CONCURRING OPINION BY ACOBA, J.

I believe that (1) this appeal is moot, but fell within the public interest exception to the mootness doctrine,[1] (2) Petitioner had the right to a contested case hearing on a decision to remove the Native Hawaiian burial remains (iwi) in this case, and (3) the circuit court of the first circuit (the court) erred when it determined that it lacked subject matter jurisdiction over the administrative appeal. I respectfully disagree with the majority's analysis in several aspects. First, I do not concur with the majority's opinion that "a contested case hearing was mandated by statute (i.e., HRS § 6E-43) and agency rule ([Hawaiʻi Administrative Rules (HAR)] § 13-300-51

[1] While the claims of Petitioner/Appellant-Appellant Paulette Kaʻanohiokalani Kaleikini (Petitioner) are moot in this case, I would hold that Petitioner's claim would fall into the "public interest" exception to the mootness doctrine. This court has held in Kahoʻohanohano v. State, 114 Hawaiʻi 302, 333, 162 P.3d 696, 727 (2007), that "'when the question involved affects the public interest and an authoritative determination is desirable for the guidance of public officials, a case will not be considered moot.'" (Quoting Slupecki v. Admin. Dir. of Courts, State of Hawaiʻi, 110 Hawaiʻi 407, 409 n.4, 133 P.3d 1199, 1201 n.4 (2006) (citations omitted).) In Kahoʻohanohano, this court stated that the criteria that it considers in determining the degree of public interest are "(1) the public or private nature of the question presented, (2) the desirability of an authoritative determination for the future guidance of public officers, and (3) the likelihood of future recurrence of the question." Id. (citations and brackets omitted).

First, Petitioner's claim is one of public nature because "[t]he public has a vital interest in the proper disposition of the bodies of its deceased persons, which is in the nature of a scared trust for the benefit of all." 1990 Haw. Sess. Laws Act 306, § 1 at 956. Second, an authoritative determination for future guidance of public officers on this issue is important considering the confusion surrounding the issue of whether a court had jurisdiction to review the denial of a contested case hearing under Hawaiʻi Revised Statutes (HRS) § 6E-43 (1993). Third, the likelihood of future recurrence is high considering the probability that burial sites will likely be unearthed at future construction projects. Because I find that Petitioner's claim falls within the "public interest" exception, I reach the merits of this case.

[(2009)])[.]" Majority opinion at 40. Instead, I would hold that Petitioner's constitutional due process right as a Native Hawaiian practicing the native and customary traditions of protecting iwi mandated that a contested case hearing be held. Second, I disagree with the majority's assertion that "the [Board of Land and Natural Resources (BLNR)] chairperson's determination [as] . . . to whether the procedural requirements have been met," id. at 38, determines whether "'the appeals panel shall hold a contested case hearing[,]'" id. (emphasis in original) (quoting HAR § 13-300-51), inasmuch as I believe the allowance of such determination by the chairperson is invalid and the panel itself should determine whether to hold a hearing. Third, assuming arguendo that the chairperson did have the authority to determine whether a contested case hearing would be convened or not, as the majority maintains (and with which I do not agree), then Aha Hui Malama O Kaniakapupu v. Land Use Comm'n, 111 Hawaiʻi 124, 139 P.3d 712 (2006) [hereinafter "Kaniakapupu"], would apply, and the court would have been correct in deciding that it lacked subject matter jurisdiction inasmuch as the chairperson's denial of Petitioner's request for a hearing in this case was analogous to the denial by the Land Use Commission (LUC) of the appellant's request for a hearing in Kaniakapupu, which a majority of this court upheld.

I.

HRS § 6E-43 governs the removal of prehistoric and historic burial sites. HRS § 6E-43(a) states that, "[a]t 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 the department's approval."[2] (Emphasis added.) With regard to native Hawaiian burial sites, an "appropriate island burial council shall determine whether preservation in place or relocation of previously identified native Hawaiian burial sites is warranted,"[3] and render a determination "within forty-five days of referral by the department unless otherwise extended by agreement between the landowner and the department." HRS § 6E-43(b). "Within ninety days following the final determination, a preservation or mitigation plan shall be approved by the department in consultation with any lineal descendants, the respective council, other appropriate Hawaiian organizations, and any affected property owner."[4] HRS § 6E-43(d).

[2] HRS § 6E-2 (1993 & Supp. 2006) defines the term "department" as "the department of land and natural resources" (DLNR).

[3] HRS § 6E-43.5 (1993 & Supp. 2006) governs the creation, appointment, composition and duties of the island burial councils.

[4] HRS §6E-2 defines the a "mitigation plan" as "a plan, approved by the department, for the care and disposition of historic properties, aviation artifacts, and burial sites or the contents thereof, that includes monitoring, protection, restoration, and interpretation plans."

HRS § 6E-43(c) authorizes the appeal of council determinations. HRS § 6E-43(c) states that "[c]ouncil determinations may be administratively appealed to a panel composed of three council chairpersons and three members from the [BLNR] as a contested case pursuant to chapter 91." (Emphases added.) Also, "[i]n 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." Id. (emphasis added).

By the use of the term "may," HRS § 6E-43(c) on its face permits an appeal of a council's determination by way of a contested case hearing "pursuant to [HRS] [c]hapter 91."[5] There is nothing in HRS § 6E-43(c) to indicate that "may" should not be given its ordinary meaning as permissive or discretionary. I agree with Petitioner that "[i]n this context, it would have been absurd for the legislature to use the word 'shall' because that would have meant that every council determination would be

[5] See Kahoʻohanohano v. Dep't of Human Servs., 117 Hawaiʻi 262, 281, 178 P.3d 538, 557 (2008) ("Where the language of the statute is plain and unambiguous, our only duty is to give effect to its plain and obvious meaning.") (Citations omitted.); State v. Klie, 116 Hawaiʻi 519, 522, 174 P.3d 358, 361 (2007) ("Where the statutory language is unambiguous, the court's sole duty is to give effect to its plain and obvious meaning." (Citing State v. Sakamoto, 101 Hawaiʻi 409, 412, 70 P.3d 635, 638 (2003) (citations omitted).); City & County of Honolulu v. Ing, 100 Hawaiʻi 182, 189, 58 P.3d 1229, 1236 (2002) ("[O]ur foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself." (Citing State v. Pacheco, 96 Hawaiʻi 83, 94, 26 P.3d 572, 583 (2001).)). "The term 'may' is generally construed to render optional, permissive, or discretionary the provision in which it is embodied; this is so at least when there is nothing in the wording, sense, or policy of the provision demanding an unusual interpretation." State v. Kahawai, 103 Hawaiʻi 462, 465, 83 P.3d 725, 728 (2004) (citations omitted) (emphasis added); cf. Black's Law Dictionary 1068 (9th ed. 2009) (defining the term "may" as "[t]o be permitted to[,]" "[t]o be a possibility" or "[l]oosely, is required to; shall; must").

appealed." Thus, HRS § 6E-43(c) permits persons aggrieved by the council's determination the opportunity to appeal by way of a contested case hearing.

II.

