after having requested one, any agency could arbitrarily and capriciously deny anyone a hearing at any time, regardless of whether such hearing were required by law, and the aggrieved party could never obtain judicial review of such denial . . . .[ ]
>
> However, in [Kaniakapupu], the Hui did not request a contested case hering [sic]. Indeed, the Hui concede[d] that . . . [ ]there is no procedural vehicle for any party or interested person to obtain a contested case hearing on whether a petitioner has failed to perform according to the conditions imposed, or failed to perform according to representations or commitments she made . . . .[ ]
>
> . . . So [the circuit court], while not sure about it, because they didn t actually answer the question, believe[s] that the filing of the [dec action], assigned to Judge Lee, is the proper vehicle. That [the circuit court] doesn t have jurisdiction, because there wasn t a contested case hearing.[11]

Accordingly, the circuit court dismissed Kaleikini s agency appeal case. Additionally, the circuit court ruled that, inasmuch as it did not have jurisdiction to hear the agency appeal, Kaleikini s motion for a stay was rendered moot. However, recognizing the pending dec action, the circuit court sua sponte re-filed Kaleikini s motion for a stay in that case. An order dismissing Kaleikini s agency appeal for lack of subject matter jurisdiction, consistent with the circuit court s oral

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[11] The circuit court additionally stated:

> Well, I may be wrong. But I would ask you folks to read what I believe is the current and most recent decision. I read the part that I thought was the most pertinent as to that. And it does leave an opening because in this case they ruled that in order to get a contested case hearing you have to put that in writing, which [Kaleikini s attorneys] did, I m understanding.
>
> . . . .
>
> And frankly, it wouldn t hurt my feelings . . . if [Kaleikini s attorney] for purpose of knowing the future takes it up, because this is a question the [s]upreme [c]ourt did not answer.

ruling, was entered on March 16, 2007. On April 4, 2007, the circuit court entered its final judgment. On April 9, 2007, Kaleikini filed a timely notice of appeal in the case at bar from the circuit court s March 16, 2007 order and April 4, 2007 final judgment.

2. Dec Action

As indicated above, Kaleikini s motion for a stay was re-filed on February 22, 2007 in the dec action and sought to prevent DLNR and its chairperson from approving GGP s [b]urial [t]reatment [p]lan, which would allow the immediate disinterment of human remains discovered on the project site, until a decision on the merits of [the] agency appeal [was] issued by [the circuit court]. A hearing was held on Kaleikini s motion for a stay on February 23, 2007,[12] but no transcript of the proceeding was provided in the record on appeal for the dec action. On March 28, 2007, an order denying Kaleikini s motion for a stay was entered.

On February 28, 2007, Kaleikini filed a motion for a preliminary injunction, seeking again to prevent DLNR from approving GGP s burial treatment plan and to prohibit GGP from disinterring numerous graves and relocating ancient Hawaiian human skeletal remains (iwi) located there. Both DLNR and GGP opposed the motion. After a hearing on October 24, 25, and 26,

[12] The Honorable Randall K.O. Lee presided over Kaleikini s motion for a stay.

2007, the circuit court,[13] on November 27, 2007, filed an order denying Kaleikini s motion for a preliminary injunction.

On August 21, 2007, Kaleikini filed a motion for summary judgment, arguing, inter alia, that DLNR failed to hold a contested case hearing as required by law. Both DLNR and GGP opposed Kaleikini s motion for summary judgment. A hearing was apparently held on Kaleikini smotion on September 27, 2007; however, no transcript of the hearing was included in the record on appeal in the dec action. On October 12, 2007, the circuit court denied Kaleikini s motion for summary judgment.

On October 29, 2007, Kaleikini -- with permission of the circuit court -- filed a seven-count second amended complaint in the dec action.[14] Therein, Kaleikini alleged that she was entitled to declaratory and injunctive relief because: (1) DLNR s denial of Kaleikini s request for a contested case hearing was without basis and invalid (count 1); (2) [t]he disinterment of Native Hawaiian burials in this instance would adversely affect [Kaleikini] s Native Hawaiian rights and would violate Art. XII § 7 of the Hawai i State Constitution (count 2); (3) the OIBC s failure to investigate alternatives and require the developer to explore alternatives [was] a breach of its public trust responsibilities (count 3); (4) the OIBC s

[13] The Honorable Glenn J. Kim presided over the remainder of the dec action.

[14] Kaleikini -- with permission of the court -- had filed a first amended complaint on May 2, 2007.

decision to remove the burials violated Kaleikini s fundamental rights because [p]rotection of burials is a fundamental right that all citizens enjoy and that the OIBC s decision was not narrowly tailored given its failure to consider alternatives (count 4); (5) the disinterment of iwi in this instance [would] violate HRS § 6E-43 and HAR § 13-300-36 (count 5); (6) the proposal to remove iwi would irreparably injure the iwi and relief was needed pursuant to HRS § 6E-13 (1993) (governing enforcement of chapter 6E, which relates to historic preservation) (count 6); and (7) DLNR failed to consult with Kaleikini and others prior to authorizing the removal of many of the inadvertently discovered burial remains as required by law or to properly consider the criteria provided in HAR § 13-300-36 prior to authorizing the removal of many of the inadvertently discovered burial remains (count 7).

On January 30, 2008, DLNR filed a motion for summary judgment, arguing that judgment should be entered in its favor as to all of Kaleikini s claims because, as a matter of law, [Kaleikini could not] prevail on the merits of her claims against [DLNR]. On February 11, 2008, GGP filed a substantive joinder in DLNR s motion for summary judgment. Kaleikini opposed DLNR s motion, and, on March 4, 2008, a hearing was held regarding, inter alia, DLNR s motion for summary judgment. At the close of the hearing, the circuit court orally granted DLNR s motion for summary judgment and GGP s joinder as to count 1 (denial of

contested case hearing), count 2 (violation of Hawai i constitution article XII, section 7), count 3 (breach of public trust), and count 4 (violation of fundamental rights), reasoning that there were no genuine issues of material fact as to those counts inasmuch as DLNR was within [its] discretion to decide whether there was a legal basis for a contested case hearing and that Kaleikini s constitutional claims were not supported by Hawaii s case law. With regard to count 5 (violation of HRS § 6E-43, HAR § 13-30-36), count 6 (irreparable injury to iwi), and count 7 (improper decision-making authorizing the removal of many inadvertent discoveries), the court found that issues of material fact existed and, thus, denied DLNR s motion for summary judgment and GGP s joinder as to those counts. A written order confirming the circuit court s oral ruling was filed on March 19, 2008.

On June 10, 2008, the parties filed a stipulation to dismiss all of the remaining claims in the second amended complaint (i.e., counts 5, 6, and 7) with prejudice, pursuant to a settlement agreement, which the circuit court approved. Thereafter, the circuit court entered a judgment in favor of DLNR, but for reasons that are not relevant to the issues before this court, subsequently entered a first and second amended judgment in the dec action on February 9 and February 27, 2009, respectively. Kaleikini filed a timely notice of appeal from the

circuit court s first and second amended judgments on March 3, 2009 in appeal No. 29675.[15]

B. Appeal of the Instant Agency Appeal Case Before the ICA

Relying primarily on Public Access Shoreline Hawai i v. Hawai i County Planning Commission [hereinafter, PASH], 79 Hawai i 425, 903 P.2d 1246 (1995), Kaleikini argued before the ICA that the circuit court erred in dismissing sua sponte her agency appeal for lack of jurisdiction. She maintained that the circuit court had subject matter jurisdiction, pursuant to HRS chapter 91. In response, DLNR contended that HRS chapter 91 -- specifically, HRS § 91-14 (1993 and Supp. 2008)[16] -- did not

[15] The supreme court record in appeal No. 29675 reveals that this appeal is currently stayed due to GPP s notice of filing of bankruptcy, filed on May 8, 2009.

[16] HRS § 91-14 provides in relevant part that:

> (a) Any person aggrieved by a final decision and order in a contested case or by a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief is entitled to judicial review thereof under this chapter; but nothing in this section shall be deemed to prevent resort to other means of review, redress, relief, or trial de novo, including the right of trial by jury, provided by law. Notwithstanding any other provision of this chapter to the contrary, for the purposes of this section, the term person aggrieved shall include an agency that is a party to a contested case proceeding before that agency or another agency.
>
> (b) Except as otherwise provided herein, proceedings for review shall be instituted in the circuit court within thirty days after the preliminary ruling or within thirty days after service of the certified copy of the final decision and order of the agency pursuant to rule of court, except where a statute provides for a direct appeal to the intermediate appellate court, subject to chapter 602. . . . The court in its discretion may permit other interested persons to intervene.

