CAAP-19-0000449

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

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| KEEP THE NORTH SHORE COUNTRY,<br><br>Appellant-Appellant<br><br>vs.<br><br>BOARD OF LAND AND NATURAL RESOURCES, THE DEPARTMENT OF LAND AND NATURAL RESOURCES, SUZANNE D. CASE IN HER OFFICIAL CAPACITY AS CHAIRPERSON OF THE BOARD OF LAND AND NATURAL RESOURCES; AND NA PUA MAKANI POWER PARTNERS, LLC<br><br>Appellees-Appellees. | Civil No. 18-1-0960-06 JPC<br>(Agency Appeal)<br><br>APPEAL FROM THE FINAL JUDGMENT, filed MAY 23, 2019<br><br>FIRST CIRCUIT COURT<br><br>HONORABLE JEFFREY P. CRABTREE, JUDGE |

**OPENING BRIEF**

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Hawai'i Cases**



**Other Cases**



**Statutory and Constitutional Materials**

**Administrative and Court Rules**



**Other Authorities**

# OPENING BRIEF

Appellant KEEP THE NORTH SHORE COUNTRY, a Hawai'i nonprofit corporation (Appellant) respectfully submits its Opening Brief pursuant to Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b) in this appeal from the circuit court's Final Judgment, filed May 23, 2019, which affirmed the decision of Appellees BOARD OF LAND AND NATURAL RESOURCES, THE DEPARTMENT OF LAND AND NATURAL RESOURCES, and SUZANNE D. CASE IN HER OFFICIAL CAPACITY AS CHAIRPERSON OF THE BOARD OF LAND AND NATURAL RESOURCES (Board or BLNR) to approve Appellee NA PUA MAKANI POWER PARTNERS, LLC's (NPM) application for a habitat conservation plan (also HCP). [Docket No.] 70 Record on Appeal (ROA) Volume (V.) 30 at [PDF page no.] 147, 240 (BLNR Findings of Fact, Conclusions of Law, Decision and Order, filed May 16, 2018 (BLNR FOFs/ COLs/ DnO).

This Court has jurisdiction over this appeal pursuant to Hawaii Revised Statutes (HRS) §§ 91-7, 91-14, 602-57, 632-1, and constitutional provisions for Appellant's right to a clean and healthy environment. Haw. Const. art. XI §9.

## I. Statement of the Case

### A. Background

Appellant is a grassroots, volunteer-based North Shore non-profit, formed in 2006, "to preserve, protect and enhance the heritage and rural character of the North Shore of O'ahu, Hawai'i, in partnership with communities from Ka'ena Point to Kahalu'u." 16 ROA V.3 at 303. Appellant's mission is to preserve, protect, and enhance the heritage and rural character of the North Shore, which includes protecting endangered and threatened species and their habitat. Appellant's members advocate for the preservation of the natural environment and see biodiversity as an integral part of the rural character of the North Shore. Appellant and its members have volunteered on wildlife conservation projects throughout the state, including Kahuku Point, Malaekahana, and James Campbell National Wildlife Refuge, near or within the area affected by the Project." *Id.* at 304.

In 2012, NPM initiated plans to construct a 25 megawatt (MW) industrial wind facility on approximately 706.7 acres of rural country area of Kahuku, O'ahu, Tax Map Key Nos. (1) 5-6-008:006 and (1) 5-6-006:018. 70 ROA V.30 at 155 (BLNR FOF 38), 38 ROA V.14 at 272. NPM's wind power project will include eight wind turbine generators that, with maximum blade tip heights of 173 meters (m) above the pad elevation (project). *Id.* at 244.

NPM's project substantially risks killing and injuring ʻōpeʻapeʻa - the Hawaiian hoary bat (*Lasiurus cinereus semotus*), along with seven other species of endangered birds that are listed and protected under Federal and State law. 70 ROA V. 30 at 159 (BLNR FOF 52). NPM is required to obtain Board approval for a habitat conservation plan prior to constructing its project.

ʻŌpeʻapeʻa are cryptic and solitary in nature, resulting in our limited knowledge of its ecology and life history. 40 ROA V.15 at 61 (NPM Exh. A44). An estimated few hundred to a few thousand ʻōpeʻapeʻa exist throughout most of the main Hawaiian islands, although "it is generally accepted that it is not feasible" to establish a population estimate. *Id.* They are a long-lived species with low reproductive rates, making populations susceptible to localized extinction. 26 ROA V.8 at 56, 62 (NPM Exh. A10); 66 ROA V.28 at 136-37 (Hearing Tr. 8/7/2017).

Every wind power project in Hawaiʻi has killed ʻōpeʻapeʻa. 46 ROA V.18 at 109-25 (Legislative Report on Incidental Take Permits). Every habitat conservation plan approved in Hawaiʻi has underestimated the number of ʻōpeʻapeʻa that would be killed by wind power facilities. 20 ROA V. 5 at 147 (NPM final habitat conservation plan); 46 ROA V.18 at 109-25; 58 ROA V.24 at 47 (Kahuku Wind Power 2012 Rpt); 66 ROA V.28 at 92 (Hearing Tr. 8/7/2017). Between 2006 and June 2016, wind power facilities under habitat conservation plans have killed an estimated 146 ʻōpeʻapeʻa in Hawaiʻi. 46 ROA V.18 at 110, 114, 118, 121, 123.

On March 8, 2015, NPM published its draft habitat conservation plan, dated February 2015. 48 ROA V.19 at 100, 102. The draft habitat conservation plan described wind turbine generators with a maximum blade tip height that could range from 427 feet (ft; 130 meters) to 512 ft (156 m). *Id.* at 117, 152.

On June 4, 2015, BLNR held a hearing on NPM's draft habitat conservation plan, during which NPM described 156m wind turbine generators. 70 ROA V.30 at 151 (BLNR FOF ¶5).

In March 2016, NPM released its final habitat conservation plan, which increased the turbine length by nearly 25 percent to 200m (656 feet), but did not change its estimates of ʻōpeʻapeʻa take, despite relying on studies that calculated exposure probabilities based on height of the wind turbine systems. 70 ROA V.30 (BLNR FOF ¶10); 22 ROA V. 6 at 190-91, 197. As of BLNR's review of the NPM project, no commercially available wind turbine generators extending to 200 meters existed. 70 ROA V.30 at 156 (FOF ¶43). The public was not afforded further hearings to address this significant change in the project, nor did the Endangered Species Review Committee's review potential impacts of this change on listed species. *Id.*; 48 ROA V.19 at 116-17 (NPM FEIS).

Relying on Kahuku Wind Power data in its final habitat conservation plan, NPM estimated that its project would take 1.7-2.5 ʻōpeʻapeʻa per year or 51 ʻōpeʻapeʻa in the next twenty years based on data from a smaller wind power project, the Kahuku Wind Power facility. 70 ROA V.30 at 148; 20 ROA V.5 at 135 (final habitat conservation plan). In late 2011, the Kahuku Wind Power project, consisting in twelve wind turbine generators with a maximum height of 128 meters, initiated operations in Kahuku. 66 ROA V.28 at 458. The Kahuku Wind Power project was inoperative in August 2012, and was thereafter limited to generating only 15 percent - 5 megawatts (MW) out of its 33 MW - of its capacity until January 30, 2014. *Id.*; 64 ROA V.27 at 83 (Exh. B38 at 8). During the period between August 29, 2013 and January 29, 2014, bat mortality data was collected but the Kahuku Wind Power facility impacts was only operating at approximately 15 percent of its capacity at that time. 66 ROA V.28 at 459.

Under the final habitat conservation plan, NPM's wind turbine generators would idle at wind speeds of 5 meters per second (m/s) or less. 22 ROA V.2 at 71. Appellant sought to increase the curtailment of wind turbine generator operation to 6.5 m/s or more. 12 ROA V.1 at 27. NPM's final habitat conservation plan, however, relied on a single study for the proposition, "No significant additional improvement over this level was detected when the cut-in speed was increased to 6.5 m/s (Arnett et al. 2009, 2010)." 20 ROA V.5 at 135. In the 2009 Arnett study supporting this assertion, the dataset showed twice as many bats, six as opposed to three, were killed at a higher 6.5 m/s cut-in speed when compared with a cut-in speed of 5 m/s. 24 ROA V.7 at 243 citing Arnett et al., 2009 ("We found 3 fresh fatalities at turbines that were curtailed when wind speeds were <5.0 *m/s* (C5) the preceding night, 6 at turbines curtailed when wind speeds were <6.5 *m/s* (C6), and 23 at turbines that were fully operational."). The Endangered Species Review Committee's reliance on Arnett et. al's 2010 study for the assertion that "no significant improvement" was seen at an increase from 5 m/s to 6.5 m/s counters another study by the same researcher in the same year, which "demonstrated that raising cut-in speeds of turbines to between 5 - 6.5 m/s, or reducing rotor speeds on lower wind nights reduced bat fatalities between 57.5 - 82% over the course of single fall migration seasons. . . ." 48 ROA V.19 at 38, 42 citing Arnett et. al, "Altering Turbine Speed Reduces Bat Mortality at Wind-Energy Facilities," 201 *Frontiers in Ecology and Environment* (2010).

Despite NPM's reliance on findings contrary to reason and other evidence, the Board concluded the studies were inconclusive as to whether a higher cut in speed reduced bat take. 70 ROA V.30 at 208.