It is evident that Petitioner was entitled to a contested case hearing under HRS chapter 91. Among other factors, "[a] contested case is an agency hearing that . . . is required by law[.]" E & J Lounge Operating Co. v. Liquor Comn'n of City & County of Honolulu, 118 Hawaiʻi 320, 330, 189 P.3d 432, 442 (2008) (quoting Pub. Access Shoreline Hawaiʻi v. Hawaiʻi County Planning Comm'n, 79 Hawaiʻi 425, 431, 903 P.2d 1246, 1252 (1995) [hereinafter "PASH"] (internal quotation marks, citation, and brackets omitted)); Pele Def. Fund v. Puna Geothermal Venture, 77 Hawaiʻi 64, 67, 881 P.2d 1210, 1213 (1994).[6] "In order for [an agency] hearing to be 'required by law,' it may be required by [(1)] agency rule, [(2)] statute, or

[6] HRS § 91-14 (1993 & Supp. 2009) affords aggrieved parties judicial review over a contested case whenever the requirements of § 91-14, as set forth in PASH, are satisfied. The four requirements are:

> [F]irst, 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.

PASH, 79 Hawaiʻi at 431, 903 P.2d at 1252 (emphasis added). I concur with the majority that the other requirements would be met in this case.

[(3)] constitutional due process." PASH, 79 Hawaiʻi at 431, 903 P.2d at 1252 (citing Puna Geothermal, 77 Hawaiʻi at 68, 881 P.2d at 14); Kaniakapupu, 111 Hawaiʻi at 132, 139 P.3d at 720.

A.

This court in Bush v. Hawaiian Homes Commission, 76 Hawaiʻi 128, 134, 870 P.2d 1272, 1278 (1994), held that

> [i]f 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.

(Quoting Kona Old Hawaiian Trails Group v. Lyman, 69 Haw. 81, 90, 734 P.2d 161, 167 (1987) (Emphasis in original.)); see also Kaniakapupu, 111 Hawaiʻi at 131, 139 P.3d at 719. HRS § 6E-43, the statute "governing the activity in question, d[id] not mandate a hearing." Bush, 76 Hawaiʻi at 135, 870 P.2d at 1279. HRS § 6E-43(c) provides that "[c]ouncil determinations may be administratively appealed to a panel." (Emphasis added.) From the plain language of HRS § 6E-43, there is nothing to suggest that once a council determination is appealed to the panel that the panel is then required to conduct a contested case hearing pursuant to chapter 91. Therefore, on its face the statute does not "mandate a hearing prior to the agency's decision-making" and thus, a hearing is not "required by [the statute]." Bush, 76 Hawaiʻi at 134, 870 P.2d at 1278.

The administrative "rule[s] governing the activity in question" further support the conclusion that a contested case

hearing is not mandated by the statute. Id. Subchapter 5, chapter 300, subtitle 13 of the HAR, entitled "Administrative Appeals," establishes the process for administrative appeals of burial council determinations. HAR § 13-300-51(a) states in relevant part:

> 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.[7]

(Emphases added.) The mandate that "the appeals panel shall hold a contested case hearing upon timely written petition of any person who is aggrieved" in HAR § 13-300-51 is explicitly limited by the term "when required by law[.]" HAR § 13-300-51(a). In other words, there must be direction from other "law" that requires the appeals panel to convene a contested case hearing. Thus, HAR § 13-300-51 indicates that the rules, by themselves, do not mandate a contested case hearing unless required by other law.

B.

Because a contested case hearing "w[as] not required by statute or agency rule[,] . . . the remaining question [becomes] whether the hearing[was] required by constitutional due

[7] HAR § 13-300-54(a) (2009) directs that four types of persons may be allowed admission as a party -- the applicant, landowner, "[a]ny person who has been recognized by the department as a known lineal descendant to the Native Hawaiian skeletal remains[,]" or "[a]ny person who can show a substantial interest in the matter that is affected by the council determination, or by the outcome of the decision of the appeals panel."

process." Puna Geothermal, 77 Hawaiʻi at 68, 881 P.2d at 1214 (citation omitted). In Puna Geothermal, Puna Geothermal Ventures (PGV) applied for two permits under HRS chapter 342 (1985). Id. at 66, 881 P.2d at 1212. "By statute and agency rule, the [Department of Health (DOH)] ha[d] discretionary authority to hold public hearings on such applications." Id. (citing HRS § 342-6(c); HAR § 11-60-45(a)) (emphasis omitted). In its discretion, the DOH held two "public informational hearings" where "various individuals testified after requesting contested case hearings." Id. "The DOH referred these requests to the Attorney General's (AG's) office," who "determined that there was no legal mandate to grant a contested case hearing." Id. Accordingly, the DOH denied the contested case hearing requests and granted PGV's permit application. Id. On appeal to the circuit court, PGV moved to dismiss the appeal for lack of subject matter jurisdiction. The circuit court denied the motion and subsequently denied PGV's motion to reconsider. Id. PGV appealed to this court.

After determining that a contested case hearing was not required by statute or administrative rule, this court held that "[c]onstitutional due process protections mandate a hearing whenever the claimant seeks to protect a 'property interest,' in other words, a benefit to which the claimant is legitimately entitled." Id. (citations omitted). This court further stated that,

> as a matter of constitutional due process, an agency hearing is also required where the issuance of a permit implicating an applicant's property rights adversely affects the constitutionally protected rights of other interested persons who have followed the agency's rules governing participation in contested cases. . . . [C]f. Bush, 76 Hawaiʻi at 136, 870 P.2d at 1280 (holding that the court does not have jurisdiction to hear the claims of persons aggrieved by a final agency decision involving third party agreements because the subject matter of the hearing did not concern "property interests" under the Hawaiian Homes Commission Act and the HAR).

Id. (some emphasis added and some in original).

In this case, the Oahu Island Burial Council (OIBC) addressed the burial treatment plan of General Growth Properties, Inc. (GGP), which sought to remove iwi discovered at the Ward Villages Shops Project. Had the OIBC denied GGP's request to remove the iwi, GGP would have been entitled to a contested case hearing, pursuant to HRS § 6E-43, inasmuch as the denial of the treatment plan would have affected GGP's property interest and use of its property.[8] Additionally, as stated in Puna Geothermal, "as a matter of constitutional due process, an agency hearing is also required where the issuance of a permit implicating an applicant's property rights adversely affects the constitutionally protected rights of other interested persons who have followed the agency's rules governing participation in contested cases." Id. (some emphasis added, some in original). Thus, under Puna Geothermal, Petitioner would be entitled to a contested case hearing as a matter of constitutional due process

[8] The removal of a burial site without the permission of the DLNR is subject to criminal penalties under HRS § 6E-72 (Supp. 2006) and HRS § 6E-73 (Supp. 2006), and civil and administrative penalties under HRS § 6E-11 (Supp. 2006). HRS § 6E-11 also creates administrative and civil punishments.

if GGP's property rights adversely affected Petitioner's constitutionally protected rights.

In this case, Petitioner's "constitutionally protected right" was the denial of her right to exercise her Native Hawaiian customary and traditional practices -- specifically, to ensure that the iwi receive proper care and respect. Native Hawaiian rights are protected by article XII, section 7 of the Hawaiʻi Constitution. Pele Def. Fund v. Paty, 73 Haw. 578, 616-21, 837 P.2d 1247, 1269-72 (1992); PASH, 79 Hawaiʻi at 434, 903 P.2d at 1256. Article XII, section 7 of the Hawaiʻi Constitution provides:

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

This court has also held in PASH, that "those persons who are 'descendants of native Hawaiians who inhabited the islands prior to 1778' and who assert otherwise valid customary and traditional Hawaiian rights under HRS § 1-1 are entitled to protection regardless of their blood quantum." 79 Hawaiʻi at 449, 881 P.2d at 1270 (citing Haw. Const., art. XII, § 7) (emphasis in original).

