

**From:** [Leigh-Wai Doo](#)  
**To:** [Miyahara, Calen](#); [DLNR.BLNR.Testimony](#)  
**Subject:** [EXTERNAL] opposition to BLNR denial of contested hearing date 10/27/23 CDUA OA -3913  
**Date:** Wednesday, October 25, 2023 1:01:44 PM

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## opposition to denial of contested hearing

Testimony of Leigh Wai Doo in favor of a contested case hearing, and that the BLNR and the DLNR Recuse themselves because of Bad Faith.

Fairness, impartiality, and judgment on the merits, are the foundation of stability of government, including its regulatory agencies. Both the administrator of the DLNR, including staff and the BLNR-board of land a natural resources should RECLUSE themselves from this contested case hearing and be replaced by a impartial board due to an appearance of egregious improprieties that undermine faith in good government. In summary, the egregious improprieties are:

1. EA . An incomplete environmental assessment was approved. A full environmental statement and review is mandated. The environmental assessment was woefully inadequate in procedure as well as substance. A full final EIS is required.

In its nearly 100 years, the Doris Duke Breakwater Has not been breached, has not been shown itself to be a hazard, and is a historic landmark of the Diamondhead area and the Doris Duke home.

The applicants destruction of the Breakwater would be the change of nearly 100 years of settled sound construction that would be a Pandora's box of destruction with uncertain unknown ramifications on the environment, particularly the sea currents and environment in this age of climate change.

2. Important SMP documents hidden. The reasons of the Director of Honolulu's department of planning and permitting reasons by initial letter on why the DorisDuke/ DLNR application needs to go through a shoreline management permit SMP was not initially attached and addressed and was not in the application documents. Questions on present status.

3. Contentious testimony not rebutted . All hearings and submittals to the three applications for approval of breakdown of the Breakwater were very contentious, disputed issues of fact which were not sincerely responded to. Trite bureaucratic dismissals were the responses without facts.

4. Facts and reasoning of opposition to break water destruction were not disapproved , or addressed by countervailing facts. Many educated opposition testimony from neighbors, lawyers, neighborhood boards, surfers and the public, spoke against the destruction of the Breakwater with no meaningful response from the applicant and DLNR.

5. Reasoning of BLNR articulating approval absent in a this third

attempt for approval. The prior twice denial decisions of the Board of land and natural resources articulated their reasons for denial ; those prior denial decisions were not rebutted.

Without sound reasoning for a reversal of a prior decision, the present BLNR, decision for the destruction of the Breakwater appears flippant, authoritarian, and based on personal undisclosed decisions, rather than facts and reasoning.

6. Reasoning and facts need to be the basis of judgment, which is clearly stated for public acceptance as an educational vehicle of stability in government. Department administration and board review and judgment or delegated responsibilities of good faith impartial review and decision making based on the facts and public concerns. On the destruction of the break water at Doris Duke's, there were many many people , the public, in opposition to the destruction. Fundamentally the support for the destruction was the Doris Duke foundation and the DLNR Director and the third decision making board voting in favor of destruction . Their discussion following provided little reasoning nor rebuttals. Neither DLNR nor BLNR declared a conflict of interest, or even a statement on why their was an appearance of impropriety or bias, and why they were voting in favor of destruction.

7. Leigh Wai Doo. Has submitted testimony at every hearing in opposition to the destruction of the Breakwater. His testimony was not refuted, not fully addressed, rebutted, nor disproven. Example, he testified that the fencing uprights were the problem because it allowed the width between the uprights enough space for a person's feet to stand and jump into the swim basin. A simple additional upright bar in between would eliminate the jumping bar platform. As recently as mid October 2023, that additional bar was not placed to inhibit jumpers from standing on the fence. I witness that two weeks ago. There appears no urgency to stop the jumpers.

8. Collusions. Collusion of the Director of DLNR and the Doris Duke Foundation is apparent. The department Director has responsibilities of directing the department staff. The initial application was filed by the Doris Duke foundation but fast processed through DLNR administration with many shortcomings in the application by the staff. presumably the initial application, consultants and studies were paid for by the Doris Duke foundation and not objectively diligently reviewed by DLNR. The Director and officials of the Doris Duke foundation were in continual contact, without public notification, and concurred on their desired mutual conclusion of the destruction of the break water long before the formal process became public. That Director and department collusion continued over the three applications, including over the denial of the first two applications by the BLNR. The DLNR Director and department were in direct conflict with the first board BLNR and strove to not take the direction of the policy making Board of DLNR on the first two times, undermining efficient government. And this is a story of a conflict between the Director and staff with

the policy making board and applies to all regulatory agencies.

9. The present 3rd application is a near verbatim replication of the first two applications, which were denied by the previous board of BLNR and no sound reasoning was provided on why the change, a reversal of two previously denials.

10. An extraordinarily bad precedent has been established by the Director and BLNR in approving this third near verbatim application , denied twice Reversing the prior board's decision of a few years previous.

11. Bad Faith appears Without sound, articulated, reasoning . That bad faith is compounded if the present board denies Dr. Fred Fong's contested case hearing, and the friends of the Doris Duke swim Basin for a contested case hearing. The appearance of impropriety will otherwise always be present in Hawaii's history.

12. \$ Money of \$1 million was pledged by the Doris Duke foundation to be donated to the state of Hawaii for the destruction of the Breakwater .. The hastened rushes by DLNR for approvals by the Board before the deadline of the \$1 million was to be rescinded by the Doris Duke Foundation evidences itself in this third application process.