B. Procedural History

In December 2015, the Department of Land and Natural Resources' (DLNR) Endangered Species Recovery Committee (also "ESRC") released its "Hawaiian Hoary Bay Guidance Document" (bat guidance document"). 40 ROA V.15 at 57 (NPM Exh. A44). The Endangered Species Review Committee produced the bat guidance document after a two-day workshop whose purpose was to develop "cohesive, consistent guidelines for project proponents attempting to avoid, minimize, and mitigate for incidental bat take, and for the regulators tasked with overseeing those projects." 40 ROA V.16 at 60-61. The bat guidance document is intended to "serve as a guide during the development of new habitat conservation plans and the oversight and adaptive management of existing HCPs [habitat conservation plans]." *Id.*

On February 25, 2016, the Endangered Species Review Committee voted to recommend approval of NPM's draft habitat conservation plan application, which incorporated Committee revisions. 38 ROA V. 15 at 332, 336-37. Board member Sam Gon (Gon) was present as a voting member of the Endangered Species Review Committee and made the motion to approve NPM's application. *Id.*

In March 2016, NPM published their final habitat conservation plan, which described wind turbines with a maximum blade tip height ranging from 427 feet (ft; 130 meters) to 656 ft (200 m). 20 ROA V.5 at 82, 96.

On July 26, 2016, the project's Final Environmental Impact Statement (FEIS) was published and accepted. 30 ROA V.10 at 44. The FEIS described a project utilizing wind turbines with a "maximum height at the top of the blade of up to 512 feet (156 meters)[.]" *Id.* at 59.

At its November 10, 2016 regular meeting, the Board held a public hearing on NPM's request for approval of an incidental take permit and final habitat conservation plan for its industrial wind turbine project located at Tax Map Key Nos. (1) 5-6-005:018 and 5-6-008:006 (project). 14 ROA V.2 at 210. The Board deferred decisionmaking after Appellant orally requested a contested case hearing on the proposed NPM incidental take permit/habitat conservation plan approval. 16 ROA V.3 at 265; 70 ROA V.30 at 153. Also at the Board's November 10, 2016 meeting, Member Gon "disclosed that he was briefly on the endangered species advisory committee that advises windfarm projects. He is no longer on that committee and this particular company and proposal was not one that he provided substantial input to." 16 ROA V.3 at 264, 265 (meeting minutes).

On November 19, 2016, Appellant filed its written petition for a contested case with the Board. 16 ROA V.3 at 293. Four others filed written petitions for a contested case on November 21, 2016. 70 ROA V.30 at 153.

At its December 12, 2016 meeting, the Board determined to grant Appellant's petition for a contested case hearing. 16 ROA V.3 at 314; 18 ROA V.4 at 268. Gon was one of three votes against granting Appellant's contested case request. 40 ROA V.15 at 21 (12/12/2016 minutes).

At its January 13, 2017 meeting, the Board voted to consolidate four other contested case petitions with that of Appellant. 18 ROA V.4 at 313; 40 ROA V.15 at 41 (1/17/2017 minutes).

On June 26, 2017, NPM filed its opening brief with the Board. 44 ROA V.17 at 9.

On February 14, 2017, the Board issued Minute Order No. 1, which notified parties that Yvonne Y. Izu was selected as the hearing officer. 70 ROA V.30 at 153.

On July 17, 2017, Appellant filed its responsive brief. 44 ROA V.17 at 207.

On August 7 and 8, 2017, the Board's hearing officer presided over a contested case hearing. 22 ROA V.6 at 11; 70 ROA V.30 at 155. Appellant subpoenaed Scott Fretz, DLNR Division of Forestry and Management (DOFAW) Branch Manager and Endangered Species Review Committee Chair, and examined him as a witness. 66 ROA V.28 at 191 (Tr. 8/8/2017).

By Minute Order No. 11, dated November 1, 2017, the hearing officer submitted her recommended findings of fact, conclusions of law, and decision and order, which included a recommendation that the Board to disapprove NPM's habitat conservation plan for failure to have met the criteria for acceptance pursuant to HRS Chapter 195D. 66 ROA V.28 at 475.

The hearing officer's Minute Order No. 12 provided for parties to submit exceptions to the recommended findings of fact, conclusions of law, and order. *Id.* at 546. Both Appellant and NPM did so. 68 ROA V.29 at 8, 186.

On January 12, 2018, the Board held a contested case hearing on the hearing officer's recommendations and the parties' proposed exceptions. 68 ROA V.29 at 216 (Tr. 1/12/2018). The Board chair announced that its staff had distributed a letter from Senator Lorraine Inouye to other Board members and the chair subsequently emailed other the Board members to instruct them not to read it. *Id.* at 219. The Board chair acknowledged the Board "received a letter from Senator Lorraine Inouye to be distributed to the board in this matter" and "actually did distribute it[.]" *Id.*

Also at the January 12, 2018 contested case hearing, Board member Roehrig disclosed that just prior to the hearing, he "got a phone call from a legislator talking to me rather impassioned on this docket" concerning the "wind project" that the legislator favored. 68 ROA 29 at 219-20. Roehrig recused himself from participation. *Id.* at 220. Board member Yuen also disclosed that Senator Inouye called him concerning the wind project, but stated that he declined to discuss the matter with her. *Id.* at 221. Member Yuen did not recuse himself from participating in the hearing.

*Id.* Appellant orally requested Gon's recusal at the outset of the hearing, but the Chair directed Appellant to file a motion for that request and Gon participated in the hearing. 68 ROA 29 at 222.

At the contested case hearing, Gon addressed Appellant's request for his recusal in a lengthy statement that referenced his familiarity with ʻōpeʻapeʻa, ESRC's investigation of factual representations in the application, and his determinations as to the significance of information presented in the contested case hearing as opposed to that which was reviewed by the Endangered Species Review Committee:

> This was -- we discussed this with the attorney general's office and also with the ethics . . . commission and the opinion is that . . . my serving on the Endangered Species Recovery Committee is via my expertise as a conservation biologist. I have in fact published on Hawaiian bats.
> [ . . . . ]
> MR. GON: Oh. I published on Hawaiian bats and really interested in them, understand them as well as maybe more than perhaps a handful of other folks that have focused on Hawaiian hoary bats and I love to chat with them about what they've learned about the biology , what we know and what we don't know about Hawaiian hoary bats. And the consensus is that it is -- it remains a fairly poorly understood creature.
> It is true that it was a surprise to everyone how many bats occur on the island of Oahu. They were once thought to be mostly concentrated on the island of Kauai and the island of Hawaii. To find them in high numbers was a big surprise for Kawailoa folks, certainly, and as we learn more about their presence in Kahuku and the northern Koolau, surveys began in the more central parts of the Koolau, including the Poamoho mitigation area. The idea of mitigation to expand from, say, habitat enhancement to include research was a difficult one for the Fish and Wildlife Service to make because research i s typically not included as a valid mitigation action. However, given the need for more information on ecology, on the requirements of habitat for ope'ape'a, the decision was made by those -- by those federal representatives at an ESRC meeting to include that in the bat guidance document.
> So, you know, the . . . idea of turning this HCP back the ESRC at this stage, mere months after its issuance and approval, is not going to result in any -- in any significant change in the information that has already been considered by the ESRC and by the state and federal agencies. And yet I'm very interested in hearing and in fact have looked over . . . this contested case record.
> The idea of my ability to take in fresh information and provide for an opinion on this particular case is not in question. I enjoy looking at new information, considering whether or not it provides a significant deviation from what has already been known at the time. I'm actually in a really good position to determine whether or not what I hear today, what I've read in the contested case information does represent relatively new information.
> So the decision was made in consultation with the [attorney general] AG for me to remain in this deliberation. And then continuing on now, the idea that the ESRC did not consider other turbine projects and other bats and the ramifications of that on this particular case is probably erroneous. I mean, the fact that it doesn't show up in the HCP record kind of flies in the face of the fact that the ESRC went to visit as many of these projects in person to look at the areas that were being surveyed, to consider the records for each of those places, the different conditions and habitat, the -- everything from the vegetation, to the wind,

> typical wind, behavior, and the like in order to assess what was most appropriate to apply to this particular HCP.
> So I just wanted to point out that the decision by the ESRC to follow the guidance of the state and federal representatives there to utilize the Kahuku -- the adjacent Kahuku information was not lightly made , nor was it meant to try to fudge the data or in other ways influence or minimize the potential impact of this . In fact they considered, with a great deal of concern, the fact that the take of 'ope'ape'a were higher than anticipated in almost all of the sites, actually. So that's another consideration to take as we consider . . . in this deliberation.

68 ROA V.29 at 260-63 (ellipses added, redacted, brackets inserted).

On January 24, 2018, Appellant filed a motion to recuse Gon in accordance with leave granted by the Board's Minute Order No. 13 to file the motion. 68 ROA V.29 at 267, 70 ROA V.30 at 7.

Also on January 24, 2018, Appellant filed an open records request under HRS Chapter 92F with the Board to access the "letter sent in 2018 from Senator Lorraine Inouye to Suzanne Case or the BLNR regarding the Na Pua Makani Wind Energy Project." 12 ROA V.1 at 18.

On January 29, 2018, the Board denied Appellant's open records request, stating the agency did not maintain the records. 12 ROA V.1 at 18.

On February 21, 2018, the Board filed a notice of Gon's filing of a disclosure. 70 ROA V.30 at 35. Gon wrote, referencing NPM's final habitat conservation plan: "While on the ESRC, I considered the HCP at issue currently." 70 ROA V. 30 at 36.

By Minute Order No. 14, dated March 23, 2018, the Board denied Appellant's motion to recuse Gon. 70 ROA V.30 at 43. Board member Roehrig's signature was omitted as "recused" from this matter, but Gon signed the minute order. *Id.* at 43-44.