(Emphasis added.)

confer jurisdiction on the circuit court to review DLNR s denial of Kaleikini s request for a contested case hearing because Kaleikini did not participate in a contested case.

On June 2, 2009, the ICA issued an order requesting supplemental memoranda, stating specifically:

> Inasmuch as Kaleikini, in filing the separate proceeding in [the dec action] may have already obtained the remedy she seeks in this appeal -- judicial review of [DLNR] s allegedly wrongful denial of her request for a contested-case hearing and a stay of decisionmaking [sic] on the burial-treatment plan for the project -- this appeal may be moot.
>
> To assist this court in determining whether an actual controversy continues to exist in this case [(i.e., the agency appeal case)], Kaleikini and [DLNR] are hereby directed to file supplemental memoranda not to exceed five pages, no later than ten calendar days from the filing of this order, discussing the following issues:
>
> (1) The status of [the dec action] and whether any orders, decisions, or judgments have been rendered [therein] that affect this appeal and any remedial relief sought by Kaleikini in [the agency appeal case];
> (2) Whether the burial-treatment plan for the project has been implemented; and
> (3) Why this appeal is not moot.

On June 12, 2009, Kaleikini filed her supplemental memorandum, indicating that, although she had filed a notice of appeal from the circuit court s February 9 and February 27, 2009 amended judgments in the dec action, the proceedings were stayed due to GGP s notice of filing of bankruptcy. Thus, Kaleikini contended that she had not received the relief she requested in [the agency appeal] from [the dec action]. (Emphasis in original.) With regard to whether the burial treatment plan had been implemented, Kaleikini stated it was her understanding that all the terms of the current burial treatment plan [had] not been

fully implemented. (Emphasis in original.) Additionally, Kaleikini acknowledged that the parties had entered into a settlement agreement in the dec action with respect to counts 5-7 of her second amended complaint, but indicated that the settlement agreement didnot settle [c]ounts 1-4, which include[d] the [c]ount regarding the denial of the contested case hearing and, in fact, Kaleikini stated that [t]he settlement explicitly acknowledged [Kaleikini] s right to appeal [c]ounts 1-4 . . . [and, thus, t]he settlement did not affect [Kaleikini] s rights in this appeal. (Emphasis in original.) Lastly, Kaleikini asserted that, [e]ven if the [ICA] were to interpret the settlement agreement so broadly as to resolve the issue of the contested case and burial treatment plan, exceptions to the mootness doctrine clearly apply ; specifically, the public interest and the capable of repetition yet evading review exceptions.

Conversely, DLNR -- in its supplemental memorandum filed on June 15, 2009 -- asserted that the mootness doctrine would be properly invoked in the case at bar because (1) [the dec action] substantively disposed of the issue on appeal in [the agency appeal case] and (2) the terms of the [s]ettlement [a]greement provided that all of the previously identified burials . . . would be reinterred either in a [c]entral [b]urial [p]reservation [s]ite or in a specific reburial site for

specified remains.[17] In DLNR s view, Kaleikini s appeal was moot because the parties [had] . . . agreed to the relocation and reinterment of the burials, which ha[d] already occurred, and, thus, there [was] no basis for contesting the decision of the OIBC to relocate the burials and there [was] no effective remedy which this court could order in this case. (Emphasis added.)

On July 9, 2009, the ICA issued an order dismissing Kaleikini s appeal as moot. Therein, the ICA stated, inter alia, that:

[17] The settlement agreement, which was attached as Exhibit A to DLNR s supplemental memorandum, provided in relevant part that Kaleikini expressed her support and agreement with the April 9, 2008[] OIBC recommendation in favor of the Addendum to the Burial Treatment Plan, discussed below. Additionally, the agreement stated:

> The disinterment of Native Hawaiian remains is wholly inconsistent with [Kaleikini] s cultural beliefs and Kaleikini opposes the disinterment of any burials on the property on that basis. Kaleikini agrees, however, that the Central Burial Preservation Site shall be used for the reinterment of the subject and all other burial remains which may be encountered on the [p]roperty, and for which disinterment and relocation have been properly authorized. [Kaleikini] hereby confirms her support of such use of the Central Burial Preservation Site and agrees that she shall not seek to prevent the use of the Central Burial Site in any administrative or judicial proceedings or actions, or otherwise.

Also attached as Exhibit A to DLNR s supplemental memorandum was a copy of what was purported to be a draft of the addendum to the burial treatment plan to the Ward Village Shops project. The addendum indicates that, between March and October 2007, fifty-four more iwi were inadvertently discovered in the project area during the excavation associated with the disinterment of the [eleven] previously identified [iwi], during excavation related to project construction, and during subsequent . . . authorized exploratory excavation. The addendum proposes that (1) thirty-one of the inadvertently discovered iwi would be preserved in place and (2) the remaining iwi would be disinterred, stored, and then reinterred in, among other places, a central burial site.

> Based on our review of the record in this appeal, this court s Order Requesting Supplemental Memoranda filed on June 2, 2009, Kaleikini s supplemental memorandum filed on June 12, 2009, and [DLNR s] supplemental memorandum filed on June 15, 2009, it appears that . . . , Kaleikini filed a [dec. action] which, among other claims, challenged (1) the denial of her request for a contested-case hearing, and (2) the [OIBC] s approval for disinterment and relocation of the historic remains. In [the dec action], the circuit court dismissed Kaleikini s claim for wrongful denial of her request for a contested-case hearing via summary judgment. Her remaining claims were dismissed by summary judgment or stipulation of the parties. Subsequently, the parties entered into a settlement agreement, general release, and waiver of claims (settlement agreement). Pursuant to the settlement agreement, the parties agreed to a revised burial plan that addressed the inadvertently discovered and future discoveries of historic remains. The revised burial plan has been implemented.
>
> Inasmuch as the remedy sought by Kaleikini -- a determination that the circuit court had jurisdiction to review the denial of Kaleikini s request for a contested-case hearing -- is no longer necessary, this appeal is moot. See Carl Corp. v. State, Dep t of Educ., 93 Hawai i 155, 164, 997 P.2d 567, 576 (2000) (holding that invocation of the mootness doctrine is proper where events have so affected the relations between the parties that the two conditions [for] justiciability relevant on appeal -- adverse interest and effective remedy -- have been compromised). (Ellipsis omitted.)[18]

(Emphasis added.) (Footnote omitted.) Thereafter, this court accepted Kaleikini s application on November 4, 2009 and heard oral argument on December 17, 2009.

II. STANDARD OF REVIEW

It is axiomatic that mootness is an issue of subject matter jurisdiction. Whether a court possesses subject matter jurisdiction is a question of law reviewable de novo. Hamilton v. Lethem, 119 Hawai i 1, 4-5, 193 P.3d 839, 842-43 (2008) (citations and internal quotation marks omitted).

[18] Although Kaleikini maintained on appeal that exceptions to the mootness doctrine clearly apply, the ICA apparently failed to address them.

III. DISCUSSION

As previously indicated, Kaleikini argues that the ICA erred when it concluded that Kaleikini s appeal was moot and did not address whether it fell within any exceptions to the mootness doctrine. More specifically, Kaleikini contends that [t]he ICA erred in its decision because (1) the case is not moot; (2) this case falls squarely within the public interest exception to the mootness doctrine; and (3) this case would also fall within the capable of repetition yet evading review exception to the mootness doctrine. Additionally, Kaleikini raises the following questions: (1) [w]hat procedure should be used to challenge an agency s denial of a request for a contested case hearing ; (2) [d]oes a recognized cultural descendent to Native Hawaiian burial remains (iwi), who engages in traditional and customary practices with respect to those remains, have the right to a contested case hearing on a decision to remove iwi ; and (3) [h]ow can a Native Hawaiian and a cultural descendent of iwi obtain timely judicial review of an administrative decision to remove iwi? (Emphasis in original omitted.)

A. Mootness

In her application, Kaleikini states:

> The issues . . . in this appeal are not moot. . . . Kaleikini asked that . . . [DLNR] s decision to deny her request for a contested case hearing be reversed; that the [circuit] court issue an order requiring a contested case hearing; that a decision on the burial treatment plan be stayed; that she be awarded attorney s fees and costs; and that the [circuit] court provide such other relief as is just and proper.