In light of these constitutional provisions, native Hawaiians, whose customary practices demand that the iwi remain in place, have equal rights to a contested case hearing where

these practices are adversely affected. In this case, Petitioner is a native Hawaiian with more than 50% native Hawaiian ancestry. As a native Hawaiian, her customary and traditional rights were entitled to protections articulated in article XII, section 7. Id. The OIBC recognized that Petitioner was a "cultural descendent"[9] to the iwi that were in issue in this case. In fact, Petitioner is a direct descendant of the original Land Commission Awardee for the property upon which the Ward Village Shops project was located. Thus, a contested case hearing was mandated by constitutional due process and, consequently, "required by law."

HRS § 91-14(a) provides the means by which judicial review of contested case hearings is obtained. HRS § 91-14(a) states in relevant part:

> (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[.]

Because Petitioner was entitled to a contested case hearing, she would be entitled to judicial review of an adverse determination from a contested case hearing. PASH, 79 Hawaiʻi at 431, 903 P.2d at 1252 (stating that HRS § 91-14 requires that "the proceeding

[9] A "cultural descendant" with respect to Native Hawaiian remains is "a claimant recognized by the 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." HAR § 13-300-2.

that resulted in the unfavorable agency action must have been a 'contested case' hearing").[10]

III.

A.

The majority argues that "the BLNR chairperson's determination is limited to whether the procedural requirements [in HAR § 13-300-52 (2009)] have been met, and, if so, HAR § 13-300-51 provides that 'the appeals panel shall hold a contested case hearing.'" Majority opinion at 38 (first emphasis added; second emphasis in original) (brackets omitted). Stated differently, the majority contends that "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[,]" and "[i]f so, then HAR § 13-300-51 mandates a contested case hearing . . . 'required by law.'" Majority opinion at 43-44. I do not believe the chairperson may validly determine procedural requirements or make any decision as to whether a contested case hearing can be held.

[10] As the court in this case noted, HRS § 91-14 allows for alternative remedies in the event that the issue decided does not fall squarely within Chapter 91. HRS § 91-14 states that "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." HRS § 91-14(a). Thus, in the event that the court lacked subject matter jurisdiction over appeal of the chairperson's denial of a contested case hearing (assuming arguendo the validity of this provision), nothing under HRS § 91-14 would prevent Petitioner from seeking other means of relief "provided by law" such as through a declaratory judgment.

The majority relies on HAR § 13-300-53 to support its conclusion that the chairperson has the power to determine whether a contested case may be convened. HAR § 13-300-53 states in relevant part:

> (a) After a determination is made by the presiding officer[11] 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.) Thus, under the majority's position, if on one hand, the chairperson, under HAR § 13-300-53, decides that all procedural requirements are met, the chairperson has no authority to deny the contested case hearing, and "the appeals panel shall hold a contested case hearing" pursuant to HAR § 13-300-51. If, on the other hand, under HAR § 13-300-53, the chairperson decides that the procedural requirements are not met, the chairperson is authorized to make the "determination" that a contested case hearing is not required. In my view this is incorrect.

The majority's interpretation of HAR §§ 13-300-51, 13-300-52, and 13-300-53 constructs a framework that lacks a basis in the rules. See majority opinion at 38 (stating that the "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[]" but instead "is limited to whether procedural requirements have been met") (emphasis added);

[11] The term "presiding officer" is defined as "the chairperson of the [BLNR]." HAR § 13-300-2.

id. at 45 ("[T]he determination of the chairperson pursuant to HAR § 13-300-53 is limited to an examination of whether a party has compiled with the procedural requirements for submitting an appeal pursuant to HAR § 13-300-52.") (Emphasis added.); id. at 55 ("[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 . . . and . . . the BLNR chairperson is the designated officer to determine whether such procedural requirement has been met.") (Emphasis added.).

Although the majority draws a distinction between procedural and substantive matters, on its face HAR § 13-300-51 does not establish limits on the discretion of the chairperson to procedural matters. Nor does HAR § 13-300-51 state that once procedural requirements are satisfied, that the appeals panel must hold a contested case hearing. Furthermore, HAR § 13-300-53 also makes no distinctions between procedural or substantive matters. HAR § 13-300-53 does not limit the chairperson's role to that of only determining procedural matters. Instead, HAR § 13-300-53 states generally that the chairperson makes a determinations of whether "a contested case hearing is required." In fact, there is no basis in the language of the rules for differentiating between procedural and substantive grounds. The majority's drawing of a distinction between procedural and substantive matters is thus problematic.

Indeed, there is no statute vesting the chairperson with any authority to determine whether a contested case hearing should be held or not. HRS § 6E-43(c) states that "[c]ouncil determinations may be administratively appealed to a panel . . . as a contested case hearing pursuant to chapter 91[,]" (emphasis added) and that "[t]he chairperson . . . shall preside over the contested case and vote only in the event of a tie." Under the plain language of the statute, the only authority granted to the chairperson is the authority to "preside over the contested case" and to "vote only in the event of a tie." HRS § 6E-43(c). There is nothing in HRS § 6E-43(c) that grants authority to the chairperson to decide whether a contested case hearing will be permitted or not.

B.

Because HRS § 6E-43 does not vest the chairperson with authority to make such a determination, neither can the administrative rules that implement HRS § 6E-43 invest the chairperson with such power. This court has held 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." Stop H-3 Ass'n v. State Dep't of Transp., 68 Haw. 154, 161, 706 P.2d 446, 451 (1985) (citing Pac. Gas & Elec. Co. v. United States, 664 F.2d 1133, 1136 (9th Cir. 1981); Rowe v. W. Virginia Dep't of Corrections, 292 S.E.2d 650,

653 (W.Va. 1982); Harris v. Alcoholic Beverage Cent. Appeals Bd., 228 Cal. App. 2d 1, 6, 39 Cal. Rptr. 192, 195 (1964); 73 C.J.S. Public Administrative Law § 89 (1983)). Furthermore, "[a]dministrative rules and regulations which exceed the scope of the statutory enactment they were devised to implement are invalid and must be struck down." Stop H-3 Ass'n, 68 Haw. at 161, 706 P.2d at 451 (citations omitted); see also Coon v. City & County of Honolulu, 98 Hawaiʻi 233, 251, 47 P.3d 348, 366 (2002) ("The court shall declare the rule invalid if it finds that it violates . . . statutory provisions, or exceeds the statutory authority of the agency." (Quoting Foytik v. Chandler, 88 Hawaiʻi 307, 315, 966 P.2d 619, 627 (1998).); Agsalud v. Blalack, 67 Haw. 588, 591, 699 P.2d 17, 19 (1985) ("It is axiomatic that an administrative rule cannot contradict or conflict with the statute it attempts to implement."). Put another way, "an administrative agency can only wield powers expressly or implicitly granted to it by statute." Haole v. State, 111 Hawaiʻi 144, 152, 140 P.3d 377, 385 (2006) (quoting Morgan v. Planning Dep't, County of Kauai, 104 Hawaiʻi 173, 184, 86 P.3d 982, 993 (2004)).

As 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 HRS § 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." Stop H-3 Ass'n, 68 Haw. at 161, 706 P.2d at 451 (citations omitted). The majority's reliance, then, upon HAR § 13-300-53 in its assertion that "the chairperson's assessment is limited to whether the procedural requirements have been met," majority opinion at 38, in my view is wrong.