On May 16, 2018, the Board entered its Findings of Fact, Conclusions of Law, and Decision and Order (Board Decision). 12 ROA V.1 at 34; 70 ROA V.30 at 47. Four members, including Gon, signed the Board Decision. 70 ROA V.30 at 245. One member did "not concur", one omitted his signature, and a third was recused. *Id.* at 245-46.

On June 15, 2018, Appellant appealed to the circuit court pursuant to HRS §91-14 and cited their right to a clean and healthful environment under article XI, §9 of the Hawai'i Constitution. 12 ROA V.1 at 11.

On August 21, 2018, Appellant filed its opening brief with the circuit court. 12 ROA V.1 at 163.

On October 1, 2018, the Board and NPM filed their answering briefs with the circuit court. 12 ROA V.1 at 210, 221.

On October 15, 2018, Appellant filed its reply brief. 12 ROA V.1 at 265.

On April 10, 2019, the circuit court entered its Order Affirming the Board's Decision. 12 ROA V.1 at 275.

On April 26, 2019, Appellant filed a request for further findings and conclusions pursuant to HRCP Rule 72, which NPM opposed. 12 ROA V.1 at 284, 290.

On May 23, 2019, the circuit court filed its Final Order Affirming Order Affirming BLNR's Decision, which specifically provided that its Order Dated April 10, 2019 "is sufficient and will not be changed." 12 ROA V.1 at 296-98.

Also on May 23, 2019, the circuit court entered its final judgment. 12 ROA V.1 at 300.

On June 21, 2019, Appellants timely filed its notice of appeal from the circuit court's final judgment to this Court. 12 ROA V.1 at 305.

## II. Points of error

The circuit court reversibly erred by:

(1) applying an incorrect standard of "clear error" in reviewing Appellant's contentions as "factual" issues, where they are points of procedural errors. 12 ROA V.1 at 278, 279 ("The appeal is focused on whether there is sufficient factual evidence in the record"). The circuit court clearly erred by stating Appellant "does not seem to identify any conclusion of law by the BLNR which [Appellant] argues is erroneous." 12 ROA V.1 at 279. Appellant raised the Board's failure to support its legal conclusions under HRS chapter 195D, including that NPM's habitat conservation plan provides for minimization to the maximum extent practicable as required under HRS §195D-4. *See e.g.* 12 ROA V.1 at 169 (citing COL Nos. 18.e; 28-31).

(2) affirming the Board's decision, which relied on Endangered Species Review Committee findings and recommendations concerning an earlier version of the NPM proposal, to conclude that NPM's incidental take permit and habitat conservation plan application complied with HRS chapter 195D. 12 ROA V.1 at 280. Appellant raised this to the circuit court. *Id.* at 164, 198, 202.

(3) affirming the Board's approval of NPM's application where even the circuit court acknowledged Gon's participation as a Endangered Species Review Committee and Board member is "clearly a potential problem" and "a legitimate question whether best practices standards include opining as an ESRC member and then voting on the same issue as a BLNR member." 12 ROA V.1

at 280. Gon's participation in deliberations and as a voting member of the Board violated Appellant's constitutional due process rights, constituted a procedural error, and was affected by other error of law. HRS §91-14(g). The circuit court relied on: (i) its interpretation of HRS §84-14, which addresses conflicts of interests for state employees, not standards for judicial conduct; (ii) the vote differential; and (3) Appellant's purported failure to carry its burden in arguing this point. 12 ROA V.1 at 280. Appellant raised objections to Gon's failure to recuse himself from deliberations and voting on the NPM application and also raised evidence of Gon's bias against Appellant's position before the Board and the circuit court. 12 ROA V.1 at 179, 203; 70 ROA V.30 at 7; 23 ROA V.1 at 163.

(4) concluding Appellant waived its objections to the ex parte communications between Senator Inouye and the Board where Appellant had requested copies of those communications from the Board, the Board denied that request, and the disclosure of ex parte communication did not arise until the day of the last hearing in the proceedings. 12 ROA V.1 at 280-81 (circuit court conclusions). Appellant raised the issue to the Board (12 ROA V.1 at 18) and the circuit court (12 ROA V.1 at 31, 206). The circuit court further erred by failing to address the Board's refusal to disclose and remedy ex parte communications distributed to the Board. 12 ROA V.1 at 280-81.

## III. Standards of Review

*1. Administrative agency appeals.*

> Review of a decision made by the circuit court upon its review of an agency's decision is a secondary appeal. The standard of review is one in which [the appellate] court must determine whether the circuit court was right or wrong in its decision, applying the standards set forth in HRS § 91-14(g) (1993) to the agency's decision.

*Citizens Against Reckless Dev. v. Zoning Bd. of Appeals*, 114 Hawai'i 184, 193, 159 P.3d 143, 153 (2007) (citing *Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan*, 87 Hawai'i 217, 229, 953 P.2d 1315, 1327 (1998)). HRS § 91-14(g) provides:

> Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:
> (1) In violation of constitutional or statutory provisions; or
> (2) In excess of the statutory authority or jurisdiction of the agency; or
> (3) Made upon unlawful procedure; or
> (4) Affected by other error of law; or
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

HRS § 91-14(g). "Under HRS § 91-14(g), conclusions of law are reviewable under subsections (1), (2), and (4); questions regarding procedural defects are reviewable under subsection (3); [findings of fact] are reviewable under subsection (5); and an agency's exercise of discretion is reviewable under subsection (6)." *Paul v. Dep't of Transp.*, 115 Hawai'i 416, 426, 168 P.3d 546, 556 (2007) quoted case omitted). Pursuant to HRS § 91-14(g), an agency's conclusions of law are reviewed *de novo*, *Camara v. Agsalud*, 67 Haw. 212, 216, 685 P.2d 794, 797 (1984), while an agency's factual findings are reviewed for clear error, HRS § 91-14(g)(5).

*2. Constitutional questions.*

The appellate court answers "questions of constitutional law by exercising our own independent judgment based on the facts of the case. Thus, [the appellate court reviews] questions of constitutional law under the 'right/wrong' standard." *Cnty. of Kaua'i v. Baptiste*, 115 Hawai'i 15, 25, 165 P.3d 916, 926 (2007) (internal quotation marks and citation omitted).

## IV. Argument

A. The circuit court applied the wrong standard of review in assessing Appellant's appeal.

The circuit court applied the incorrect standard of "clear error" to Appellant's appeal partly as a consequence of misidentifying the Board's legal errors as "factual issues." 12 ROA V.1 at 279 ("The appeal is focused on whether there is sufficient factual evidence in the record."). HRS chapter 195D specified factors, assessments, and methods that the Board was required to employ in its decision-making on NPM's application. The Board violated its statutory mandate or exceeded its statutory authority by failing to adhere to parameters required by HRS chapter 195D, committed other errors of law, and issued its decision upon an unlawful procedure, each of which errors are reviewed *de novo.* HRS § 91-14(g)(1), (2), and (3). Further, the circuit court erred by concluding Appellant did not challenge any of the Board's legal conclusions because these conclusions were specifically cited in Appellant's opening and reply briefs. *See e.g.* 12 ROA V.1 at 169 (COLs 18.e; 28-31), 171 (COL 15.e), 267 (Reply Brief).

"A conclusion requires evidence to support it." *In re Kaua'i Elec. Div.,* 60 Hawai'i 166, 184, 590 P.2d 524, 537 (1978); *see also Mahuiki v. Planning Commission,* 65 Haw. 506, 519, 654 P.2d 874, 882 (1982) ("We have combed the record in vain for findings"). Although a court's review is deferential, the court "must engage in a careful, searching review to ensure that the agency has made a rational

analysis and decision on the record before it." *Nat'l Wildlife Fed. v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 927 (9th Cir. 2007). A court "must not 'rubber-stamp' . . . administrative decisions that [it] deem[s] inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 858 (9th Cir. 2005) (first alteration in original, remaining alterations added).

Studies describe a 78 percent decrease in bat mortality when a 6.5 m/s cut in speed was utilized, as opposed to a 5 m/s cut in speed. 46 ROA V.18 at 191. The Board pointed to no evidence that increasing curtailment to a cut-in speed of 6.5 m/s would not decrease take of ʻōpeʻapeʻa, which curtailment would minimize and mitigate impacts to the maximum extent practicable as required by HRS §195D-4(g)(1). Rather, and contrary to its decision, the Board specifically found "raising turbine cut-in speed during low-wind periods should reduce bat kills" and "studies conducted across numerous ecosystems and facilities have consistently shown a decrease in fatalities of about 50 percent or more once cut-in speeds are equal to or greater than 5.0 m/s." 70 ROA V.30 at 207 (FOF Nos. 270, 272).

The Board found the Bat Guidance Document constitutes "the best science currently available" and adopted its recommendations imposing a 5 m/s cut in speed, with a higher cut in speed imposed if bat take is higher than expected. 70 ROA V.30 at 152, 209 (FOF Nos. 16, 277). HRS § 195D-4(g)(1), however, requires minimizing and mitigating take to the maximum extent practicable, and not adoption of the "best science." *Id.* The Board applied an incorrect standard in interpreting its obligations under HRS § 195D-4(g)(1) and failed to adopt measures that would protect ʻōpeʻapeʻa to the maximum extend practicable.

In the context of federal regulations concerning oil spill response, "maximum extent practicable" means "within the limitations of available technology, as well as the physical limitations of personnel." *Alaska Wilderness League v. Jewell*, 788 F.3d 1212, 1223 (9th Cir. 2015) (discussing definition under 30 C.F.R. § 254.6). "[T]he phrase 'maximum extent practicable' . . . has a superlative quality and therefore must refer to the greatest option in a range of possibilities." *Id.*, 788 F.3d at 1229 (Nelson, J., dissenting).