(Emphasis in original.) However, during oral argument, Kaleikini conceded that the denial of [her request for a contested case hearing] essentially mooted her claim because of the passage of time. As a result, Kaleikini focused her argument before this court on the exceptions to the mootness doctrine, i.e., public interest and capable of repetition yet evading review. Based on Kaleikini s concession, we hold that the instant appeal is moot and turn to examine whether Kaleikini s appeal falls within any of the exceptions to the mootness doctrine.

B. Public Interest Exception to the Mootness Doctrine

Kaleikini argues that the public interest exception applies here because the question presented in this case involves two important issues : (1) the rights of Native Hawaiians; and (2) access to the courts. This court has stated that, [w]hen analyzing the public interest exception, [it] look[s] to (1) the public or private nature of the question presented, (2) the desirability of an authoritative determination for future guidance of public officers, and (3) the likelihood of future recurrence of the question. Hamilton, 119 Hawai i at 6-7, 193 P.3d at 844-45 (citation omitted) (some brackets in original). This court recently examined the public interest exception in Hamilton and stated that:

> [T]he cases in this jurisdiction that have applied the public interest exception have focused largely on political or legislative issues that affect a significant number of Hawai i residents. For example, in Doe [v. Doe, 116 Hawai i 323, 172 P.3d 1067 (2007)], we held that the public interest exception applied because it was in the public s interest

> for this court to review the family court s ruling that Hawaii s grandparent visitation statute [was] unconstitutional on its face. Id. at 327, 172 P.3d at 1071. Additionally, in Kaho ohanohano v. State, 114 Hawai i 302, 162 P.3d 696 (2007), this court held that the subject appeal was of a public nature because the outcome would affect all state and county employees. Id. at 333, 162 P.3d at 727. Likewise, in Right to Know Committee v. City & County of Honolulu, 117 Hawai i 1, 175 P.3d 111 (App. 2007), the ICA held that the question presented was of a public nature because the issue whether the City council must conduct its business in full view of the public and in compliance with the Sunshine Law was more public in nature than private. Id. at 9, 175 P.3d at 119.

Id. at 7, 193 P.3d at 845.

As indicated by Kaleikini, the issue presented here -- the availability of judicial review of decision relating to the removal of Native Hawaiian burial sites -- is of great public importance. In amending chapter 6E to include, inter alia, the relevant sections pertaining to Native Hawaiian burial sites, the legislature specifically recognized that [a]ll human skeletal remains and burial sites within the State are entitled to equal protection under the law regardless of race, religion, or cultural origin. The public has a vital interest in the proper disposition of the bodies of its deceased persons, which is in the nature of a sacred trust for the benefit of all[.] 1990 Haw. Sess. Laws Act 306, § 1 at 956 (emphasis added). The legislature further found that native Hawaiian traditional prehistoric and unmarked burials are especially vulnerable and often not afforded the protection of law which assures dignity and freedom from unnecessary disturbance. Id. Such legislative pronouncements evince a recognition of the public importance of the issue

presented here, i.e., the process of deciding to remove previously identified Native Hawaiian burial sites. Thus, the question presented here, like in Right to Know, is of a public nature.

Second, as reflected in the circuit court s statements (1) indicating confusion surrounding the issue whether an appellant may seek review of an agency sdenial of a request for a contested case hearing and (2) suggesting the need for an authoritative answer from this court regarding the issue, it would seem desirable for this court to provide an authoritative determination providing future guidance for public officials. Lastly, with respect to the third prong, the likelihood of future recurrence of the question seems high inasmuch as it seems probable that iwi will continue to be unearthed at future construction projects. Accordingly, we conclude that the public interest exception applies to the case at bar.[19] We now turn to discuss the merits of Kaleikini s contentions on appeal.

C. Merits of Kaleikini s Appeal

As quoted supra, Kaleikini presents three questions to this court for decision; however, all three questions center around the issue whether the circuit court erred in dismissing Kaleikini s agency appeal on jurisdictional grounds. As

[19] Inasmuch as we conclude that the public interest exception applies to the facts presented here, it is not necessary to address Kaleikini s arguments relating to the applicability of the capable of repetition yet evading review exception to the mootness doctrine.

previously stated, the circuit court dismissed Kaleikini s agency appeal for lack of subject matter jurisdiction because Kaleikini did not participate in a contested case hearing. On application, Kaleikini contends that the circuit court, in so doing, erred because [t]his court[] has, in three cases, stated that a chapter 91 appeal to the circuit court is the correct procedure to challenge an agency s denial of a request for a contested case hearing (if a right to a contested case exists and proper procedures are followed). (CitingMortensen v. Board of Trustees of Emp. Ret. Syst. Trustees, 52 Haw. 212, 473 P.2d 866 (1970), Pele Defense Fund v. Puna Geothermal Venture, 77 Hawai i 64, 881 P.2d 1210 (1994), and PASH).

The right to appeal is purely statutory and exists only when jurisdiction is given by some constitutional or statutory provision. Lingle v. Hawai i Gov t. Employees Ass n, 107 Hawai i 178, 184, 111 P.3d 587, 593 (2005). HRS § 91-14 confers jurisdiction on the circuit court to review final decision[s] and order[s] in [] contested case[s]. As previously quoted, HRS § 91-14 provides in relevant part that:

> (a) Any person aggrieved by a final decision and order in a contested case or by a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief is entitled to judicial review thereof under this chapter; but nothing in this section shall be deemed to prevent resort to other means of review, redress, relief, or trial de novo, including the right of trial by jury, provided by law. Notwithstanding any other provision of this chapter to the contrary, for the purposes of this section, the term person aggrieved shall include an agency that is a party to a contested case proceeding before that agency or another agency.

(Emphasis added.)

In dismissing the agency appeal, the circuit court relied exclusively on this court s decision in Kaniakapupu. Specifically, the circuit court stated:

> Because, as I have read . . . Kaniakapupu . . . affirming [the circuit c]ourt s decision that [it] lack[ed] subject matter jurisdiction because there was no contested case hearing decision appealed from, it s clear that while you re appealing the decision not to give a contested case, obviously there hasn t been one.

In other words, the circuit court determined that it did not have jurisdiction over Kaleikini s agency appeal, brought pursuant to HRS § 91-14, because she did not participate in a contested case hearing. On direct appeal, Kaleikini submitted that the circuit court erred in its interpretation of Kaniakapupu and extended the holding of that case too far inasmuch a Kaniakapupu merely stands for the proposition that the circuit court does not have jurisdiction [where] no contested case hearing [is] required by law. Kaleikini asserts that the circuit court should have, instead, looked at the framework set forth by this court in PASH to determine whether it had jurisdiction to review the denial of a request for a contested case hearing. Inasmuch as the circuit court s ruling was based primarily on Kaniakapupu, we first address the applicability of that case to the facts presented here.

1. Kaniakapupu

In Kaniakapupu, landowners of a parcel of land petitioned the Land Use Commission (LUC) to amend the land use

district boundary on the parcel of land from conservation district to urban district. 111 Hawai i at 126, 139 P.3d at 714. The landowners indicated that they sought reclassification of the property to enable them to subdivide the [p]roperty, construct both replacement and new houses on the [p]roperty, and make such other repair and improvements of the existing units in a manner ordinarily and customarily allowed for urban residential uses and thereby provide house lots or homes for their children. Id. A hearing was held before the LUC, and, thereafter, the LUC entered FOFs, COLS, and a decision and order, approving the reclassification. Id. In its FOFs, the LUC found that the landowners,

> in order to provide reasonable assurance to the LUC that the proposed development is a family enterprise to provide housing for the family members and not a commercial enterprise for speculation, . . . represented that they [were] willing to be subjected to a condition that members of the families . . . would have a right of first refusal to purchase if any interest in the [p]roperty were sought to be sold.

Id. (original brackets omitted). Thus, the LUC imposed a condition on the landowners that, should they desire to sell or convey ownership of all or portions of the property, [they] shall first offer such interest to the other or in the alternative convey such interest to any of [their] children, as the case may be. Id. (original emphasis omitted).

Kaniakapupu -- the historic ruins of the royal summer cottage of Kamehameha III -- is located on property owned by the State that shares a common boundary with, and is situated

approximately 200 to 300 feet from, the [reclassified property]. Id. at 126-27, 139 P.3d at 714-15. Approximately eleven years after the LUC approved reclassification of the property, a Hui[20] was formed in order to care for and serve as a steward of Kaniakapupu. Id. at 126, 139 P.3d at 714. Thereafter, the Hui sought to have the LUC issue an order to show cause [(OSC)] as to why the classification of the [property] should not be reverted to conservation district, contending that one of the landowners had violated the condition imposed by the LUC inasmuch as she listed portions of the property for sale to the public. Id. at 127, 139 P.3d at 715. The Hui additionally requested that a hearing be held, pursuant to HAR § 15-15-70(c) (governing motions practice), on its motion for an OSC. Id. The LUC held a hearing on the Hui s motion for an OSC [hereinafter, motion hearing] and, thereafter, denied it on the basis that the Hui had not met its burden of demonstrating a failure to perform a condition, representation, or commitment on the part of the landowners. Id. at 128, 139 P.3d at 716.