The majority asserts that HAR § 13-300-53 was within the DLNR's authority because it was included in the "implied powers that [were] reasonably necessary to carry out the powers expressly granted[]" under HRS §§ 6E-43 and 6E-43.5.[12] Id. at 42 (emphasis omitted). While "it is well established that an administrative agency's authority includes those implied powers that are reasonably necessary to carry out the powers expressly granted[,]" Haole, 111 Hawaiʻi at 152, 140 P.3d at 385 (citations and emphasis omitted), this authority is not without restrictions and does not confer on agencies the authority to create rules that contradict the plain language of the statutes.

[12] HRS § 6E-43.5(c) provides in part:

> (c) The [DLNR], in consultation with the 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.

1.

In Haole, this court was asked to decide whether a Department of Transportation (DOT) rule, HAR § 19-41-7 (2005), requiring owners and operators conducting unloading activities on state piers to defend and indemnify the State, was authorized by the DOT's governing statutes. First, reviewing the plain language of the DOT's governing statutes, Haole determined that "the grant of the DOT's rule-making authority to carry out its function [was] specifically defined" and "[n]owhere in the governing statutes is there a specific delegation of power to the DOT to define the duties owed by such carriers, shippers, and consignees to the State as the indemnitee." Id. at 153, 140 P.3d at 386 (internal quotation marks, citation, and emphasis omitted).

Next, in determining that the DOT lacked implied authority to enact HAR § 19-41-7, Haole reviewed Hyatt Corp. v. Honolulu Liquor Commission, 69 Haw. 238, 738 P.2d 1205 (1987), and Orca Bay Seafoods v. Northwest Truck Sales, Inc., 32 F.3d. 433 (9th Cir. 1994), which it believed "represent[ed] two ends of the spectrum." 111 Hawaiʻi at 155, 140 P.3d at 388. On one side of the spectrum, Haole discussed Hyatt, which decided whether a Liquor Commission rule, HAR § 7-21, "prohibit[ing] liquor licensees from engaging in discriminatory practices," exceeded its rule-making authority. Id. at 154, 140 P.3d at 387. According to Haole, this court in Hyatt reasoned that the Liquor

Commission's governing statute's "'extremely broad grant of authority to the Liquor Commission,' coupled with 'the great weight to be accorded to the Commission's construction of the statute and strong public policy of this State against racial discrimination,' mandated the conclusion that the [Liquor] Commission did not exceed its rule making authority when it adopted HAR § 7-21." Id. at 155, 140 P.3d at 388 (quoting Hyatt, 69 Haw. at 245, 738 P.2d at 1209).

On the other side of the spectrum, Haole classified Orca Bay Seafoods as an example of where a court struck down a "regulation . . . that exempted from the Vehicle Information and Cost Savings Act, . . . transfers of trucks with gross vehicle weight ratings of more than 16,000 pounds" because "Congress had directly spoken on the subject of the regulation at issue" through the Vehicle Information and Cost Savings Act, which "required that all vehicle transfers include true odometer readings or a disclosure that actual mileage is unknown." Id. (emphasis in original). According to Haole, the Ninth Circuit in Orca Bay Seafoods determined that the regulation was invalid because "Congress had not delegated the power to create such an exemption," and that "deference to the agency's interpretation of its governing statutes was not required because . . . 'deference only operates if there is ambiguity or silence in the statute.'" Id. (quoting Orca Bay Seafoods, 32 F.3d at 436-37 (internal citation omitted)) (format altered).

2.

In comparing its facts to Hyatt and Orca Bay Seafoods, Haole indicated that the "instant case . . . is distinguishable from the above cases" because (1) "unlike Orca Bay Seafoods, the legislature has not spoken directly to whether the DOT may impose a regulatory duty to indemnify the State[,]" id. (emphasis added), and (2) while "[a]dmittedly, the governing statutes grant 'all powers necessary' for the regulation and control of state harbors, [] such powers are not so 'extremely broad' as those of the Liquor Commission in *Hyatt*[,]" id. at 155-56, 140 P.3d at 388-89 (emphasis added). Haole further distinguished Hyatt, stating that in Hyatt "the Liquor Commission's rule-making powers were generally described . . . ; whereas [in Haole], . . . the DOT's rule-making authority is specifically defined." Id. at 156, 140 P.3d at 389 (emphasis added).

C.

1.

Hence, Haole is not "distinguishable from" or "contrary to [this] concurrence[,]" as the majority contends. Majority opinion at 49, 50. Applying the analysis set forth in Haole, HAR § 13-300-53 exceeded the scope of the governing statute, HRS § 6E-43. First, as the majority concedes, HRS § 6E-43 "define[d] the role of the chairperson[.]" Id. at 49. HRS § 6E-43 specifically established the role of the chairperson in the decision making process as only "presid[ing] over the contested

case and vot[ing] only in the event of a tie." HRS § 6E-43(c). Consequently, the plain language of the governing statute indicates that the chairperson was not granted the power, pursuant to HRS § 6E-43, to make any determinations other than to "preside over a contested case" and to vote "in the event of a tie." Id.

Second, with respect to the DLNR's implied authority, the legislature has not spoken directly to whether the chairperson had authority to make determinations on whether the panel shall hear a contested case hearing -- just as the legislature in Haole had "not spoken directly to whether the DOT may impose a regulatory duty to indemnify the State." Haole, 111 Hawaiʻi at 155, 140 P.3d at 388. Thus, like Haole, this case is distinguishable from Orca Bay Seafoods inasmuch as the legislature has not spoken directly to whether the chairperson has authority to make determinations on whether the panel shall hear a contested case hearing. Furthermore, like Haole, such power is not as "extremely broad" as that of the Liquor Commission in Hyatt, but instead, the chairperson's authority in the decision making process -- just as the DOT's rule-making authority to carry out its function -- is expressly defined. Because 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. See Haole, 111 Hawaii at 156, 140 P.3d at 388 (recognizing that the DOT's

rule-making authority was specifically defined and did not encompass the right to require that carriers indemnify the State); Stop H-3 Ass'n, 68 Haw. at 161, 706 P.2d at 451 ("The primary duty of the courts in interpreting statutes is to ascertain and give effect to the intention of the legislature which, in the absence of a clearly contrary expression is conclusively obtained from the language of the statute itself." (citing Kaiama v. Aguilar, 67 Haw. 549, 696 P.2d 839 (1985))).

2.

The majority disagrees with this position, arguing that "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." Majority opinion at 49. Further, the majority argues that "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." Id. These arguments are incorrect.

As noted before, "[a]dministrative rules and regulations which exceed the scope of the statutory enactment they were devised to implement are invalid and must be struck down." Stop H-3 Ass'n, 68 Haw. at 161, 706 P.2d at 451 (citation omitted). Here, the legislature was not silent as to the

authority the chairperson has in the "appellate process" for initiating and conducting an administrative appeal, but plainly limited the chairperson's role as "presid[ing] over the contested case and vot[ing] only in the event of a tie." HRS § 6E-43(c). Applying the rule of "expressio unius est exclusio alterius," the express statement of the chairperson's role as "presid[ing] over the contested case" and "vot[ing] in the event of a tie" in HRS § 6E-43(c) excludes the authority to make other determinations.[13] Thus, HRS § 6E-43(c) cannot be construed reasonably as including a grant of authority beyond that expressly set out in the statute. In defining the role of the chairperson, the legislature could have easily added to the chairperson's duties, but manifestly limited such authority under HRS § 6E-43(c). Accordingly, HAR § 13-300-53, which grants the chairperson alone the authority to decide whether "a contested case hearing is required," does in fact 1) "conflict with" and "usurp the role of the chairperson defined in HRS § 6E-43," and 2) "contradict the plain language [and] intent of the statute." Majority opinion at 50.