In determining whether 6.5 m/s was "practicable," the Board considered NPM's testimony, stating "[c]urtailing production could potentially put [NPM] in a situation where we're not meeting our production requirements." 70 ROA V.30 at 209-10 (FOF 280). Without more, such as a supportive documentation indicating NPMs production requirements and predicted production with 6.5 m/s curtailment, a "potential" situation does not factor against the statutory requirement of the

"maximum extent" of practicability. *Id.;* HRS § 195D-4(g)(1). The Board's failure to require a higher cut-in speed as a condition on its incidental take permit exceeded its authority under HRS § 195D-4(g)(1) and was affected by other error of law.

Likewise, the circuit court's statement, "[t]he appeal is focused on whether there is sufficient factual evidence in the record[,]" points to an incorrect understanding of the Board's statutory obligations. For instance, HRS § 195D-21(c) states in part: "The habitat conservation plan shall contain sufficient information for the board to ascertain with reasonable certainty the likely effect of the plan upon any endangered, threatened, proposed, or candidate species in the plan area and throughout its habitat range." Because it relied solely on Kahuku Wind Project data, excluded consideration of other wind projects in the State, and failed to analyze the impact of the increased wind turbine generator length on ʻōpeʻapeʻa, the habitat conservation plan failed to provide sufficient information for the Board to ascertain with reasonable certainty the effect of the plan on ʻōpeʻapeʻa in the plan area and throughout its habitat range as required under HRS § 195D-21(c). *See* 66 ROA V. 28 at 543. Appellant pointed out to the circuit court that the Board conclusion that 5.0 m/s curtailment represents minimization and mitigation of impacts "to the maximum practicable is unsupported by substantial evidence in the record" and sought reversal "[p]ursuant to HRS § 91-14(g)(l),(3),(4),(5), and (6)." *Id.*

HRS § 195D-4(g)(4) required that an approved habitat conservation "plan shall increase the likelihood that the species will survive and recover." HRS §195D-21(b)(1)(B) requires an approved "[habitat conservation] plan will increase the likelihood of recovery of the endangered or threatened species that are the focus of the plan." HRS § 195D-30 requires that an approved habitat conservation plan "be designed to result in an overall net gain in the recovery of Hawaii's threatened and endangered species." HRS§ 195D-4(g)(5) requires that an approved "[habitat conservation] plan takes into consideration the full range of the species on the island so that cumulative impacts associated with the take can be adequately assessed." HRS § 195D-21(b)(1) requires that the plan "be based on the best available scientific and other reliable data available."

No actual studies or data supported the Board's acceptance of representations that protecting forests at Poamoho (70 ROA V.30 at 231) will "increase the likelihood that the species will survive and recover" as required by HRS § 195D-4(g)(4). The Board exceeded its authority in concluding otherwise. The circuit court misidentified the Board's obligation to consider data on ʻōpeʻapeʻa take from the Kawailoa wind project as solely factual issues as opposed to a procedural

step in its approval of a habitat conservation plan "based on the best available scientific and other reliable data available." HRS § 195D-21(b)(1).

B. The Board's reliance on Endangered Species Review Committee recommendations concerning a project consisting in smaller wind turbine generators was in excess of its authority and was clearly erroneous.

The circuit court reversibly erred by stating it "finds no fault in the BLNR relying on and adopting the Endangered Species Review Committee's expertise in general, and its findings and conclusions on ʻōpeʻapeʻa specifically." 12 ROA V.1 at 278. BLNR discounted all studies establishing a link between turbine and rotor sweep length and take. 70 ROA V.30 at 100-03. Yet, the Endangered Species Review Committee recommendation on which the BLNR relied had not incorporated this issue. *See* 12 ROA V.1 at 165.

NPM significantly changed the project midstream and after the Endangered Species Review Committee had conducted its substantive deliberations by increasing its project's wind turbine generator lengths by nearly 30 percent to 200 meters and during the time the Endangered Species Review Committee was reviewing and approving the draft habitat conservation plan, which proposed a maximum length of 156 meters. 38 ROA V. 15 at 332, 336-37 (Feb. 25, 2016 Endangered Species Review Committee vote). The Endangered Species Review Committee's findings, conclusions, and expertise were thus directed towards a project that proposed 156 meter long wind turbine generators, and not 200 meters. *Compare* 20 ROA V.5 at 82, 96 (final March 2016 habitat conservation plan) *and* 48 ROA V.19 at 117 (draft habitat conservation plan).

Under federal protections for listed species, agencies may permit "minor changes" to a proposal in later stages of review under the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356 (1982 & Supp. III 1985), when such changes are "relatively insignificant." *Tribal Village of Akutan v. Hodel*, 869 F.2d 1185 (9th Cir. 1989*) citing Village of False Pass v. Clark*, 733 F.2d 605, 615 (9th Cir. 1984). The change in wind turbine generator length was not a minor change. The Endangered Species Review Committee did not discuss the impacts of increased rotor and turbine height on ʻōpeʻapeʻa take estimates and therefore BLNR could not have relied on that expertise. 12 ROA V.1 at 174.

NPM's consultant biologist, Thomas Snetsinger, admitted that turbine height was not a factor considered:

> [Appellant]: And, in fact, you didn't make the decision to ignore turbine height based on any study?

> [Snetsinger]: We reviewed the available information and did not feel it was appropriate to be included in that.
> [Appellant]: Can you name me one study you relied on that talked about bat -- sorry, about turbine height when you developed your habitat conservation plan and decided to ignore height?
> [Snetsinger]: We reviewed the available information and it did not include turbines of the height that we were talking about for the project; therefore, extrapolating outside of the scope of influence of those studies was not appropriate.
> [Appellant]: So if height is a factor in bat mortality, your plan does not account for it?
> [Snetsinger]: I would say that's true, but there isn't evidence to suggest that height is a factor when we're talking about turbines as representative of the project.

66 ROA V.28 at 112 (Tr. 8/7/2017 at 104). The record contains multiple references to the ways that increase wind turbine generator height would likely result in an increased take of ʻōpeʻapeʻa. 12 ROA V.1 at 174 citing 40 ROA V.15 at 62 (Endangered Species Review Committee Bat Guidance Document acknowledging that "wind turbine height" is a factor in bat mortality); 46 ROA V.18 at 78, 81 (Barclay et. al study of 33 wind power sites showing an exponential increase in bat mortality with increases in tower height); 48 ROA V.19 at 37 ("Barclay et al. (2007) examined patterns of turbine heights and rotor diameter on bird and bat fatalities at existing wind-energy facilities, and noted that bat casualty rates increased with increasing tower height . . .").

The circuit court's reversibly failed to conclude the BLNR clearly erred by failing to consider wind turbine generator height in determining whether NPM's final habitat conservation plan was "based on the best available scientific and other reliable data available." HRS § 195D-21(b)(1). BLNR conclusion that wind turbine generator length was not a significant factor was affected by other error of law. BLNR's reliance on Endangered Species Review Committee recommendations, which recommendations were not based on an analysis of the changed wind turbine length, constitutes an incorrect procedure and clear error. HRS §91-14(g).

C. Member Gon was improperly permitted to deliberate and vote on the NPM application.

*1. The circuit court applied the wrong standard laws in its review of Gon's improper decision-making role.*

The circuit court reversibly erred by affirming the Board's approval of NPM's application, which approval was procured through improper procedures that violated Appellant's due process rights. 12 ROA V.1 at 281. Specifically, the circuit court failed to apply the standard of an "appearance of impropriety" and rather relied on the: (1) lack of specific laws prohibiting an Endangered Species Review Committee member from voting on the Board; (2) compliance with financial conflicts of interest under HRS §84-14, and (3) the "the vote differential was not so close

that Mr. Gon's vote could be considered the deciding vote." 12 ROA V.1 at 280. The circuit court recognized there is "clearly a potential problem" with "an ESRC member relying on matters outside the record, or pre-judging the issue he or she decided as an ESRC member" and "a legitimate question" where one "opin[es] as a ESRC member and then vot[es] on the same issue as a BLNR member." 12 ROA V.1 at 280. Despite recognizing the apparent impropriety with Gon's participation, the circuit court concluded Appellant did not "carr[y] its burden on these recusal issues." *Id.*

"[A]n impartial tribunal is an essential component of due process in a quasi-judicial proceeding" and therefore, "'an appearance of impropriety' is the proper standard and any commissioner whose impartiality might reasonably be questioned should be disqualified from hearing the appeal." *Sussel v. City and County of Honolulu Civil Srvc. Comm'n*, 71 Haw. 101, 103, 784 P.2d 867, 869 (1989) *quoting Offutt v. United States*, 348 U.S. 11, 14 (1954). "[W]e see no reason why an administrative adjudicator should be allowed to sit with impunity in a case where the circumstances fairly give rise to an appearance of impropriety and reasonably cast suspicion on his impartiality." *Id.*, 71 Haw. at 105, 784 P.2d at 871 quoting *State v. Brown*, 70 Haw. 459, 467 n. 3, 776 P.2d 1182, 1188 n. 3 (1989).