[20] A hui is defined as, inter alia, a [c]lub, association, society, corporation, company, institution, organization, band, league, firm, joint ownership, partnership, union, alliance, troupe, [or] team. M. Pukui & S. Elbert, Hawaiian Dictionary 86 (rev. ed. 1986).

The Hui filed a notice of appeal with the circuit court and, after briefing by the parties, the circuit court dismissed the Hui s appeal for a lack of subject matter jurisdiction. Id. at 129, 131, 139 P.3d at 717, 719. More specifically, the circuit court found that

> the LUC did not hold a contested case hearing. . . . If the motion for an [OSC] had been granted, then a contested case hearing would have been required.
>
> . . . .
>
> The [circuit] court concludes that the requirement in HRS § 91-14 that the order appealed from arise from a contested case hearing, has not been met. As such, this court lacks jurisdiction to reach the issue of whether a contested case hearing was required. See Pele Defense Fund v. Puna Geothermal Venture, 77 Hawai i 64, 69 n.10, 881 P.2d 1210, 1215 n.10 (1994). This court can only dismiss the appeal and therefore does so.

Id. (original brackets omitted) (format altered). The Hui appealed the circuit court s decision to this court. Id. at 131, 139 P.3d at 719.

At the outset, this court set forth the applicable law, stating that:

> HRS § 91-14(a) provides the means by which judicial review of administrative contested cases can be obtained. Among its prerequisites, the section requires that a contested case must have occurred before appellate jurisdiction may be exercised. Pele Defense Fund v. Puna Geothermal Venture, 77 Hawai i 64, 67, 881 P.2d 1210, 1213 (1994) (citation omitted). HRS § 91-1(5) (1993) defines a contested case as a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing. HRS § 91-1(6) (1993), in turn, defines an agency hearing as such hearing held by an agency immediately prior to a judicial review of a contested case as provided in section 91-14. Thus, [a] contested case is an agency hearing that [(]1) is required by law and [(]2) determines the rights, duties, or privileges of specific parties. [PASH], 79 Hawai i [at] 431, 903 P.2d [at] 1252 (internal quotation marks and citation omitted) (emphasis added).

Id. at 132, 139 P.3d at 720 (emphasis added).

In applying the above test, the Kaniakapupu court explained that the Hui s motion for an [OSC] was essentially a threshold motion or procedural vehicle to obtain a show cause hearing in order for the LUC to determine the rights, duties, or privileges of specific parties. Id. at 134, 139 P.3d at 722 (emphasis in original). Thus, the Kaniakapupu court held that, although the motion hearing was required by law, i.e., not discretionary and mandated by HRS § 15-15-70(i), it did not determine the rights, duties, or privileges of the parties because the hearing merely addressed whether a not a contested case hearing was required regarding the Hui s motion to show cause. Id. at 133-34, 139 P.3d at 721-22.

The Kaniakapupu court, however, acknowledged the argument raised by the Hui that, if the circuit court has no jurisdiction to determine if an appellant were entitled to a contested case hearing after having requested one, any agency could arbitrarily and capriciously deny anyone a hearing at any time, regardless of whether such hearing were required by law, and the aggrieved party could never obtain judicial review of such denial. Id. at 137, 139 P.3d at 725 (original brackets omitted). Nevertheless, this court held such argument was without merit, indicating that the Hui did not request a contested case hearing and emphasizing that, [i]ndeed, the Hui concede[d] that there is no procedural vehicle for any party or interested person to obtain a contested case hearing on whether

a petitioner has failed to perform according to the conditions imposed or has failed to perform according to the representations or commitments she made. Id. (original brackets and some internal quotation marks omitted).

Here, unlike in Kaniakapupu, there is a procedural vehicle for any party or interested person to obtain a contested case, i.e., HAR § 13-300-51, and Kaleikini did request a contested case hearing pursuant to that rule. Indeed, it is undisputed, as discussed more fully infra, that Kaleikini followed the procedures set forth for requesting a contested case hearing.[21] Thus, Kaniakapupu is distinguishable from the instant

[21] We note that, in Hui Kakoo Aina Hoopulapula v. Board of Land and Natural Resources, 112 Hawai i 28, 143 P.3d 1230 (2006), this court also determined that the circuit court did not have jurisdiction over an agency appeal because, although DLNR properly promulgated specific procedures for a contested case hearing [,]. . . the [a]ppellants failed to follow the requisite procedures, [and, thus,] there was no contested case from which the Appellants could appeal, pursuant to HRS § 91-14(a). 112 Hawaii at 41, 143 P.3d at 1243. See also Simpson v. Dep t of Land & Natural Res., 8 Haw. App. 16, 24-25, 791 P.2d 1267, 1273 (1990) (holding that a public hearing required by law is not a contested case where (1) the agency has properly promulgated specific procedures for a contested case hearing and (2) a party has failed to follow such procedures).

case on that ground.[22] As such, the appropriate inquiry here is whether Kaleikini has met the requirements of HRS § 91-14. PASH, 79 Hawai i at 431, 903 P.2d at 1252 (indicating that the necessary inquiry was whether the appellant met the requirements of HRS § 91-14).

2. Contested Case Hearing

In PASH, we described the requirements of HRS § 91-14 as follows:

> **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.

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[22] The concurrence contends that our attempt to distinguish Kaniakapupu is illusory because HRS § 91-14(a) and the case law interpreting HRS § 91-14(a) do not make any reference to a procedural vehicle as a prerequisite to a contested case hearing. Concurring op. at 36, 37. More specifically, the concurrence argues that

> HRS § 91-14(a) does not suggest that there is a different standard applied to those persons aggrieved who have brought a contested case under a procedural vehicle provision from those persons aggrieved who have brought a contested case in the absence of a procedural vehicle. See E & J Lounge [Operating Co., Inc. v. Liquor Comm n of City and County of Honolulu], 118 Hawai i [320,] 330, 189 P.3d [432,] 442 [(2008)]; PASH, 79 Hawai i at 431, 903 P.2d at 1252; Puna Geothermal, 77 Hawai i at 67, 881 P.2d at 1213.

Id. at 37-38.

As indicated above, the procedural vehicle in this case is HAR § 13-300-51, and such rule provides the legal authority for aggrieved persons to request and obtain contested case hearings to appeal burial council determinations. Because the Hui in Kaniakapupu had no similar authority to request or obtain a contested case hearing, the case at bar is distinguishable from Kaniakapupu and such distinction is not illusory.

PASH, 79 Hawai i at 431, 903 P.2d at 1252 (bold emphases added). We, therefore, examine each of the PASH requirements.

a. required by law

In order for an agency hearing to be required by law, it may be required by (1) agency rule, (2) statute, or (3) constitutional due process. Kaniakapupu, 111 Hawai i at 132, 139 P.3d at 720. On direct appeal, Kaleikini argued that

> both HRS § 6E-43(c)[, quoted supra note 6,] and constitutional rights mandated that [she] be granted her request for a contested case hearing.

In Bush v. Hawaiian Homes Commission, 76 Hawai i 128, 870 P.2d 1272 (1994), this court stated:

> If the statute or rule governing the activity in question does not mandate a hearing prior to the administrative agency s decision-making, the actions of the administrative agency are not required by law and do not amount to a final decision or order in a contested case from which a direct appeal to circuit court is possible.

76 Hawai i at 134, 870 P.2d at 1278. In other words, pursuant to HRS § 91-14, in order for proceedings before an agency to constitute a contested case from which an appeal can be maintained, the agency must be required by law to hold a hearing before a decision is rendered. Lingle, 107 Hawai i at 184, 111 P.3d at 593.

Here, HRS § 6E-43(c), as previously quoted, provides that determinations [by the OIBC] may be administratively appealed to a panel composed of three council chairpersons and three members from [BLNR] as a contested case pursuant to chapter

91. In turn, HAR § 13-300-51(a), as previously quoted, states that:

> When required by law, the appeals panel shall hold a contested case hearing upon timely written petition of any person who is aggrieved by [an OIBC] determination to preserve in place or relocate Native Hawaiian skeletal remains and any burial goods from a previously identified burial site and who is properly admitted as a party pursuant to section 13-300-54.