[13] See Willis v. Swain, 113 Hawai'i 246, 250, 151 P.3d 727, 731 (2006) ("Expressio unius est exclusio alterius [-]the express mention of one thing implies the exclusion of another."); State v. Harada, 98 Hawaiʻi 18, 42, 41 P.3d 174, 198 (2002) ("[A] statute which provides for a thing to be done in a particular manner or by a prescribed person or tribunal implies that it shall not be done otherwise or by a different person or tribunal; and the maxim expressio unius est exclusio alterius, the express mention of one thing implies the exclusion of another, applies to such statute."); Fought & Co. v. Steel Eng'g & Erecti on, Inc., 87 Hawaiʻi 37, 55, 951 P.2d 487, 505 (1998) ("the express inclusion of a provision in a statute implies the exclusion of another[.]").

Next, the analysis in Haole never required that there be "a statute or statutory scheme that 'directly speaks to'" whether the DOT may impose a regulatory duty to indemnify the State in order for an administrative rule to exceed the scope of the governing statute. As previously discussed, Haole expressly declared that Orca Bay Seafoods "[was] distinguishable" because "unlike Orca Bay Seafoods, the legislature has not spoken directly to whether the DOT may impose a regulatory duty to indemnify the State." Haole, 111 Hawaiʻi at 155, 140 P.3d at 388. Despite this determination, however, Haole still concluded that the DOT did not have the implied authority to promulgate HAR § 19-41-7, in part because, "the DOT's rule-making authority [wa]s specifically defined." Id. at 156, 140 P.3d at 389. Therefore, contrary to the majority's contention, Haole did not depend on whether the legislature had enacted a statute or statutory scheme that "directly speaks to" the issue of State liability when it determined that the DOT did not have authority, express or implied, to promulgate HAR 19-41-7. Thus, by requiring that there be "a statute or statutory scheme that 'directly speaks to' the chairperson's authority," the majority directly contradicts the reasoning set forth in Haole.

D.

1.

Finally, the majority's argument that "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)," majority opinion at 46, is wrong. To support its assertion, the majority argues that (1) "HAR § 13-300-51 and our interpretation thereof do[es] not conflict with the provisions of [] chapter[91,]" id. at 44, (2) "[this] process helps ensure that parties are able to present their claims regarding the preservation of burial grounds . . . in an expeditious manner, id., (3) "HAR § 13-300-53 merely furnishes part of the process for appealing a council determination and ascertaining whether such [a] hearing is 'required by law[,]'" id. at 45, and (4) "the chairperson's determination does not . . . abrogate or alter a litigant's substantive right to appeal[,] . . . deprive the panel of their [sic] authority to adjudge the merits of the appeal[,] or [] otherwise displace the role and structure of the appellate panel laid out in HRS § 6E-43[,]" id. at 45-46.

2.

First, the majority offers no evidence that the majority's "appellate system" or "process" which requires an additional step that the chairperson decide the procedural requirements before petitions reach the panel is "effective[]" or makes such process more "expeditious" than if the panel itself were to decide whether a contested case hearing was required. Id. at 44. Second, the majority's contention that "time is of the essence, . . . because [Petitioner] was seeking to preserve

the iwi and prevent their imminent removal[,]" id., is irrelevant insofar as there is nothing to suggest that the panel could not "effectively" and "expeditiously" determine whether a contested case hearing was required.

Third, the majority's conclusion is based on the invalid view that the chairperson's decision-making duties are only limited to procedural matters. As discussed supra, neither HAR §§ 13-300-51 nor 13-300-53 makes a distinction between procedural and substantive matters. To reiterate, HAR § 13-300-53, on its face, allows the chairperson to make "determinations" of whether "a contested case hearing is required" and its scope is not limited to procedural determinations. Thus, despite the majority's contention, in making its determination pursuant to HAR § 13-300-53, a chairperson could indeed "abrogate or alter a litigant's substantive right to appeal," "deprive the panel of their [sic] authority to adjudge the merits of the appeal[,]" and "otherwise displace the role and structure of the appellate panel laid out in HRS § 6E-43." Majority opinion at 45-46.

IV.

Unlike HAR § 13-300-53, HAR § 13-300-51 does not exceed the scope of HRS § 6E-43. HAR § 13-300-51 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[.]" The term "appeals panel" is defined in HAR § 13-300-2 as "the panel comprised of three members from the

[BLNR] and three council chairpersons that administratively adjudicates an appeal of a council determination as a contested case." This definition follows the language of HRS § 6E-43(c), which permits appeals to be taken by a "panel composed of three council chairpersons and three members from the [BLNR] as a contested case." Because HAR § 13-300-51 does not exceed the scope of the statute it implements, HAR § 13-300-51 is valid. As such, instead of concluding that the chairperson alone has the authority to determine whether a contested case hearing is required, I would hold that under HRS § 6E-43, it is the panel that has the authority to determine whether a contested case hearing is required.

V.

A.

If, as the majority indicates, HRS § 6E-43 and HAR § 13-300-53 authorized the chairperson to exercise veto power over a request upon so-called procedural grounds, then under the majority's rationale in Kaniakapupu, the court would lack subject matter jurisdiction in the instant case, just as the court apparently decided in its reading of that decision. In Kaniakapupu, the majority held that although a hearing on the appellant's motion for an order to show cause (OSC) was required by law under HAR § 15-15-70(i),[14] the hearing on the motion did

[14] According to Kaniakapupu, HAR § 15-15-70, entitled "Motions," provided in pertinent part that "(i) [i]f a hearing is requested, the executive officer shall set a date and time for hearing on the motion." 111 (continued...)

not determine the rights, duties, or privileges of the parties,[15] 111 Hawaiʻi at 133-34, 139 P.3d at 721-22, a proposition disputed by the dissent. Thus, the majority there held that the hearing "did not constitute a contested case for the purposes of obtaining judicial review pursuant to HRS § 91-14(a)." Id. at

[14](...continued)
Hawaiʻi at 127 n.4, 139 P.3d at 715 n.4.

[15] The dissent in Kaniakapupu disagreed with the majority's conclusion that the hearing on the motion for an OSC was not a contested case hearing held pursuant to HRS § 91-1(5). 111 Hawaiʻi at 137, 139 P.3d at 725 (Acoba, J., dissenting, joined by Duffy, J.). The dissent would have held that the circuit court had subject matter jurisdiction over the appellant's appeal, and the appellant was entitled to judicial review under HRS § 91-14(a) because (1) the hearing was one required by law, (2) the legal rights of specific parties were determined after the hearing, (3) the decision of the LUC was final, and (4) the appellant was plainly a "person aggrieved." Id.

In particular, the dissent disagreed with the majority's view that the hearing on the motion for an OSC did not determine the rights, duties, or privileges of the parties because the hearing merely addressed whether or not a requested case hearing was required. Id. at 133-34, 139 P.3d at 721-22. Instead, the dissent stated that the hearing involved specific parties, the landowners and the appellant, and that the appellant "as a party with an interest in adjoining land, had a right to have its claim that it was adversely affected determined in a contested case hearing." Id. at 137-38, 139 P.3d at 725-26.