The circuit court misrelied on HRS §84-14, which addresses conflicts of interests for state employees, not standards for judicial conduct. 12 ROA V.1 at 282. HRS §84-14(a) addresses board members who are required to have particular qualifications and provides they "shall only be prohibited from taking official action that directly and specifically affects a business or undertaking in which the person has a substantial financial interest; provided that the substantial financial interest is related to the member's particular qualifications." *Id.* HRS §84-14 imposes a more limited category of disqualification on board members by reason of personal financial interest, as opposed to the "appearance of impropriety" standard that is directly applicable in the instant case. *See Liberty Dialysis-Hawaii, LLC v. Rainbow Dialysis, LLC*, 130 Hawai'i 95, 102-03, 306 P.3d 140, 147-48 (2013) (noting HRS §84-14 concerns a limited category of disqualification for personal interests). HRS §84-14 prohibitions against personal conflicts of interests install a lower bar than that of an "appearance of impropriety" required under *Sussel.*

*2. Gon's participation and vote in decisionmaking on NPM's application violated prohibitions against consideration of matters outside the contested case record.*

Gon was sitting as a Board member when he voted to approve NPM's application and relied on information that he obtained as an Endangered Species Review Committee member. 70 ROA

V.30 at 246. This is evident in the record because Gon raised information that was not presented to the Board during contested case hearing deliberations on NPM's application, which is in violation of HRS §91-9(g). *See* 12 ROA V.1 at 176.

"A contested case hearing . . . provides a high level of procedural fairness and protections to ensure that decisions are made based on a factual record that is developed through a rigorous adversarial process." *Mauna Kea Anaina Hou v. Bd. of Land & Natural Res.,* 136 Hawai'i 376, 380,363 P.3d 224, 228 (2015). The high level of procedural fairness and protections afforded by contested case hearings is compromised by Gon's participation as both an Endangered Species Review Committee member and deliberating and voting Board member.

HRS §91-9(g) provides: "(g) No matters outside the record shall be considered by the agency in making its decision except as provided herein." Relatedly, HRS §91-13 provides:

> No official of an agency who renders a decision in a contested case shall consult any person on any issue of fact except upon notice and opportunity for all parties to participate, save to the extent required for the disposition of ex parte matters authorized by law.

*Id.* "Consultation" of consideration of matters "outside the record" are not limited to interviews with experts or specific persons, but include considerations of, for instance, a book concerning Buddhism that was not made part of the record or consultations with an unidentified individual regarding the Buddhist belief system. *See e.g. Korean Buddhist Dae Won Sa Temple of Haw. v. Sullivan*, 87 Hawai'i 217, 241, 953 P.2d 1315, 1339 (1998) (Director of the Honolulu Department of Land Utilization violated HRS § 91–13 by considering these matters) *followed by Kilakila o Haleakala v. Bd. of Land*, 138 Hawai'i 383, 417, 382 P.3d 195, 229 (2016) (consideration of such matters outside of the record without giving notice and the opportunity for all parties to participate offends HRS §§ 91–9(g) and 91–13).

"Where an agency consults outside sources, the right of a party to cross-examine those sources and present rebuttal evidence is violated." *Mauna Kea Power Co., Inc. v. BLNR,* 76 Hawai'i 259, 262, 874 P.2d 1084, l087 (1994) (internal citations omitted). As an Endangered Species Review Committee member, Gon was involved in processes of providing consultation to DLNR. The Endangered Species Review Committee is authorized "for administrative purposes only" to "serve as a consultant to the board and the department on matters relating to endangered, threatened, proposed, and candidate species." HRS §195D-25(a). Endangered Species Review Committee members are required to, amongst other things, "[c]onsult with persons possessing expertise in such areas as the committee may deem appropriate and necessary in the course of exercising its duties[.]"

HRS §195D-25(b)(5). These solely administrative consultations were not part of the contested case hearing involving Appellant, and the consultants and the information were not available or identified to Appellant for cross-examination or subpoena.

Gon served on the Endangered Species Review Committee during its December 15, 2015 and February 25, 2016 meetings and made the motion to recommend approval of the NPM application. 38 ROA V.14 at 321, 332. As an Endangered Species Review Committee member, Gon was provided with specific information about NPM's habitat conservation plan that was not present in the record for the contested case hearing. At the January 12, 2018 hearing, Appellant requested Gon "to be recused . . . due to prior decision making in his capacity on the [Endangered Species Review Committee] on this exact Habitat Conservation Plan." 68 ROA 29 at 222. The Board chair asked Appellant to file a motion on the issue and Gon continued to participate in that hearing, stating in part: "I love to chat with [other who have published on ʻōpeʻapeʻa research] about what they've learned about the biology, what we know and what we don't know about Hawaiian hoary bats." *Id.* at 222, 260. Gon's statement indicated at least that he had formed an opinion on the meaning of "best available scientific" information, which is a legally significant term under HRS § 195D-21(b)(1) prior to the contested case. *Id.*

After Appellant argued the Endangered Species Review Committee should be given the opportunity to consider a more developed record, including the mitigative effects of a higher 6.5 m/s cut in speed, Gon advised that returning NPM's application to the Endangered Species Review Committee would not "result in any . . . significant change in the information that has already been considered by the Endangered Species Review Committee and by the state and federal agencies." *Id.* at 261. These statements indicate Gon's knowledge and consultation with sources outside the record and in violation of HRS §91-9.

Gon also specifically pointed to discrepancies between the contested case record and Endangered Species Review Committee consultations on the NPM habitat conservation plan, which demonstrated his reliance on information outside of the record in violation of HRS §91-9:

> And then continuing on now, the idea that the ESRC did not consider other turbine projects and other bats and the ramifications of that on this particular case is probably erroneous. I mean, the fact that it doesn't show up in the HCP record kind of flies in the face of the fact that the ESRC went to visit as many of these projects in person to look at the areas that were being surveyed, to consider the records for each of those places, the different conditions and habitat, the -- everything from the vegetation, to the wind, typical wind, behavior, and the like in order to assess what was most appropriate to apply to this particular HCP.

68 ROA V.29 at 262. Here, Gon specifically described consultations and surveys that he engaged as part of the Endangered Species Review Committee and which were not part of the contested case record in violation of HRS §§91-9(g) and -13.

*3. The Board was required to prevent Gon from deliberating on the NPM application and voting as a matter of due process protections for parties' constitutional rights.*

Because Gon's impartiality was reasonably questioned, he was required to "be disqualified from hearing the appeal." *Sussel*, 71 Haw. at 103, 784 P.2d at 869. That is, Gon was required to not only recuse himself, but also refrain from participating in deliberations on the NPM application. Members disqualified in a matter must take no part in the hearing or process of decision. *Bove v. Bd. of Review of City of Newport*, 185 A.2d 751 (R.I. 1962) (chair who previously represented an applicant was recused from voting but improperly continued to facilitate the conduct of the hearing). *Bove* held, "[h]aving disqualified himself from participating in the ultimate decision on the application and having requested the alternate member to sit as an active member, it was clearly the duty of the chairman to take no part in the conduct of the hearing." *Id.*, 185 A.2d at 752.

Recusal is warranted where a member of a tribunal participates as an advocate or witness, publicly expresses a predisposition, or has a financial interest or fiduciary relationship with a party in interest. *See In re Arnold*, 984 A.2d 1 (Pa. Commw. Ct. 2009) *compare 200 W. Montgomery Ave Ardmore LLC v. Zoning Hearing Bd of Lower Merion Tp.*, 985 A.2d 996 (Pa. Commw. Ct. 2009). "A claim of impermissible prejudgment of contested adjudicative facts must be supported by evidence of prejudgment and evidence that the official who prejudged actually had a decisionmaking role." Kenneth C. Davis & Richard J. Pierce, Jr., Administrative Law Treatise § 9.8, at 665 (1994). *Keating v. Ofc. of Thrift Supervision,* 45 F.3d 322 (9th Cir. 1995) (agency head's statements suggesting he prejudged the facts were insufficient where, amongst other things, the agency head resigned before the administrative law judge and agency issued their decision). In *American Cyanamid Co. v. FTC*, 363 F.2d 757 (6th Cir. 1966), a FTC chairman was disqualified from participating in deliberations on factual issues he previously passed upon in his former capacity with a subcommittee on antitrust and monopoly issues. The chairman did not deny that he or his staff had written a letter expressing factual conclusions about issue concerning the companies under scrutiny in the second set of deliberations. While "a 'strong conviction' or a 'crystallized point of view' on questions of law and policy are not grounds for disqualification", "[a]ny opinions so formed were conclusions as to facts, and not merely an 'underlying philosophy' or a 'crystallized point of view on questions of law or policy.'" *Amer. Cyanamid*, 363 F.2d at 765. Here, Gon had a decision-making role on the

Endangered Species Review Committee, motioned to recommend NPM's habitat conservation plan, and formed conclusions as to the significance of facts considered by the Endangered Species Review Committee as compared to those presented in the contested case hearing. 38 ROA V. 15 at 336-37.

Recusal was further required because the facts that Gon prejudged were disputed issued of adjudicative fact. "An adjudicatory decisionmaker can be disqualified because she prejudged disputed issues of adjudicative fact - issues of who did what, where, when, how, why, and with what motive or intent. A decisionmaker is not disqualified simply because of her prior exposure to such adjudicative facts, however." Davis & Pierce, Jr., Administrative Law Treatise § 9.8, at 664. "The line is drawn between an advance commitment about the facts and some previous knowledge of the facts." *Id.* § 9.8, at 666 *citing Withrow v. Larkin*, 421 U.S. 35 (1975) (investigative board listened to testimony and then noticed the complainant of a subsequent hearing on whether to suspend his medical license). By voting to recommend the NPM habitat conservation plan as part of the Endangered Species Review Committee, and making the motion to so recommend it, Gon had previously taken a position on the NPM habitat conservation plan and had information that was not part of the contested case record. 38 ROA V. 15 at 332, 336-37.