(Emphases added).

On direct appeal, DLNR argued that the statutory scheme did not mandate a contested case hearing because a

> contested case can occur **only if the BLNR chairperson determines that one is required**. The applicable rules do not provide an absolute right to such a hearing. See Bush, 76 Haw. at 135, 870 P.2d at 1279. In this case, [the BLNR chairperson], who had wide administrative discretion to determine the validity of a particular claim and [was] not required to hold a contested case hearing[,] [i]d., determined that based on factual and legal grounds a contested case was not required and denied appellant s request for one. Accordingly, a contested case could not have occurred and did not occur.

(Bold emphasis added.) (Emphasis and some brackets in original.) (Record citation omitted.) In support of its contention that a contested case can occur only if the BLNR chairperson determines that one is required, DLNR points to HAR § 13-300-53, which states: After a determination is made by the presiding officer[23] that a contested case hearing is required, the written notice of hearing shall be served by the [DLNR] upon the parties[.] DLNR, relying onBush, further maintains that the BLNR chairperson has wide administrative discretion to determine the validity of a particular claim and [was] not required to hold

[23] HAR § 13-300-2 defines the presiding officer as the chairperson of the [BLNR].

a contested case hearing. Bush, 76 Hawai i at 135, 870 P.2d at 1279. In our view, DLNR s reliance onBush is misplaced.

In that case, the appellants, who were native Hawaiian lessees pursuant to the Hawaiian Homes Commission Act (HHCA), took an appeal from a denial of their request for judicial review of the Hawaiian Homes Commission s (Commission) approval of third party agreements (TPAs) between non-Hawaiian farmers and native Hawaiian lessees pursuant to the HHCA. 76 Hawai i at 131, 870 P.2d at 1275. In December 1987, some appellants appeared before the Commission to contest the validity of the TPAs as violative of the HHCA provision prohibiting transfer of the native Hawaiian lessees interest in the land. Id. at 132, 870 P.2d at 1276. Upon determining that the TPAs, when properly executed, did not violate the provisions of the HHCA, the Commission caused the Department of Hawaiian Home Lands (DHHL) to notify all lessees that, if they intended to enter into a TPA, they must obtain written approval from the Commission in accordance with HAR § 10-3-35, entitled Contracts covering lease lands. Id. Four days before the Commission planned to consider the written submissions of a number of lessees, the appellants, in accordance with HAR § 10-5-31, quoted infra, petitioned for a contested case hearing. Id. Ultimately, the Commission approved the TPAs submitted by the lessees and denied the appellants request for a contested case hearing. Id. at 133, 870 P.2d at 1277. The appellants appealed both agency decisions to the circuit court.

Id. Upon motion by the Commission, the circuit court dismissed the appeal based on a lack of subject matter jurisdiction. Id. Thereafter, the appellants timely appealed to this court. Id.

In determining whether a contested case was required by law, theBush court looked to the administrative regulations at issue and determined that the regulations dictate[d] the appropriate procedure to follow in petitioning for a contested case but at the same time accord[ed] the Commission wide discretion in deciding whether to grant the petition. Id. at 135, 870 P.2d at 1279. Specifically, the HAR at issue -- HAR §§ 10-5-31 and 10-5-32 -- stated in relevant part that:

> § 10-5-31 *Contested case hearing requests*. (a) Any person or agency including the commission and the department may request a contested case hearing and shall have the right and full opportunity to assert a claim provided that the claim is based on a law or rule over which the commission has jurisdiction.
>
> . . . .
>
> (c) Upon receipt of the complaint, the department shall initiate an investigation of the matters contained in the complaint. The complaint shall be presented within a reasonable time to the commission, together with investigator s report and staff recommendation and on the basis thereof the ***commission shall determine whether proceedings shall be initiated and the matter set for hearing***.
>
> (d) It is the policy of the commission not to initiate proceedings where the matters complained of involve a private controversy redressable in the courts and where the public interest is not involved, or where it is clear on the face of the complaint that there has been no violation of the law or any rule of the commission.
>
> § 10-5-32 *Decision to hold hearing, scheduling*.
>
> (a) The commission shall hold a contested case hearing ***whenever it finds*** *that*:

> (1) Such a hearing is required by Chapter 91, HRS;
>
> (2) There is reason to believe that a law or rule of the commission has been violated;
>
> (3) Such a hearing would be in the best interest of one or more of the beneficiaries of the act; and
>
> (4) A proceeding by the commission would be in the interest of the department.

Id. at 135, 870 P.2d at 1279 (italics in original) (bold emphases added). Based on the foregoing, the Bush court reasoned that,

> [i]n both sections, the Commission is allocated the discretion to determine whether contested case proceedings should be initiated and an actual hearing held. In other words, . . . the allegedly aggrieved claimant **has a conditional right to a contested case hearing, dependent upon the Commission s evaluation of the matter.** Id. (underscored emphasis in original) (bold emphasis added).

Thus, the Bush court concluded that, inasmuch as [t]he Commission [was] granted wide administrative discretion to determine **the validity of a particular claim** and [was] not required to hold a contested case hearing . . . there [was] no **regulatory mandate** for a hearing prior to the Commission s decision on TPA petitions, and, accordingly, no hearing was required by law. Id. (underscored emphasis in original) (bold emphases added).

In determining the validity of a particular claim, the Commission was required to decide, pursuant to HAR § 10-5-32, whether it had reason to believe that a law or rule of the [C]ommission ha[d] been violated and that the hearing would be

in the best interests of one or more of the claimants and the department. However, a similar substantive determination is not required nor contemplated by the regulations applicable to the instant case. Here, as pointed out by DLNR, HAR § 13-300-53 provides that, [a]fter a determination is made by the [BLNR chairperson] that a contested case hearing is required, the written notice of hearing shall be served by the department upon the parties[.] Unlike in Bush, there is nothing in the HARs applicable to the case at bar that indicates the criteria upon which the BLNR chairperson s determination is to be based -- other than the regulatory mandate that a petition for a contested case hearing shall meet certain pleading requirements, see HAR § 13-300-52(b). In other words, the BLNR chairperson s determination is limited to whether the procedural requirements have been met, and, if so, HAR § 13-300-51 provides that the appeals panel shall hold a contested case hearing[.] (Emphasis added.) The lack of a regulation similar to that found in Bush underscores the fact that, in cases involving burial sites and human remains -- as we have here, -- the BLNR chairperson is not permitted to substitute his or her judgment for that of the appeals panel with regard to the substantive merits of the claimant s petition. In fact, because the chairperson s assessment is limited to whether procedural requirements have been met, the viability and/or validity of the allegations made in the petition are not at issue until properly

before the appeals panel. Thus, as stated previously, DLNR s reliance on Bush is misplaced.

Additionally, DLNR argues:

> Section 6E-43(c), HRS, which permits but does not require contested cases arising from certain burial council decisions, states in relevant part that burial council determinations to preserve in place or relocate previously identified native Hawaiian burials **may be administratively appealed to a panel composed of three council chairpersons and three members from the board of land and natural resources** as a contested case pursuant to chapter 91.

(Underscored emphasis added.) (Bold emphasis in original.) The DLNR further argues that, [i]t is clear from the foregoing statutory framework, as implemented by the administrative rules [(specifically focusing on HAR § 13-300-53, quoted supra)], that a section 6E-43(c) contested case can only occur if the BLNR chairperson determines that one is required. In so arguing, the DLNR believes that the word may refers to the discretionary authority of the BLNR chairperson to decide whether to allow an administrative appeal as a contested case. Seemingly, the DLNR would have us believe that, if the legislature intended to mandate a hearing, it would have used the word shall. We disagree with DLNR s reading of the statute.

First, the word may, in our view, applies to the person aggrieved by the agency s determination and who has the discretion to decide whether to pursue an administrative appeal as a contested case in the first instance. Second, we agree with Kaleikini that it would have been absurd for the legislature to use the word shall because that would have meant that every

council determination would be appealed. The language employed gave Kaleikini the right to a contested case hearing . . . with all the procedural safeguards as articulated in HRS [c]hapter 91. Those procedural safeguards are found in HAR § 13-300-52, quoted supra, note 8. Third, when the request for a contested case hearing satisfies the procedural requirements of section 13-300-52, then, HAR § 13-300-51 -- by virtue of the use of the mandatory language shall -- requires that the appeals panel hold a contested case hearing. Thus, when read together -- and coupled with our reading of HAR § 13-300-53, discussed supra, -- HRS § 6E-43 and HAR § 13-300-51 confer upon an aggrieved claimant -- like Kaleikini -- the right to a contested case hearing as long as the written petition meets the procedural requirements of HAR § 13-300-52.