At the hearing, the appellant argued that the landowners had not complied with the LUC's conditions and presented photos and a map of the area, and the landowners in response argued that they had complied with the conditions. Id. at 138, 139 P.3d at 726. Furthermore, following the hearing, the LUC filed a final decision and order concluding that "having considered [the motion, the LUC] concludes that [the appellant] has not met its burden in showing there has been a failure to perform a condition, representation, or commitment on the part of [the landowner]." Id. at 140, 139 P.3d at 728 (emphasis omitted). The dissent stated that,

> [h]ence, in line with HRS § 91-1(5), the proceeding involved "specific parties," here, [the landowner] and [the appellant]. In determining that the motion should be denied, the LUC decided the "legal rights," HRS § 91-1(5), of these parties. As required by HRS § 91-1(5), "these rights" were "determined after an opportunity for agency hearing." [The appellant] plainly was "aggrieved," HRS § 91-14(a), by this ruling. See Life of the Land v. Land Use Comm'n, 61 Haw. 3, 8-9, 594 P.2d 1079, 1082-83 (1979) (recognizing that persons living near property sought to be reclassified and those with "personal" and "special" "aesthetic and environmental interests" are "person[s] aggrieved" pursuant to HRS § 91-14(a)).

Id. (Acoba, J., dissenting, joined by Duffy, J.) (emphases added).

134, 139 P.3d at 722. Further, the majority in Kaniakapupu stated that "[the petitioner'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. (first emphasis added) (second emphasis in original). As a consequence, the majority affirmed the circuit court's determination that "the requirement in [HRS] § 91-14 that the order appealed from arise from a contested case hearing, has not been met[,]" and decided, "[a]s such, this court lacks jurisdiction to reach the issue of whether a contested case hearing was required." Id. at 131, 139 P.3d at 719.

In the instant case, the chairperson's authority to determine whether to accept a case as a contested case under the plain language of HAR § 13-300-53 fits squarely within the rubric of the majority opinion in Kaniakapupu. Under the majority's opinion in the instant case, upon request for a contested case hearing, the chairperson is authorized to make a "preliminary" determination of whether a contested case hearing is required, pursuant to HAR § 13-300-53, similar to the LUC's determination on the OSC motion in Kaniakapupu. According to the majority, in making this preliminary determination, the chairperson examines whether all the procedural requirements are met. If the procedural requirements are not met, it appears that the majority

would permit the chairperson to deny the request, as the LUC could likewise reject the show cause motion.

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 an OSC in Kaniakapupu in that both were "essentially [] threshold motion[s]" that occurred before a contested case was conducted. Applying the majority's reasoning in Kaniakapupu, the chairperson's denial of a contested case request "did not constitute a contested case for the purposes of obtaining judicial review pursuant to HRS § 91-14(a)," 111 Hawaiʻi 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, ha[d] not been met[,]" id. at 131, 139 P.3d at 719. If 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 opinion in Kaniakapupu,[16] the court in the instant case lacked subject matter jurisdiction under HRS chapter 91.

B.

The majority disagrees with the foregoing, arguing that (1) "unlike the motion hearing in Kaniakapupu, a contested case

[16] At the February 22, 2007 hearing on a motion to stay the agency appeal, the court read Kaniakapupu the same way and concluded, in part, "And so my best read of the case law, both before and after [*Kaniakapupu*], is that if there were no contested case hearing you don't get to take an appeal from the decision, preliminary or otherwise." (Emphasis added.) It should also be noted that the circuit court judge whose order dismissing the appeal for lack of jurisdiction, upheld by the majority in Kaniakapupu, is the same judge in the instant case.

hearing –- had it been held –- would have determined the 'rights, duties, or privileges of GGP[,]" majority opinion at 54, and (2) "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 a denial[,]" id. at 55-56.

With respect to the first issue, the majority's statement 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[,]" id. at 54, in my view, is an incorrect rendition of the majority's opinion in Kaniakapupu. In Kaniakapupu the appellant argued that "its motion for an [OSC] should have been granted, and, thus, a contested case hearing should have been held thereon." 111 Hawaiʻi at 135, 139 P.3d at 723. In response, the majority in Kaniakapupu stated that "[s]uch a request . . . is unattainable due to a lack of subject matter jurisdiction" because the "hearing was not a contested case hearing for the purpose of obtaining judicial review[.]" Id. at 136, 139 P.3d at 724 (internal quotation marks and citation omitted) (emphases added). Thus, the majority determined that the court lacked subject matter jurisdiction over the case, even though, had the LUC decided in favor of the appellant on the show cause motion, a contested case hearing would have been held thereon.

Similarly here, Petitioner argues that had the chairperson decided in her favor, a contested hearing would have been held. Consequently, applying Kaniakapupu to the instant case, the court lacked jurisdiction because the chairperson had denied Petitioner's request for a contested case hearing. Contrastingly, the Kaniakapupu dissent determined that "the legal rights of [] specific parties were determined after the opportunity for an agency hearing" because the appellant's hearing on the motion to show cause in Kaniakapupu did in fact ultimately determine "rights, duties, or privileges[,]" and therefore the LUC's denial was subject to judicial review. 111 Hawaiʻi at 138, 139 P.3d at 726 (Acoba, J., dissenting, joined by Duffy, J.); see supra note 15.

With respect to the majority's second argument, the majority's attribution to this concurrence that "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 capaciously deny a party a hearing without being subject to judicial review of such denial[,]" majority opinion at 55-56, is erroneous because that was the effect of the majority's ruling in Kaniakapupu and precisely the dissent's disagreement with the majority in Kaniakapupu. The result of the majority's analysis in Kaniakapupu was "to make [the LUC's denial of its OSC motion] unreviewable, contrary to the 'entitlement' to judicial review guaranteed under HRS § 91-14." Kaniakapupu, 111 Hawaiʻi

at 142, 139 P.3d at 730 (brackets omitted). Under the majority's decision in Kaniakapupu, the appellant did not have the ability to appeal the LUC's adverse decision that a contested case hearing was not required, and consequently, the agency was permitted to deny a party a hearing without being subject to judicial review of such a denial.

The dissent in Kaniakapupu clearly objected to this anomalous approach, asserting that "if the LUC had granted the motion, a subsequent contested case hearing would have been held and this court would then have jurisdiction to HRS § 91-14(a)" and "under the majority's rationale, if the LUC had granted the motion, its ultimate decision would be subject to this court's review, but since it denied the motion, its decision is unreviewable." 111 Hawaiʻi at 142-43, 139 P.3d at 730-31 (Acoba J., dissenting, joined by Duffy, J.) (emphasis added). Therefore, the dissent argued that "the fallacy of the majority's position is that the outcome of the present case is the same as it would have been had a contested case hearing been held and [the appellant] not prevailed." Id. at 143, 139 P.3d at 731.

With all due respect, then, I believe the majority's decision in Kaniakapupu was not good policy or a correct statement of law then, and it is not good policy or a correct statement of the law now.[17] Inasmuch as Kaniakapupu is precedent

[17] The majority faults this concurrence for referring to the dissenting opinion in Kaniakapupu for support because it is "not binding" and "not the law in this jurisdiction." Majority opinion at 52. However, it is (continued...)