At the January 12, 2018 hearing, Appellant pointed to new information that the Board should require the Endangered Species Review Committee to examine, including ʻōpeʻapeʻa behaviors, the impacts of taller turbines on these creatures, and the mitigative effects of a higher 6.5 m/s cut in speed. 69 ROA V.29 at 249, 258. In response, Gon opined that returning NPM's application to the Endangered Species Review Committee would not "result in any . . . significant change in the information that has already been considered by ESRC[.]" 68 ROA 29 at 261. Gon further stated he was "in a really good position to determine whether or not what I hear today, what I've read in the contested case information does represent relatively new information" and this capacity was part of his purpose in remaining in the deliberation. *Id.* at 262. Here, Gon announced his commitment to dispositive facts acquired through his participation on the Endangered Species Review Committee by concluding that new information provided in the contested case hearing would not lead to any significant change in the Endangered Species Review Committee's consideration.

Gon's estimation that he was in a "good position" to make determinations about the sufficiency of evidence presented in the contested case hearing was colored by his exposure to ex parte communications acquired while on the Endangered Species Review Committee. 68 ROA 29

at 262. Board procedures allowing Gon to participate in deliberations and as a voting Board member then permitted ex parte communications to color the entirety of the proceedings.

> Ex parte communications deprive the absent party of the right to respond and be heard. They suggest bias or partiality on the part of the judge. Ex parte conversations or correspondence can be misleading; the information given to the judge "may be incomplete or inaccurate, the problem can be incorrectly stated." At the very least, participation in ex parte communications will expose the judge to one-sided argumentation, which carries the attendant risk of an erroneous ruling on the law or facts. At worst, ex parte communication is an invitation to improper influence if not outright corruption.

J. Shaman, S. Lubet & J. Alfini, Judicial Conduct and Ethics § 5.01, at 159-60 (3d ed. 2000) *quoted by Moran v. Guerreiro*, 97 Haw. 354, 373, 37 P.3d 603, 622 (Haw. App. 2001). Appellant could not readily question whether Gon's information was accurate. Gon's pronouncement that new information presented at the contested case hearing would not change the Endangered Species Review Committee's recommendations could not be challenged because it was premised on discussions outside of the record. Gon's ex parte communications rendered him impermissibly biased, caused him to prejudged facts dispositive to the NPM application, and was thus required to be recused from both deliberations and voting.

*4. Gon's inconsistent disclosures were highly prejudicial to Appellants and demonstrated his bias.*

At the Board's November 10, 2016 meeting, Member Gon "disclosed that he was briefly on the endangered species advisory committee that advises windfarm projects. He is no longer on that committee and this particular company and proposal was not one that he provided substantial input to." 16 ROA V.3 at 264, 265 (meeting minutes). In his February 21, 2018 disclosure, however, Gon wrote: "While on the ESRC, I considered the HCP at issue currently." 70 ROA V. 30 at 36. Appellant was prejudiced by Gon's initial disclosure that he had not provided "substantial input" on the NPM application, which is inconsistent with his later disclosure in 2018. Appellants were highly prejudiced by Gon's inconsistent disclosures and the Defendants-Appellees cannot be advantaged by this inconsistency. *See Filipo v. Chang*, 62 Haw. 626, 633, 618 P.2d 295, 300 (1980) ("Equity and fairness dictate that [government] should not be permitted to take advantage of its own wrong or mistake"). How would Appellant be required to subpoena a decision maker, such as Gon, to ascertain the sources of the information upon which he relied?

Gon also demonstrated bias and prejudgment. Prior to hearing Appellant's position and reasons for seeking a contested case hearing, Gon stated: "[t]he suggestion that the habitat conservation plan is fatally flawed or inadequate[ly] researched its [*sic*] problematic in his mind." 40

ROA V.15 at 20 (12/9/2016 meeting minutes). Gon's statement reveals prejudice as to the adjudicative facts. Gon voted against granting Appellant's contested case hearing request. *Id.* at 21.

*5. The Board did not cure its violations of HRS §91-9(g) and other due process violations.*

The Board did not cure its violation of HRS §91-9(g) nor other due process violations by allowing Appellant to brief its objections to Gon's participation and including Gon's disclosure statement in the record. 70 ROA V.30 at 35. "The appropriate remedy for any bias, conflict of interest, or appearance of impropriety is the recusal or disqualification of the tainted adjudicator." *In re Water Use Permit Applications,* 94 Hawai'i 97, 122, 9 P.3d 409, 434 (2000). Where the tainted adjudicator has already participated in the deliberations, an agency may cure its improper consideration of matters outside the record through "a rehearing" and if it "affords the parties the opportunity to cross-examine the outside source and to present rebuttal evidence," but the Board did not take these measures. *Mauna Kea Power Co., Inc. v. Board of Land and Natural Resources*, 76 Hawai'i 259, 262, 874 P.2d 1084, 1087 (1994) citing *Waikiki Shore, Inc. v. Zoning Bd. of Appeals*, 2 Haw. App. 43, 45, 625 P.2d 1044, 1046 (1981) (agency decision vacated where consultation with an outside source occurred without giving the opposing party an "opportunity to rebut" the information). In *Mauna Kea Power Co.,* board members consulted outside sources but cured their violation of HRS §91-9(g) by conducting a second hearing that provided the parties to cross-examine the outside consultant and to provide rebuttal evidence. *Id.* ("Therefore, while the BLNR improperly consulted outside sources, the violation was cured by the subsequent rehearing proceeding.").

Here, the Board did not afford Appellant opportunities for a hearing to cross-examine the outside sources of information provided to Gon while on the Endangered Species Review Committee, or to present evidence rebutting those outside sources. The Board did not cure its flawed procedures and its Decision should be reversed and remanded for rehearing with Gon recused from participation.

D. <u>The Board failed to cure due process violations resulting from ex parte communications from Senator Inouye</u>

*1. Appellant did not waive objections to the Board's improper handling of ex parte communications.*

Appellant argued to the circuit court that the Inouye letter and phone calls were *ex parte* communications in violation of HAR § 13-1-37 through which the legislator "exerted improper political pressure on the BLNR during the period of deliberation between the Hearings Officer's

Recommendation and the final decisions in order to get applicant's habitat conservation plan approved. This level of interference violated Keep the North Shore Country's right to procedural due process." 12 ROA V.1 at 180. Appellants' Notice of Appeal alleged Senator Inouye's ex parte communications "tainted the entire proceeding" (12 ROA V.1 at 31 (¶149)) and Amended Statement of the Case stated under Count 4 (Improper political pressure and Ex Parte Communications) that Senator Inouye wielded improper political pressure in order to get the NPM project approved. 12 ROA V.1 at 206 (SOC ¶155). Appellant sought complete disclosure of the *ex parte* communications regarding the project from the Board, but the Board refused. 12 ROA V.1 at 180.

The circuit court incorrectly concluded Appellant waived objections to ex parte communications between Senator Inouye and Board members. 12 ROA V.1 at 282. Waiver does not apply because: (1) Appellant sought the ex parte communications through a HRS chapter 92F public records request; and (2) the Board had an independent duty to maintain those communications and disclose them, which it failed to do. 12 ROA V.1 at 18.

Although the Board chair asserted Board members had been instructed not to read ex parte communication from Senator Inouye they have received via email, the record establishes that at least the Board chair read enough of the letter from Senator Inouye to recognize it as an ex parte communication. 69 ROA V.28 at 219. The other Board members did not confirm or deny that they had not read the ex parte communication. *Id.* at 219-220. More critically, the administrative record does not include the ex parte communications and they were neither maintained nor disclosed to the parties. The Board Decision makes no reference to the *ex parte* communications with Senator Inouye save for a cryptic reference to Member Roehrig's recusal from participation under FOF ¶37A, which was caused by his telephone conversation with Senator Inouye. 70 ROA V.30 at 155; *see* 68 ROA V.29 at 220-21.

As a quasi-judicial body, the Board had an obligation to maintain the ex parte communications as part of its record and disclose them to the parties for review, rebuttal, and rehearing. *Mauna Kea Power,* 76 Hawai'i at 263, 874 P.2d at 1088 (1994) (a reopened hearing to allow rebuttal of the *ex parte* communications cured due process concerns) *followed by Moran v. Guerreiro*, 97 Hawai'i 35, 55, 37 P.3d 603, 623 (App. 2001). The Board's failure to maintain and disclose the communication shifted the burden of proof to the Board. In any case, Appellant's undisputed request for the ex parte communication cannot be considered a waiver of the Board's egregious error and was sufficient as an objection to withstand a defense of waiver.

In the criminal context, due process prohibits the government from suppressing or failing to disclose evidence favorable to a defendant as a violation of due process. *See Brady v. Maryland,* 373 U.S. 83 (1963) *followed by U.S. v. Price*, 566 F.3d 900 (9th Cir. 2009) (lower court erred by failing to consider whether government failed to disclose relevant information in the possession of any of the involved agents and not just what the prosecutor knew). The proponent of a claim that the government failed to disclose evidence carries the initial burden. *Price*, 566 F.3d at 910. Upon such a showing, "the burden shifts to the government to demonstrate that the prosecutor satisfied his duty to disclose all favorable evidence known to him or that he could have learned from 'others acting on the government's behalf.'" *Id.* Here, the Board completely failed to disclose the ex parte communication and the burden shifts to the Board to establish otherwise. *Id.* The Board, and not Appellant, failed to carry its burden. The circuit court's conclusion to the contrary was reversible error. 12 ROA V.1 at 282.