Here, it is undisputed that Kaleikini complied with the requirements of HAR § 13-300-52, that is, her written petition was proper. As such, a contested case hearing was mandated by statute (i.e., HRS § 6E-43) and agency rule (HAR § 13-300-51) and, thus, was required by law. Kaniakapupu, 111 Hawai i at 132, 139 P.2d at 720 (agency hearing required by law when mandated by statute, rule or constitutional due process).[24]

[24] Inasmuch as we determine that a contested case hearing was mandated by statute and agency rule, it is not necessary for us to address Kaleikini s contention that a contested case hearing was mandated by the constitution.

The concurrence argues that,

> [a]s the majority suggests, HAR § 13-300-53 grants the chairperson the power to decide whether a contested case will be convened or not. However, this authority exceeds the scope of HRS § 6E-43, because [HAR] § 13-300-53 gives the chairperson authority that the plain language of HRS § 6E-43 does not grant. There is nothing in the statute that empowers the chairperson to exercise a veto over a request upon so-called procedural or any other grounds. Accordingly, the provision in HAR § 13-300-53 that affords the chairperson the power to make such decisions is invalid and must be struck down.

Concurring op. at 16 (citing Stop H-3 Ass n v. State Dep t of Transp., 68 Haw. 154, 161, 706 P.2d 446, 451 (1985)) (emphasis added). We disagree.

Preliminarily, we observe that, although an agency hearing can be required by law if required by an agency rule, see Kaniakapupu, 111 Hawai i at 132, 139 P.3d at 720, a rule that exceeds the scope of its statutory authority is invalid and, consequently, could not legally require an agency hearing. Inasmuch as the concurrence attacks the validity of a DLNR agency rule, we first turn to examine the DLNR s rule-making authority.

With respect to an agency s rule-making authority, this court has stated that:

> A public administrative agency possesses only such rule-making authority as is delegated to it by the state legislature and may only exercise this power within the framework of the statute under which it is conferred. Administrative rules and regulations which exceed the scope of the statutory enactment they were devised to implement are invalid and must be struck down. In other words, an administrative agency can only wield powers expressly or implicitly granted to it by statute.

Capua v. Weyerhaeuser, 117 Hawai i 439, 446, 184 P.3d 191, 198 (2008) (citing Haole v. State, 111 Hawai i 144, 156, 149 P.3d 377, 389 (2006)) (emphasis and brackets omitted). However, it is

also well-established that an administrative agency s authority includes those implied powers that are reasonably necessary to carry out the powers expressly granted. The reason for implied powers is that, as a practical matter, the legislature cannot foresee all the problems incidental to carrying out the duties and responsibilities of the agency. Capua, 117 Hawai i at 446, 184 P.3d at 198 (emphasis added) (citation omitted).

Here, the DLNR s authority to make rules related to the historic preservation of burial grounds is found in HRS § 6E-43.5 (2009), which provides in relevant part that [t]he [DLNR], in consultation with the [burial] councils, office of Hawaiian affairs, representatives of development and large property owner interests, and appropriate Hawaiian organizations . . . shall adopt rules pursuant to chapter 91 **necessary to carry out the purposes of this section**. (Emphases added). The purposes of this section, i.e., HRS chapter 6E, are set forth in HRS § 6E-1, as follows:

> The Constitution of the State of Hawai i recognizes the value of conserving and developing the historic and cultural property within the State for the public good. . . . The legislature further declares that it is in the public interest to engage in a comprehensive program of historic preservation at all levels of government to promote the use and conservation of such property for the education, inspiration, pleasure, and enrichment of its citizens. The legislature further declares that it shall be the public policy of this State to provide leadership in preserving, restoring, and maintaining history and cultural property, to ensure the administration of such historic and cultural property in a spirit of stewardship and trusteeship for future generations, and to conduct activities, plans, and programs in a manner consistent with the preservation and enhancement of historic and cultural property.

(Emphases added.) Accordingly, the plain language of HRS § 6E-43.5 authorizes the DLNR to promulgate rules that are: (1) in accordance with HRS chapter 91 (governing administrative procedure); and (2) necessary to implement or carry out the purposes of HRS chapter 6E, including engag[ing] in a comprehensive program of historic preservation at all levels of government and/or promot[ing] the use and conservation of historical and cultural property. We now examine HAR § 13-300-53 in light of the DLNR s statutory rule-making authority.

Title 13, subtitle 13, chapter 300 of the HAR, promulgated by the DLNR, sets forth the rules of practice and procedure relating to burial sites and human remains. HAR § 13-300-53, entitled notice of hearing, provides that,

> [a]fter a determination is made by the presiding officer that a contested case hearing is required, the written notice of hearing shall be served by the department upon the parties in accordance with section 91-9.5, HRS, and shall be served on all persons admitted as a party at their last recorded address not less than fifteen days prior to the beginning of the contested case hearing.

(Emphasis added.) As indicated supra, the BLNR chairperson s authority to determine whether a contested case hearing is required is limited to whether a party has met the procedural requirements set forth in HAR § 13-300-52. Stated differently, the chairperson, in making his or her determination, examines only whether a party has complied with procedural requirements for filing an administrative appeal from an OIBC determination.

If so, then HAR § 13-300-51 mandates a contested case hearing and such hearing is, thus, required by law.

A review of HRS chapter 91 demonstrates that HAR § 13-300-53 and our interpretation thereof do not conflict with the provisions of such chapter. Further, a contested case hearing that is required by law when a party complies with the procedural dictates of HAR § 13-300-52 enables parties to present the merits of their appeal. It follows that such process helps ensure that parties are able to present their claims regarding the preservation of burial grounds and other historic property in an expeditious manner, often in situations where time is of the essence, as was the case here because Kaleikini was seeking to preserve the iwi and prevent their imminent removal. As a result, HAR § 13-300-53 effectively creates an appellate system that is consistent with the preservation and enhancement of historic and cultural property and, thus, carries out the purposes of HRS chapter 6E. Consequently, it does not exceed the DLNR s rule-making authority under HRS § 6E-43.5. We now determine whether HAR § 13-300-53 exceeds the scope of HRS § 6E-43(c), as the concurrence contends.

As indicated supra, HRS § 6E-43(c) provides that:

> Council determinations may be administratively appealed to a panel composed of three council chairpersons and three members of the [BLNR] as a contested case pursuant to chapter 91. In addition to the six members, the chairperson of the [BLNR] shall preside over the contested case and vote only in the event of a tie.

In other words, HRS § 6E-43(c) provides for the right to administratively appeal a council determination to a panel. However, it does not set forth a specific process for initiating and conducting such an appeal. As stated above, the legislature cannot foresee all the problems incidental to carrying out the duties and responsibilities of the agency. As a result, agencies -- such as the DLNR in this case -- have the power to make rules that are reasonably necessary to carry out its duties. Based on such rule-making power, the DLNR appropriately promulgated administrative rules necessary to implement the statutory right to appeal by establishing procedural rules to initiate and conduct an administrative appeal to the OIBC, including, inter alia, HAR § 13-300-53.

As previously concluded, the determination of the chairperson pursuant to HAR § 13-300-53 is limited to an examination of whether a party has complied with the procedural requirements for submitting an appeal pursuant to HAR § 13-300-52. Indeed, the chairperson does not decide or even address the substantive merits of a party s appeal. As a result, HAR § 13-300-53 merely furnishes part of the process for appealing a council determination and ascertaining whether such hearing is required by law. Further, the chairperson s determination does not: (1) abrogate or alter a litigant s substantive right to appeal as set forth in HRS § 6E-43(c); (2) deprive the panel of their authority to adjudge the merits of

the appeal; or (3) otherwise displace the role and structure of the appellate panel laid out in HRS § 6E-43. Thus, HAR § 13-300-53 does not exceed the scope of HRS § 6E-43, and, instead, carries out a function of the administrative appellate process, as authorized by HRS § 6E-43.5(c), quoted supra. Therefore, the concurrence s argument that HAR § 13-300-53 is invalid and must be struck down is unavailing. See Concurring op. at 16.

The concurrence, however, disagrees with our conclusion that HAR § 13-300-53 does not exceed the scope of HRS § 6E-43 and, relying on Haole v. State, 111 Hawai i 144, 140 P.3d 377 (2006), argues that, [b]ecause the legislature specifically defined the role of the chairperson in HRS § 6E-43, this court, as well as the DLNR[,] must give effect to the language of the statute itself. Concurring op. at 21 (citations and internal brackets omitted).