[17](...continued)
self-evident that judges are permitted to adhere to a position set forth in a previous concurring or dissenting opinion. See, e.g., United States v. Ross, 456 U.S. 798, 825 (1982) (Blackmun, J., concurring) (stating that "[m]y dissents in prior cases have indicated my continuing dissatisfaction and discomfort with the Court's vacillation" with regard to the Court's jurisprudence on vehicle searches); Cioffi v. United States, 419 U.S. 917, 918 n.2 (1974) (Douglas, J., dissenting, joined by Brennan, J.) ("In my dissent from Osborn[v. United States, 385 U.S. 323 (1966),] and elsewhere, I have set forth my view that even prior judicial approval cannot validate intrusions into constitutionally protected zones of privacy for the seizure of mere evidentiary material[.]") (Citation omitted.); cf. State v. Fitzwater, 122 Hawaiʻi 354, 374, 227 P.3d 520, 540 (2010) (quoting Justice Thomas's concurring opinion in White v. Illinois, 502 U.S. 346, 365 (1992), which stated in part, that "I continue to adhere to my position that 'the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions[]'").

Second, positions contained in a concurring or dissenting opinion, which are not "the law" or "binding[,]" majority opinion at 52, do not necessarily remain so. Compare State v. Maugaotega, 115 Hawaiʻi 432, 446-47, 168 P.3d 562, 576-77 (2007) (following remand from the United States Supreme Court, this court said "[i]nasmuch as [] HRS § 706-662 . . . authorizes the sentencing court to extend a defendant's sentence beyond the 'standard term' authorized solely by the jury's verdict . . . [,] the statute is unconstitutional on its face") (footnote omitted), and Cunningham v. California, 549 U.S. 270, 281 (2007) ("This Court has repeatedly held that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge[.]"), with State v. Maugaotega, 107 Hawaiʻi 399, 411, 114 P.3d 905, 917 (2005) (Acoba, J., dissenting, joined by Duffy, J.) (stating that "[b]ased on the dissent in [State v. Rivera, 106 Hawaiʻi 146, 102 P.3d 1044 (2004),] I would vacate the extended terms of imprisonment and remand for resentencing"), vacated and remanded by Maugaotega v. Hawaii, 549 U.S. 1191 (2007), and Rivera, 106 Hawaiʻi at 166, 167, 102 P.3d at 1064, 1065 (Acoba, J., dissenting, joined by Duffy, J.) (stating that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury," and thus, "the State's sentencing procedure [in HRS § 706-662] did not comply with the Sixth Amendment") (internal quotation marks, citations, and brackets omitted).

Third, Chief Justice Hughes's statement is relevant:

> When unanimity can be obtained without sacrifice of conviction, it strongly commends the decision to public confidence. But unanimity which is merely formal, which is recorded at the expense of strong, conflicting views, is not desirable in a court of last resort, whatever may be the effect upon public opinion at the time [the case is decided]. This is so because what must ultimately sustain the court in public confidence is the character and independence of the judges. They are not there simply to decide cases, but to decide them as they think they should be decided, and while it may be regrettable that they cannot always agree, it is better that their independence should be maintained and recognized than that unanimity should be secured through its sacrifice.

William J. Brennan, Jr., In Defense of Dissents, 37 Hastings L.J. 427, 434 (continued...)

established by this court, the court cannot be faulted for concluding, as it apparently and correctly did in applying the majority's reasoning in Kaniakapupu, that it did not have subject matter jurisdiction under HRS chapter 91.[18]

C.

In an attempt to distinguish Kaniakapupu from this case, the majority states that, "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 [Petitioner] did request a contested case hearing pursuant to that rule." Majority opinion at 31 (emphases omitted); see also id. at 32 n.22; id. at 54.[19] The majority's attempt to distinguish

[17](...continued)
(1986) (quoting C. Hughes, The Supreme Court of the United States, 67-68 (1928)) (emphasis added). With all due respect, insofar as this concurrence is consistent with the dissent in Kaniakapupu, I maintain the position of the dissent taken there.

[18] In the February 22, 2007 hearing on a motion to stay the agency appeal, the court similarly determined, based on its reading of Kaniakapupu, that it did not have jurisdiction over the agency appeal. In arriving at this conclusion the court stated in part that:

> Because, as I have read [Kaniakapupu], the 2006 decision, affirming [the court's] decision that I lack subject matter jurisdiction because there was no contested case hearing decision appealed from, it's clear that while [Petitioner is] appealing the decision not to give a contested case, obviously there hasn't been one.

[19] Similarly, the concurring opinion by Justice Recktenwald reiterates that "this court [in Kaniakapupu] recognized that there was no 'procedural vehicle' for the [appellant] to obtain a contested case hearing on its motion for an [OSC]." Concurring opinion at 1 (quoting Kaniakapupu, 111 Hawaiʻi at 137, 139 P.3d at 725). For the reasons set forth infra, the emphasis on a "procedural vehicle" by both the majority and that concurrence, in my view, erroneously creates a "procedural vehicle" requirement where HRS chapter 91 does not require one. HRS chapter 91 makes no reference to a "procedural vehicle" and the majority and that concurrence fail to point to any part of this chapter that would lend itself to such a "procedural vehicle" distinction. Furthermore, even if such a "procedural vehicle" was required, under the majority's approach in this case, HAR § 15-15-70 plainly would be
(continued...)

Kaniakapupu is illusory for at least three reasons.

First, the majority's attempt to differentiate Kaniakapupu is illusory because it suggests that there is a different standard applied to those persons aggrieved who seek a contested case hearing under a "procedural vehicle" provision from those persons aggrieved who seek a contested case hearing in the absence of a "procedural vehicle." The majority's 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[,]" majority opinion at 31 (internal quotation marks omitted), then Kaniakapupu 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[,]'" id. 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[20] and the court lacks

[19](...continued)
the "procedural vehicle" to obtain a contested case hearing in Kaniakapupu.

[20] In Kaniakapupu, whether the appellant was required to show that the hearing was one "required by law" was never at issue. Both the majority, 111 Hawaiʻi at 132, 139 P.3d at 720, and the dissent, id. at 124, 137, 139 P.3d at 725 (Acoba J., dissenting, joined by Duffy, J.), decided that the hearing on the motion for an OSC was one "required by law" and went on to address whether the hearing ultimately determined the rights, duties, and privileges of specific parties. Thus, to make clear, a petitioner would need to show that the subject agency hearing was one required by law.

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 Hawaiʻi at 134, 139 P.3d at 722. Consequently, under the majority's 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.[21] What the majority does not accept is the clear import of the majority view of Kaniakapupu, which the court correctly ascertained and attempted to follow.

Contrary to the majority's position, HRS § 91-14(a) does not make any reference to a "procedural vehicle" as a prerequisite to a contested case hearing. HRS § 91-14(a) states in pertinent part that "[a]ny person aggrieved by a final decision and order in a contested case or by a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief is entitled to judicial review thereof under this chapter[.]" (Emphases added.) HRS § 91-14(a) does not suggest

[21] The majority quotes a portion of this paragraph and then accuses this concurrence of offering no support for this position except "the dissenting opinion in Kaniakapupu" which the majority states is "not binding on this court and, as importantly, not the law in this jurisdiction." Majority opinion at 52. However, this concurrence cites to the majority opinion in Kaniakapupu which indicates that the majority in Kaniakapupu clearly recognized that had the show cause hearing been held in that case, the hearing would have determined the rights, duties and privileges of specific parties. See Kaniakapupu, 111 Hawaiʻi at 134, 139 P.3d at 722. Thus, despite the majority's contention, majority opinion at 52, the support provided by this concurrence for this position is the majority opinion in *Kaniakapupu*.