*2. Ex parte communications from Senator Inouye violated HRS §§ 91–9(g) and 91–13 and Appellant's due process rights.*

> Substantive ex parte communications and procedural ex parte communications that may subtly affect the decisionmaking of an agency adjudicator are, by their nature, "outside the record," such that the quasi-judicial decisionmaker of an agency may not consider them in the decisional process without giving notice and the opportunity for all parties to participate; otherwise, HRS §§ 91–9(g) and 91–13 are necessarily offended.

*Kilakila*, 138 Hawai'i at 383, 416, 382 P.3d at 228. *Kilakila* specified the kinds of ex parte communications that can be considered "substantive." *Kilakila*, 138 Hawai'i at 383, 416, 382 P.3d at 228. Disclosure and maintenance of the ex parte communications in the agency record are required where the communications: "(1) involve substantive matters, (2) are facially phrased as a procedural inquiry but bear the potential to subtly affect the substantive decisionmaking of an agency adjudicator, or (3) are made to or received from a party or an interested person, regardless of whether the subject is substantive or procedural." *Id.*, 138 Hawai'i at 383, 417, 382 P.3d at 229 *citing Mauna Kea Power Co.,* 76 Hawai'i at 262–63, 874 P.2d at 1087–88 (footnote omitted). The Senator Inouye communications involved NPM's application for the "wind project," expressed that she was in favor of the application, and were directed to the substantive matter of the Board's action thereon. 68 ROA V.29 at 220. Because the communications came from a State Senator, they were further substantive. *See Abrahamson v. Wendell*, 249 N.W.2d 302 (1976), *on reh'g* 256 N.W.2d 613 (1977) (pressure or appearance of public officer whose influence might be great has been subject to disapproval); *also Place v. Board of Adjustment of Borough of Saddle River*, 200 A.2d 601 (1964). The

absence of the ex parte communication in the record prevents Appellant from determining whether the second or third factors would also apply to identify the ex parte communication as "substantial."

Where "ex parte communications are not timely disclosed to allow the parties to respond, the right of parties to present evidence and argument on all issues involved is contravened." *Kilakila*, 138 Hawai'i at 417, 382 P.3d at 229 *citing* HRS § 91–9(c) *and Town v. Land Use Comm'n*, 55 Haw. 538, 548-49, 524 P.2d 84, 91–92 (1974). The failure of the tribunal to disclose ex parte communications means the parties are precluded "from conducting cross-examination and from submitting rebuttal evidence concerning their contents." *Id. citing* HRS § 91–10(3) *and Town*, 55 Haw. at 548–49, 524 P.2d at 91–92. Conversely, disclosing the ex parte communications "would allow the parties to challenge or respond to the contents of such ex parte communications [. . . . ] and permit courts to effectively review the implications of the communications to the validity of the agency decision." *Kilakila*, 138 Hawai'i at 415, 382 P.3d at 227 *citing Prof'l Air Traffic Controllers Org. v. Fed. Labor Relations Auth.*, 685 F.2d 547, 564 n.32 (D.C. Cir. 1982).

The Board chair's mere description of the event of the ex parte communication did not constitute "disclosure." "[I]n order for disclosure to effectively serve the values protected by due process and HAPA, the contents of the disclosure should be sufficiently detailed to allow the parties to adequately respond to the ex parte communications and to permit the courts to independently review the nature and substance of the communications." *Kilakila*, 138 Hawai'i at 417, 382 P.3d at 229 *citing Mauna Kea Power Co.,* 76 Hawai'i at 261, 874 P.2d at 1086. Where ex parte communication are required disclosed, that disclosure should include the "(a) written ex parte communication, (b) any writing memorializing the nature, character, or substance of an oral communication, and (c) any response to the ex parte communication." *Id.* The Board violated the inherent procedural requirements of HRS chapter 91 by not only failing to disclose the ex parte communications, but also failing to maintain records of the communications. *Id. citing* HRS chapter 91. Where ex parte communication remain undisclosed, "[t]he risk that off-the-record information would influence the decisionmaking process of an agency adjudicator would remain open, and the possibility that individuals would be deprived of important rights and interests would remain high." *Kilakila*, 138 Hawai'i at 418, 382 P.3d at 230 (holding due process protections required disclosure of ex parte communications to Board members).

*3. The Board's failure to cure Inouye's ex parte communications rendered its decision void.*

The Board's failure to disclose Inouye's ex parte communications requires the Board Decision be invalidated. *Kilakila*, 138 Hawai'i at 419, 382 P.3d at 231 (ex parte communications

have potential to render agency decision voidable). "[U]nder both constitutional due process and HAPA, only when the inappropriate ex parte communication at issue had prejudiced the complaining party would the invalidation of the agency decision be warranted." *Id.* Here, the Board Decision is not only voidable, but void due to the impossibility of disclosing Inouye's ex parte communication, which were not maintained as part of the agency's record and against Appellant's objection, which was implicit in its request for the communications. *See* 12 ROA V.1 at 18. In *Kilakila,* ex parte communications were required to be disclosed in order for a "court to determine whether the discussion at the meeting constituted improper ex parte communications that could potentially invalidate the [subject] permit on due process grounds[.]" *Kilakila*, 138 Hawai'i at 419, 382 P.3d at 231. Unlike the situation reviewed by *Kilakila,* the Board cannot cure its improper procedures. Thus, the Board Decision is void and proceedings on NPM's application should be reopened.

## V. Conclusion

Based on the foregoing arguments, Appellant respectfully requests that this Court vacate the circuit court's Final Judgment, filed May 23, 2019, and remand this matter with instructions to the Board of Land and Natural Resources for further proceedings.

DATED: Honolulu, Hawai'i September 5, 2019

*/s/ Lance D. Collins*
LAW OFFICE OF LANCE D COLLINS
LANCE D. COLLINS
Attorney for Appellant

## VI. Statement of Related Cases

None.

# APPENDICES

ORIGINAL



IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

| | |
|---|---|
| KEEP THE NORTH SHORE COUNTRY,<br><br>Appellant,<br><br>vs.<br><br>BOARD OF LAND AND NATURAL RESOURCES, the DEPARTMENT OF LAND AND NATURAL RESOURCES, SUZANNE D.CASE in her official capacity as Chairperson of the Board of Land and Natural Resources and NA PUA MAKANI POWER PARTNERS, LLC,<br><br>Appellees. | CIVIL NO. 1CC 18-1-960 (JPC)<br><br>(Agency Appeal)<br><br>ORDER AFFIRMING BLNR'S DECISION; NOTICE OF ENTRY<br><br>Judge: Hon. Jeffrey P. Crabtree<br><br>Hearing: 12/5/18<br><br>Trial Week: N/A (agency appeal) |

ORDER AFFIRMING BLNR'S DECISION

1. Since this is an agency appeal, where this court applies standards of review and serves as an appellate court reviewing the decision from the BLNR, the court believes this order is a sufficient summary of the court's decision. In view of the voluminous record, and in order to issue its decision sooner, the court has not written a thorough and detailed review of all the arguments and factual and legal issues presented, complete with record references. If any party believes further detail or conclusions are required under HRCP Rule 72, HRS Section 91-14, or other applicable authority, the court requests a filing detailing what further findings or conclusions are

required, and by what authority, along with proposed findings and conclusions. This is not an invitation to re-argue the case. The court has made its decision. However, the court is willing to expand on its reasoning and bases if it is required. Any such request shall be filed and a courtesy copy delivered to this Division by noon on Friday, April 26, 2019.

2. Following the hearing on December 5, 2018, the court ordered the parties to participate in a Settlement Conference, which was held with Judge Dean E. Ochiai. Judge Ochiai later informed this court that the Settlement Conference was unsuccessful and this court could go ahead and decide the motion. This court assures the parties it is not aware of any position that any party took during the Settlement Conference, and this court has not considered or relied on any information that is not part of the record in this case.

3. The court has reviewed all of the 9300+ page record on appeal, with particular emphasis on the Hearing Officer's findings and conclusions and record references (ROA at 8760 et seq), BLNR's findings and conclusions and record references (ROA at 9134 et seq) and the parties' briefs and all record references therein.

4. The applicable legal authority and standards of review are clear. Agency appeals are primarily governed by HRS Section 91-14. Findings of fact are reviewed under the clearly erroneous standard. Conclusions of law are freely reviewable. Mixed determinations of law and fact are decided under the clearly erroneous standard. Dao v. Zoning Board of Appeals, 144 Haw. 28, 39 (App. 2019) (citations omitted). The court's analysis includes but is not limited to the following.

5. Na Pua Makani seeks to construct wind turbines in Kahuku. This will likely kill certain birds and bats which are endangered species. Therefore, Na Pua Makani needs an incidental take license ("ITL") which authorizes it to "take" or cause these deaths. The ITL in turn requires a Habitat Conservation Plan ("HCP"). The BLNR is responsible for approving or disapproving the ITL and HCP.

6. Plaintiff Keep the North Shore Country objected to the ITL and HCP and requested and received a contested case hearing. Plaintiff focused its efforts on the ʻōpeʻapeʻa, also known as the Hawaiian hoary bat. Information on the ʻōpeʻapeʻa is not as developed as with many other endangered species, largely because of their relatively small numbers and limited distribution in certain areas on certain islands. In order to base its decision on the HRS Section 91-14 criteria, BLNR turned to its statutorily designated (HRS Section 195D-25) science consultant, the Endangered Species Recovery Committee ("ESRC"). The ESRC is composed of members with special expertise, training, and experience on issues relevant to the Board's approval of the ITL and HCP. It did substantial work culminating in its "Bat Guidance" report (ROA at 4761-4799). Reviewing the Bat Guidance report, this court was struck by how much effort and thought went into it. In its own way, it is a remarkable document, and a testament to the serious efforts made to collect information and have that information inform and guide decision-making to preserve and protect ʻōpeʻapeʻa. The BLNR essentially adopted the factual findings of the ESRC. While the Hearings Officer eventually recommended against the project, the Hearings Officer agreed with the essential factual findings of the ESRC. The court finds no fault in the BLNR relying on

and adopting the ESRC's expertise in general, and its findings and conclusions on ʻōpeʻapeʻa specifically.