It appears that the concurrence relies upon Haole to essentially assert that the role of the chairperson -- as defined in HRS § 6E-43 -- is a limited one, and that, because no other role for the chairperson was set forth in HRS § 6E-43, the chairperson has no further authority outside of presiding over the contested case and voting in the event of a tie. HRS § 6E-43. We disagree.

The concurrence correctly observes that the Haole court examined an administrative rule imposing a regulatory duty on

owners and operators conducting unloading activities on state piers to defend and indemnify the State of Hawaii in order to determine whether such rule was authorized by the statutes governing the Department of Transportation (DOT). Haole, 111 Hawai i at 146, 140 P.3d at 379. In so doing, the Haole court looked to and applied the test for reviewing an agency s construction of a statute which it administers set forth in Orca Bay Seafoods v. Northwest Truck Sales, Inc., 32 F.3d 433 (9th Cir. 1994) -- the first question of which is whether Congress[, i.e., the legislature,] has directly spoken to the precise question at issue. Haole, 111 Hawai i at 155, 140 P.3d at 388.

Looking to the first question of the test, the Haole court observed that the legislature had spoken to the issue of State liability when it enacted the State Tort Liability Act, which provided in part that the State is generally liable for actual damages caused by the negligence of its employees in the same manner and to the same extent as a private individual under like circumstances. Id. at 151, 140 P.3d at 384 (quoting HRS § 662-2 (1993)). It further observed that [t]his court has consistently held that private parties may contract to indemnify the indemnitee for the indemnitee s own negligence but there must be a clear and unequivocal assumption of liability by one party for the other party s negligence. Id. (citations omitted).

In examining whether the language of the DOT s governing statutes authorized the State to impose a duty of indemnification via statute (instead of contractually imposing such a duty), the Haole court determined that the DOT s authority was specifically defined in the governing statutes, and that such statutes did not explicitly state that DOT s rule-making authority includes the power to impose a duty of indemnification. Id. at 154, 140 P.3d at 387. With regard to the DOT s implied powers, theHaole court concluded that, because: (1) the DOT s authority is specifically defined by statute; (2) the legislature had spoken to the issue of State liability; and (3) the DOT could contract for the indemnity that it was attempting to impose in an administrative rule, the DOT was not permitted to bypass the general requirement that parties (in this case, the State) seeking to shift liability to another . . . must secure the clear and unequivocal agreement of that party to assume the liability of another. Id. at 155-56, 140 P.3d at 388-89 (citation omitted). Consequently, the Haole court held, in relevant part, that the statutes governing the DOT do not explicitly or implicitly authorize the DOT to issue administrative rules exonerating the State from the negligence of its employees. Id. at 160, 140 P.3d at 393 (footnote omitted).

Here, HRS § 6E-43 defines the role of the chairperson, just as the DOT statutes defined the powers of the DOT. Such defined powers indicate that the chairperson does not have

explicit power, pursuant to HRS § 6E-43, to examine the procedural requirements for requesting a contested case hearing -- just as the DOT did not have explicit power under the statute to promulgate an administrative rule which imposed a duty to indemnify the State. However, the language of HRS § 6E-43 does not limit the BLNR chairperson s authority to make a procedural determination, and the legislature has not spoken to the issue such that the DLNR is precluded from using its implied powers to delegate such authority. Indeed, unlike the State Tort Liability Act in Haole (in which the legislature had directly spoken to the issue of State liability), there is no statute or statutory scheme that directly speaks to the chairperson s authority to assess whether a contested case hearing is required. Further, as previously discussed, the statutes are silent as to the proper process for initiating and conducting an administrative appeal, and, thus, do not limit the DLNR s implicit authority to promulgate rules setting forth such an appellate process. Consequently, no intent or policy of the legislature precluded the DLNR from exercising its implied powers to promulgate HAR § 13-300-53 and grant the chairperson authority to determine whether a contested case hearing is required. Accordingly, Haole is not only distinguishable from the instant case, but also contrary to the concurrence. We now turn to examine whether the chairperson s authority under HAR § 13-300-53 directly conflicts with the plain language of HRS § 6E-43.

The relevant language of HRS § 6E-43, i.e., that the chairperson of the [BLNR] shall preside over the contested case and vote only in the event of a tie, precludes the chairperson from making a substantive decision as to the merits of a party s contested case, except in the event of a tie. As discussed at length supra, HAR § 13-300-53, when read in conjunction with other relevant administrative rules, gives the chairperson the authority to make an assessment of only the procedural requirements set forth in HAR § 13-300-52(a), and such assessment is entirely unrelated to the merits. Consequently, the authority granted to the chairperson in HAR § 13-300-53 does not conflict with or usurp the role of the chairperson defined in HRS § 6E-43, nor does it contradict the plain language or intent of the statute.

Based on the foregoing, we maintain that the DLNR had implicit authority to issue administrative rules that provide a procedure for requesting and obtaining a contested case hearing, including HAR § 13-300-53, which, in turn, permits the BLNR chairperson to make the determination whether a contested case hearing is required. Accordingly, the concurrence s argument that the role of the chairperson defined in HRS § 6E-43 is the end of the matter is incorrect.

We turn next to examine whether the requested contested case hearing would have determined the rights, duties, and

privileges of specific parties. PASH, 79 Hawai i at 431, 903 P.2d at 1252.

b. rights, duties, and privileges

Inasmuch as no contested case hearing was held, but, as discussed above, was required by HRS § 6E-43 and HAR § 13-300-51 the issue here is whether the hearing, had it been held, would have determined the rights, duties, and privileges of specific parties. Id. In PASH, this court stated that, with regard to whether a hearing would determine the rights, duties, and privileges of specific parties, its inquiry [was] properly directed at the party whose application was under consideration. Id. at 432, 903 P.2d at 1253. Likewise, in Puna Geothermal, this court stated that:

> The public hearings held by the DOH were proceedings in which PGV sought to have the legal rights, duties or privileges of land in which it held an interest declared over the objections of other landowners and residents of Puna. Mahuiki v. Planning Comm n, 65 Haw. 506, 513, 654 P.2d 874, 879 (1982) (concluding that this characteristic is an obvious element of a contested case hearing); see also Town v. Land Use Comm n, 55 Haw. 538, 548, 524 P.2d 84, 91 (1974) (holding that adjacent property owner has a property interest in the amendment of a district boundary). Thus, the DOH hearings were contested case[s] because they were proceeding[s] in which the legal rights, duties or privileges of specific parties were required by law to be determined after an opportunity for agency hearing. HRS § 91-1(5).

77 Hawai i at 68, 881 P.2d at 1214. Accordingly, the relevant inquiry in the instant case, as in PASH, is whether a contested case hearing would have determined the rights, duties, or privileges of GGP.

The concurrence claims that:

> The majority decision today, coupled with the majority s decision in Kaniakapupu, creates different standards for determining whether an agency action is a contested case.
>
> Thus, on one hand, if there is a procedural vehicle for any party or interested person to obtain a contested case[,] thenKaniakapupu does not apply and the analysis as set forth in the majority s opinion here rests on whether the hearing, had it been held, would have determined the rights, duties, and privileges of specific parties. Majority opinion at 51. If so, then the court has jurisdiction under HRS chapter 91. On the other hand, if there is no such procedural vehicle for obtaining a contested case, then Kaniakapupu applies and the court lacks jurisdiction because there was no contested case hearing, even though, had the hearing been held, the hearing would have determined the rights, duties, and privileges of specific parties. Kaniakapupu, 111 Hawai i at 134, 139 P.3d at 722. Consequently, the foregoing standard, even if the hearing, had it been held, would have determined the rights, duties, and privileges of specific parties, the court lacks jurisdiction pursuant to HRS chapter 91.

Concurring op. at 36-37 (footnotes omitted). However, the only support provided by the concurrence for such position is **the dissenting opinion** in Kaniakapupu, which is not binding on this court and, as importantly, not the law in this jurisdiction.

Turning to the relevant inquiry whether a contested case hearing in this case would have determined the rights, duties, or privileges of GGP, we observe that OIBC s approval of GGP s burial treatment plan (and DLNR s subsequent approval of such plan without a contested case hearing) implicated GGP s use of its project site because HAR § 13-300-33 (2009) prohibits the

> [i]ntentional removal of human skeletal remains or burial goods from a previously identified Native Hawaiian burial site . . . until a determination to relocate is made by the council[.]