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, 118 Hawaiʻi at 330, 189 P.3d at 442; PASH, 79 Hawaiʻi at 431, 903 P.2d at 1252; Puna Geothermal, 77 Hawaiʻi at 67, 881 P.2d at 1213. HRS § 91-14 makes no reference to such a procedural vehicle distinction, and the majority fails to provide any factual or legal support for such a contention.

Second, the majority's emphasis on the fact that in Kaniakapupu the administrative rule allowed parties to file a motion for an OSC, whereas the administrative rule here allows aggrieved parties to request a contested case hearing, majority opinion at 54-55, is a distinction without a difference. In Kaniakapupu, HAR § 15-15-93 allowed interested persons to file a motion for an OSC for failure to perform a condition. This court recognized that a hearing on the motion was required under HAR § 15-15-70 and that "the LUC d[id] not have any discretion to determine whether to hold a hearing once a hearing [was] requested[.]" 111 Hawaiʻi at 133, 193 P.3d at 721. Thus, contrary to the majority's assertions, HAR § 15-15-70 was a "procedural vehicle" by which an "interested party" could obtain a contested case hearing.[22]

[22] In similar vein, the concurring opinion of Justice Recktenwald argues that the court "erroneously applied Kaniakapupu" because unlike in the instant case, (1) "the relevant administrative rules [in Kaniakapupu] required (continued...)

Similarly, in the instant case, HAR § 13-300-53 states that notice of a hearing be served to parties "[a]fter a determination is made by the [chairperson] that a contested case hearing is required[.]" (Emphasis added.) Under the majority's interpretation of HAR § 13-300-53, before a hearing is conducted, the chairperson must "examine[] only whether a party has complied with procedural requirements" and then "mak[es] his or her determination" of whether a contested case hearing is required.[23]

[22](...continued)
that a hearing be held on the [appellant]'s motion for an [OSC], but the hearing did not constitute a contested case hearing[,]" concurring opinion at 1 (citing Kaniakapupu, 111 Hawaiʻi at 132-34, 139 P.3d at 720-22); (2) "there was no 'procedural vehicle' for the [appellant] to obtain a contested case hearing[,]" id. (citing Kaniakapupu, 111 Hawaiʻi at 137, 139 P.3d at 725) and "[t]hus, a contested case was not 'required by law' [in Kaniakapupu,]" id. However, under the majority's rationale in the instant case, the OSC motion in Kaniakapupu was a procedural vehicle to obtain an OSC hearing. Whether any hearing constitutes a contested case is a conclusion reached when a court determines that a proceeding is one "in which legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for an agency hearing." HRS § 91-1(5).

As both the Kaniakapupu majority and dissent agreed, the hearing on the motion for an OSC was mandatory under HAR § 15-15-70 and "required by law." Furthermore, as the dissent stated, the record indicated the hearing ultimately "determined the 'legal rights . . . of specific parties'" and, thus, was a contested case hearing subject to judicial review. Kaniakapupu, 111 Hawaiʻi at 137, 139 P.3d at 725 (Acoba, J., dissenting, joined by Duffy, J.). Of course, "it must be the substance of the agency proceeding, not its form, that controls. The controlling principle is not the label accorded the motion or proceeding, but the effect of the agency's decision." Id. at 143, 139 P.3d at 731. Hence, applying the majority's view in the instant case, there was "a procedural vehicle" for the contested case hearing. Justice Recktenwald's concurrence that "a contested case hearing was not 'required by law [in Kaniakapupu,]" concurring opinion at 1 (citing Kaniakapupu, 111 Hawaiʻi at 137, 139 P.3d at 725), would preclude judicial review of the LUC's denial of a contested case hearing in the absence of a "procedural vehicle."

[23] Justice Recktenwald's concurring opinion appears to adopt the majority's position, stating, "as set forth by the majority opinion, the relevant Hawaiʻi Administrative Rules and statutes provide for such a hearing in the instant context." Concurring opinion at 1 (citing majority opinion at 40). With all due respect, this is incorrect. As discussed supra, the relevant statute, HRS § 6E-43, provides that council determinations may be appealed to a panel and, therefore, does not mandate that a hearing be conducted pursuant to HRS chapter 91. Moreover, HAR § 13-300-51 does not mandate a contested case hearing because the rule is explicitly limited by the term "when required by law," and thus, there must be direction from other "law" that requires the panel to convene a contested case hearing.
(continued...)

Majority opinion at 43. Under the majority's view, then, the chairperson must differentiate between substantive and procedural matters and can deny a hearing based on procedural grounds. Thus, contrary to the majority's position, the chairperson's determination is analogous to a "'threshold motion' to obtain a hearing that determines the rights, duties, or privileges of specific parties[,]" id. at 55, inasmuch as such a determination must be made before a contested case hearing can be held.

Third, as PASH indicates, an agency hearing is "required by law" if required by "statute, agency rule, or constitutional due process." 79 Hawaiʻi at 431, 903 P.2d at 1252 (citing Puna Geothermal, 77 Hawaiʻi at 67-68, 881 P.2d at 1213-14). It is not necessary that the aggrieved party also demonstrate that there was an additional "procedural vehicle" that allowed the aggrieved party to obtain a contested case

[23](...continued)
Furthermore, in my view, HAR § 13-300-53 exceeds the scope of HRS § 6E-43, and even if it is held to be valid (as the majority believes it to be), HAR § 13-300-53 does not mandate that a contested case hearing be held inasmuch as HAR § 13-300-53 provides that the chairperson must first determine that a contested case hearing is required. Hence under HAR § 13-300-53, as viewed by the majority, the chairperson has discretion in determining whether Petitioner was entitled to a contested case hearing before the panel, and therefore, the contested case hearing is not mandated by HAR § 13-300-53.

It follows then that the denial of Petitioner's request for a hearing in the instant case is analogous to the denial of the petitioners' motion to show cause in Kaniakapupu because review by the chairperson, like the OSC in Kaniakapupu, is viewed by the majority as preliminary and determinative of the right to a contested case hearing. Therefore, under the majority's analysis in Kaniakapupu, the chairperson's denial of Petitioner's request, like the LUC's denial in Kaniakapupu, would not be subject to judicial review. For these reasons, in my view, Justice Recktenwald's statement that, "as set forth by the majority opinion, the relevant Hawaiʻi Administrative Rules and statutes provide for such a hearing in the instant context[,]" concurring opinion at 1 (citing majority opinion at 40), is wrong, and that concurrence is incorrect in asserting that the court "erroneously applied Kaniakapupu[,]" id.

hearing. For example, in this case, as discussed supra, Petitioner's hearing was "required by law" under Petitioner's constitutional due process right as a Native Hawaiian practicing the native and customary traditions of protecting iwi. As a result, Petitioner was entitled to a contested case hearing, regardless of whether HAR § 13-300-51 did or did not provide Petitioner with a "procedural vehicle" to obtain a contested case hearing. Petitioner was already entitled to a contested case hearing because it was "required by law" under constitutional due process. Therefore, whether an administrative rule contains a "procedural vehicle" that would allow Petitioner a contested case hearing is wholly irrelevant in this case to whether judicial review would be available to examine a ruling adverse to Petitioner.