7. There are factual issues where the decision-making or analysis could reasonably vary from what the ESRC and BLNR concluded. Key examples of this include 1) the degree to which the Kawailoa bat deaths data should have been considered compared to the data from the neighboring Kahuku WTG facility; 2) the efficacy of increasing the cut-in speed from 5 m/s to 6.5 m/s for Low-Wind Speed Curtailment ("LWSC")(the idea is to reduce the giant rotor blade's operation in lower-speed wind, because of the belief that ʻōpeʻapeʻa are more active in low winds; 3) whether the HCP would increase the likelihood that ʻōpeʻapeʻa will survive and recover; 4) the cumulative impact of the project on Oahu's population of ʻōpeʻapeʻa; and 5) the change in height and rotor sweep area for the WTGs. But it is not for this court to decide who had the better argument or how this court would have decided those issues. The question for this court is limited to whether BLNR's factual findings and mixed questions of fact and law on those issues were clearly erroneous. This court is satisfied that those decisions were made on the best available data, and the ITL (the estimate of ʻōpeʻapeʻa deaths from the project) were reasonably adjusted to account for ambiguity or uncertainty on these factors.

8. The court also notes that especially where the Hearing Officer had different conclusions, the BLNR added or confirmed numerous conditions to the HCP which provide for increased monitoring, better mitigation, research and funding, and adaptive measures in the future if ʻōpeʻapeʻa deaths from the WTGs exceed estimates. The HCP as approved by the BLNR requires adaptive management throughout the 20-

year permit term, including bat death mitigation, monitoring, reports, and operational changes, including the higher cut-in speed for LWSC if ʻōpeʻapeʻa bat deaths are higher than initially expected. In other words, if the essential facts relied on in approving the HCP and ITL turn out to be wrong, the adaptive measures which are part of the HCP license should step in and provide further protection for the ʻōpeʻapeʻa.

9. Regarding conclusions of law, Plaintiff does not seem to identify any specific conclusion of law by the BLNR which Plaintiff argues is erroneous. The appeal is focused on whether there is sufficient factual evidence in the record. At most, Plaintiff seems to argue a mixed question of law and fact on whether the BLNR's findings comply with HRS Section 195 regarding the likelihood that ʻōpeʻapeʻa deaths are minimized as a result of the HCP, and the likelihood that the ʻōpeʻapeʻa population will increase as a result of the HCP. Applying the clearly erroneous standard to a mixed question of law and fact, this court does not have a firm and definite conviction that a factual mistake has been made, or that BLNR's factual findings are otherwise clearly erroneous.

10. Disqualification or recusal of Sam Gon, III.

A. BLNR Board member Sam Gon, III served as a member of the ESRC, and recommended that the ESRC support the ITL and HCP in this case. He was also a voting member of the BLNR Board which decided the issue. This resulted in two recusal or disqualification arguments by Keep the North Shore Country: 1) Mr. Gon as an ESRC member had and relied on information that is not in the record when he acted as a BLNR member, and 2) he should have been disqualified from voting as a BLNR member on the ITL and HCP issue he "prejudged" as an ESRC member.

B. This court does not agree with Na Pua Makani that Plaintiff KNSC waived this issue by not appealing before the BLNR issued its decision. Plaintiff's motion to recuse Mr. Gon was denied before the BLNR made its decision, but in this court's view that did not trigger the right to appeal an order which was interlocutory in nature.

C. Regarding Mr. Gon's alleged "outside the record" information, the state of the record is not crystal clear. That said, obviously, the members of the ESRC have their own information, training, education, and experience, which they are expected to apply to the task at hand. But to the extent an ESRC member also sits as a voting BLNR member, potential problems arise with the voting BLNR member relying on matters outside the record, or pre-judging the issue he or she decided as an ESRC member. This is clearly a potential problem. The court believes there is a legitimate question whether best practices standards include opining as an ESRC member and then voting on the same issue as a BLNR member. That said, the court is not aware of any legal authority which prohibits an ESRC member from voting as a BLNR member. Further, Mr. Gon stated he was impartial and would consider all the evidence. And the conflicts of interest statute, HRS Section 84-14, does not appear to prohibit what occurred here. The court also notes, parenthetically, that the vote differential was not so close that Mr. Gon's vote could be considered the deciding vote. In any event, this court does not find that Plaintiff carried its burden on these recusal issues.

11. Attempted support by State Senator Lorraine Inouye. The record shows that during BLNR's deliberations, Senator Inouye called several BLNR board members to support this project, and sent a letter to BLNR voicing support for the project. One

BLNR board member recused himself as a result of Senator Inouye's phone call. Another board member declined to talk with Senator Inouye regarding the project. BLNR Chair Suzanne Case represented on the record that the Senator's letter was intercepted before it was read by the other board members, and the record shows no other board members spoke with the Senator. The court does not find that Plaintiff has met its burden. It appears that KNSC did not object to these events at the time, and only raised it for the first time on appeal to this court. Therefore, the issue is waived. In the alternative, considering the issue on its merits, the record does not show any actual direct contact with the board members, other than the two contacts described above, one of which resulted in recusal, and the other in no substantive communication. The court finds this limited contact is not sufficient to warrant reversal, and is not sufficient to justify a remand for further fact-finding on the issue.

12. This case can be thought of as "green vs. green." On the one hand, we have a project which per its supporters will reduce Hawai'i's CO2 emissions by 1 million tons over its 20 year life, reduce Hawai'i's dependence on imported fossil fuels, spend up to $4.6 million to minimize negative impacts, increase the likelihood of protected species' survival, and contribute substantial funds to benefit the Kahuku community. On the other hand, we have an endangered species of native bat, or 'ōpe'ape'a, which is legally entitled to strong protection under Hawai'i and federal laws, as part of a larger effort not to extinguish species, not reduce biodiversity, and not contribute to a cascading series of events if a tipping point in species eradication is reached. The court's hope and expectation, based on the evidence presented, is that rather than

seeing this case as "green vs. green," by applying and enforcing Hawai'i's strong environmental protections, the result will be a win-win, rather than a win-lose.

THEREFORE, FOR REASONS INCLUDING BUT NOT LIMITED TO THOSE SHOWN ABOVE, THE DECISION OF THE BOARD OF THE BUREAU OF LAND AND NATURAL RESOURCES ENTERED IN THIS MATTER ON MAY 16, 2018, IS HEREBY AFFIRMED.

DATED: Honolulu, Hawai'i: APR 10 2019

Jeffrey P. Crabtree
Judge of the above-entitled court

PKM

FIRST CIRCUIT COURT
STATE OF HAWAII
FILED

2019 MAY 23 AM 10: 14

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

KEEP THE NORTH SHORE COUNTRY,

Appellant,

vs.

BOARD OF LAND AND NATURAL RESOURCES, the DEPARTMENT OF LAND AND NATURAL RESOURCES, SUZANNE D. CASE, in her official capacity as Chairperson of the Board of Land and Natural Resources and NA PUA MAKANI POWER PARTNERS, LLC,

Appellees.

CIVIL NO. 18-1-0960-06 JPC
(AGENCY APPEAL) dq/JPC

**FINAL JUDGMENT**

JUDGE: HON. JEFFREY P. CRABTREE

**FINAL JUDGMENT**

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, in accordance with Rule 58 of the Hawai'i Rules of Civil Procedure, and pursuant to the ORDER AFFIRMING BLNR'S DECISION dated April 10, 2019, and that certain FINAL ORDER AFFIRMING ORDER AFFIRMING BLNR'S DECISION ENTERED APRIL 10, 2019, that FINAL JUDGMENT is hereby entered in favor of Appellees Board of Land and Natural Resources, the Department of Land and Natural Resources, Suzanne D. Case, in her official capacity as Chairperson of the



Compliance Program
Date: 5-22-19
dqora
6th Division

Board of Land and Natural Resources, and Na Pua Makani Power Partners, LLC, and against Appellant Keep the North Shore Country on all claims, causes of action and the appeal in this action. There are no claims or issues remaining for adjudication against any parties in this action, and therefore this Judgment in favor of Appellees is a final judgment under *Jenkins v. Cades Schutte Fleming & Wright*, 76 Hawai'i 115, 869 P.2d 1334 (1994).

DATED: Honolulu, Hawai'i, _____, 2019.

_____

JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

_____

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KEEP THE NORTH SHORE COUNTRY

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Board of Land and Natural Resources, and Na Pua Makani Power Partners, LLC, and against Appellant Keep the North Shore Country on all claims, causes of action and the appeal in this action. There are no claims or issues remaining for adjudication against any parties in this action, and therefore this Judgment in favor of Appellees is a final judgment under *Jenkins v. Cades Schutte Fleming & Wright*, 76 Hawai'i 115, 869 P.2d 1334 (1994).

DATED: Honolulu, Hawai'i, MAY 22 2019, 2019.

JUDGE OF THE ABOVE-ENTITLED COURT
JAMES S. KAWASHIMA for JEFFREY P. CRABTREE

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was duly served on the following parties via electronic filing (JEFS):

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DATED: Honolulu, Hawai'i September 5, 2019

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