Moreover, the approval or disapproval of the burial treatment plan determined what GGP s duties were with respect to the iwi

discovered on the project site. Accordingly, had a contested case hearing been held, it would have determined the rights, duties, or privileges of GGP.

The concurrence contends that:

> The chairperson s review of a petition for a contested case hearing is analogous to the LUC s entertainment of the appellant s motion for order to show cause in Kaniakapupu in that both were essentially threshold motions that occurred before a contested case was conducted. Applying the majority s reasoning in Kaniakapupu, the chairperson s denial of a contested case did not constitute a contested case for the purposes of obtaining judicial review pursuant to HRS § 91-14(a), 111 Hawaii at 134, 139 P.3d at 722, and, hence, the requirement in HRS § 91-14 that the order appealed from arise from a contested case hearing, had not been met[,] id. at 131, 139 P.3d at 719.

Concurring op. at 30 (internal brackets omitted). Consequently, the concurrence argues that, [i]f the provision in HAR § 13-300-53 regarding the chairperson s authority is valid, as the majority holds (and which I believe it is not, as indicated previously), then, pursuant to the majority in Kaniakapupu, the court in the instant case lacked subject matter jurisdiction under HRS chapter 91. Id. at 30-31 (emphasis in original) (footnote omitted). However, the concurrence misconstrues our characterization of the BLNR chairperson s role in the administrative appeal process and, as such, incorrectly analogizes Kaniakapupu to the instant case.

In Kaniakapupu, it was undisputed that, in order for the petitioner-Hui to obtain a contested case hearing, they had to first file an OSC motion, request a hearing on that motion, and meet their burden of proof in demonstrating that an order to

show cause was required. Kaniakapupu, 111 Hawai i at 127-128, 139 P.3d at 715-716. Indeed, the parties acknowledged that only if the LUC grants a motion and issues an order to show cause would a contested case be conducted. Id. at 136, 139 P.3d at 724. Finally, the Hui admitted that there was no procedure for them -- or any interested party -- to directly request or obtain a contested case hearing in their case. Id. at 137, 139 P.3d at 725. Thus, the OSC motion filed by the Hui and subsequent motion hearing were the only procedural devices that could possibly have provided them with a contested case hearing that would determine the rights, duties, or privileges of specific parties. Consequently, the Hui s OSC motion constituted a threshold motion, and the motion hearing provided the only procedural vehicle to obtain a contested case hearing.

In the instant case, however, there was a statutory and agency rule which allowed Kaleikini to directly request and obtain a contested case hearing -- i.e., HRS § 6E-43(c) and HAR § 13-300-51. Further, as discussed supra at section C.2.b, we determined that, unlike the motion hearing in Kaniakapupu, a contested case hearing -- had it been held -- would have determined the rights, duties, or privileges of GGP.

Additionally, we determined that a party can meet the required by law element of HAR § 13-300-51 by complying with the procedural requirements set forth in HAR § 13-300-52, quoted supra, and, pursuant to HAR § 13-300-53, the BLNR chairperson is

the designated officer to determine whether such procedural requirements have been met. Thus, the chairperson s determination is to ascertain whether a party seeking an appeal has met the required by law element of HAR § 13-300-51. Consequently, such determination by the chairperson -- unlike the LUC s denial of the Hui s OSC motion in Kaniakapupu -- does not constitute a threshold motion to obtain a hearing that determines the rights, duties, or privileges of specific parties. Accordingly, the instant case is clearly distinguishable from Kaniakapupu.

Moreover, if the chairperson s determination whether a hearing was required by law constitutes a threshold motion or procedural vehicle, as the concurrence contends, then any inquiry as to whether a contested case hearing is required by law prior to holding the hearing would be a threshold inquiry that does not constitute a contested case for the purposes of obtaining judicial review pursuant to HRS § 91-14(a). Thus, under the concurrence s interpretation, a party would never have the ability to appeal the adverse determination that a hearing was not required by law, and any agency could arbitrarily and capriciously deny a party a hearing without being subject to judicial review of such denial. Such a result is contrary to fundamental notions of fairness and justice and abrogates the important interest in giving parties the opportunity to appeal adverse rulings.

In sum, we are unpersuaded by the concurrence s attempt to analogize the instant case to Kaniakapupu. As a result, the concurrence s contention that the court lacked subject matter jurisdiction under HRS chapter 91, pursuant to the majority opinion in Kaniakapupu is wholly without merit.

3. Final Decision and Order

The second prong of the PASH requirements calls for an examination whether the agency s action . . . represents a final decision and order, or a preliminary ruling such that deferral of review would deprive the claimant of adequate relief. PASH, 79 Hawai i at 431, 903 P.2d at 1252. Kaleikini argues that this court has repeatedly found that the denial of a request for a contested case hearing (or to participate in one) is a sufficiently final decision for judicial review. (Citing Puna Geothermal, PASH, and In re Hawai i Gov t Employees Ass, n 63 Haw. 85, 88-89, 621 P.2d 361, 364 (1980)). We agree.

As previously stated, this court, in PASH held that the circuit court properly exercised jurisdiction over an agency appeal where the agency denied a request by the appellants to participate in a contested case hearing. 79 Hawai i at 431-33, 903 P.2d at 1252-54. Here, Kaleikini requested a contested case hearing, which DLNR denied. The denial of Kaleikini s request constituted a final decision and order inasmuch as it ended the litigation. Accordingly, this prong of the PASH requirements is met.

4. Applicable Agency Rules

The third step requires a determination whether the claimant . . . followed the applicable agency rules and, therefore, [was] involved in the contested case[.] PASH, 79 Hawai i at 431, 903 P.2d at 1252. Kaleikini states that she followed all applicable agency rules. More specifically, Kaleikini asserts that,

> [a]s in PASH and [Puna Geothermal], Kaleikini testified against the authorization to relocate the iwi. As in PASH and [Puna Geothermal], Kaleikini filed a written request for a contested case hearing. Kaleikini s petition was timely filed and included all the relevant information requested. Kaleikini followed the rules by requesting a hearing on a contested matter in her October 12, 2006 letter[.]

As quoted supra note 8, HAR § 13-300-52 governs the procedures that must be followed in requesting a contested case hearing. Our review of Kaleikini s October 12, 2006 letter, reveals that she complied with HAR § 13-300-52 inasmuch as her letter contained statements regarding: (1) the legal authority by which appeal is requested, i.e., HRS § 6E-43 and HAR §§ 13-300-51 and 13-300-52; (2) the council determination being appealed and the date of the determination, i.e., the September 13, 2006 decision to relocate the iwi at the Ward Village Shops Project; (3) the nature of the interest that may be adversely affected by the council determination, i.e., Kaleikini s rights under article XII, section 7 of the Hawai i constitution and her rights as a cultural decedent; (4) the relevant facts and issues

raised; and (5) the relief being sought. HAR § 13-300-52. Thus, Kaleikini complied with the applicable agency rules.

5. Standing

The final prong requires that the claimant s legal interests must have been injured -- i.e., the claimant must have standing to appeal. PASH, 79 Hawai i at 431, 903 P.2d at 1252. Kaleikini argues that she has standing as a Native Hawaiian and as a cultural descendent of the iwi.

As indicated above, Kaleikini s legal interests stem from her cultural and religious beliefs regarding the protection of the iwi. The HAR at issue here specifically provide standing to cultural descendant[s], such as Kaleikini. Additionally, the Hawai i constitution -- article XII, section 7 -- protects such rights. Throughout the instant litigation, Kalekini has averred that her cultural and religious beliefs require her to ensure that the iwi is left undisturbed and that the OIBC s decision, allowing GGP to disinter the iwi, has caused her cultural and religious injury. As such, we believe Kaleikini has alleged sufficient facts upon which this court can determine she has standing. Accordingly, Kaleikini has also met this final prong of the requirements set forth in PASH.

IV. CONCLUSION

Based on the foregoing, we hold that, although Kaleikini s appeal was moot, it fell within the public interest exception to the mootness doctrine. We additionally hold that a

contested case hearing was (1) required by law and (2) would have determined the rights, duties, and privileges of specific parties. Further, we conclude that: (1) DLNR s denial of Kaleikini s request for a contested case hearing represented a final decision and order ; (2) Kaleikini followed the applicable agency rules and, therefore, was involved in the contested case; and (3) Kaleikini s legal interests were injured --i.e., she has standing to appeal. Accordingly, we hold that the circuit court erred in dismissing Kaleikini s agency appeal for a lack of subject matter jurisdiction. Consequently, we vacate the ICA s order dismissing Kaleikini s appeal for mootness and remand the case to the circuit court for further proceedings consistent with this opinion.

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