Please do not add to the recent sad reputation of Hawaii 's government processes riddled with corruption, collusion and favoritism. please provide solid written statements, and reasons for all decisions to restore, public faith in government.

Respectfully submitted by Leigh -Wai Doo,

lwdoo4u@icloud.com

former Honolulu City Council member for the area of Diamondhead and testifier at all public hearings against the destruction of the Breakwater.

<CCE21102023.pdf>

**From:** [fongf001@hawaii.rr.com](mailto:fongf001@hawaii.rr.com)  
**To:** [fongf001@hawaii.rr.com](mailto:fongf001@hawaii.rr.com)  
**Subject:** RE: For June 22, 2018 meeting, Comments on the needed qualifications of a Hearing Officer for Contested Case OA-18-02.  
**Date:** Thursday, October 26, 2023 3:21:37 AM

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I request the process by DLNR for the selection of a hearing officer who is “able to serve with strict impartiality and having no conflicts of interest or appearance of conflict; ....

Respectfully, Fred Fong

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**From:** Fred Fong <[fongf001@hawaii.rr.com](mailto:fongf001@hawaii.rr.com)>  
**Sent:** Tuesday, June 19, 2018 9:30 PM  
**To:** Mary Jane Tabios <[Fongf004@hawaii.rr.com](mailto:Fongf004@hawaii.rr.com)>  
**Cc:** FRED FONG <[FONGF001@hawaii.rr.com](mailto:FONGF001@hawaii.rr.com)>  
**Subject:** RE For June 22, 2018 meeting, Comments on the needed qualifications of a Hearing Officer for Contested Case OA-18-02.

Recorded receipt: June 20, 2018

To BLNR,

Since I am away till 6/26/2018, I have designated my assistant, Mary Jane Tabios-Felicilda, to present the following needed qualifications for the proposed selection of a Hearing Officer by the BLNR’s Chairperson (Contested Case OA-18-02).

I am a neighbor to the subject property.

Respectfully,

Frederick Fong  
4361 Kaikoo Place  
Honolulu, Hawaii 96816  
Email [Fongf001@hawaii.rr.com](mailto:Fongf001@hawaii.rr.com)  
Cell (808) 277-6786

1. For the June 22, 2018 BLNR’s meeting, there is a proposed agenda item that  
OCCL- OFFICE OF CONSERVATION AND COASTAL LANDS-  
“Request that the Board of Land and Natural Resources authorize the appointment of a Hearing Officer for Contested Case OA-18-02 regarding.....and that the Board delegate the authority for the selection of the Hearing Officer to the Chairperson.”.
1. The qualifications for the contested case hearing officer (as in the TNT case) should  
“include the following: (1) being an attorney licensed to practice law in the State of Hawaii and in good standing; (2) being able to serve with strict impartiality and having no conflicts of interest or appearance of conflict; and (3) being available to devote a

- substantial amount of time in the next six to twelve months; and (4) being willing to accept the prevailing charge rate relevant to the professional services as a hearing officer, as determined by the Department of Land and Natural resources (DLNR). Other desirable qualifications include civil litigation experiences, practice in administrative law and process, familiarity with government proceedings and procedures, and knowledge of the statutes and rules administered by the DLNR.”
2. Selection of the hearing officer should be pursuant to HRS 103D-304, which requires the DLNR to assemble and vet a list of applicants. Pursuant to this statute, (1) the list should be reviewed by a selection committee, which ranks the three candidates; and (2) the BLNR Chairperson then negotiates a contract with the first ranked person... or subsequent recommended available choices thereof.
  3. Examples of members of a selection committee (as in the TMT case) were James Duffy, Associate Justice of the Hawaii Supreme Court (Ret.); Stella Kam, Deputy Attorney General; and Christopher Yuen, Member of the BLNR.

Respectfully submitted,

Frederick Fong  
4361 Kaikoo Place,  
Honolulu, Hawaii 96816  
[Fongf001@hawaii.rr.com](mailto:Fongf001@hawaii.rr.com)  
Cell (808) 277-6786



STATE OF HAWAII  
BOARD OF LAND AND NATURAL RESOURCES

PETITION FOR A CONTESTED CASE HEARING

OFFICIAL USE ONLY	
Case No.	Date Received
Board Action Date / Item No.	Division/Office

**INSTRUCTIONS:**

- File (deliver, mail or fax) this form within ten (10) days of the Board Action Date to:  
 Department of Land and Natural Resources  
 Administrative Proceedings Office  
 1151 Punchbowl Street, Room 130  
 Honolulu, Hawaii 96813  
 Phone: (808) 587-1496, Fax: (808) 587-0390 ✓
- DLNR's contested case hearing rules are listed under Chapter 13-1, HAR, and can be obtained from the DLNR Administrative Proceedings Office or at its website (<http://dlnr.hawaii.gov/forms/contested-case-form/>). Please review these rules before filing a petition.
- If you use the electronic version of this form, note that the boxes are expandable to fit in your statements. If you use the hardcopy form and need more space, you may attach additional sheets.
- Pursuant to §13-1-30, HAR, a petition that involves a Conservation District Use Permit must be accompanied with a \$100.00 non-refundable filing fee (payable to "DLNR") or a request for waiver of this fee. A waiver may be granted by the Chairperson based on a petitioner's financial hardship.
- All materials, including this form, shall be submitted in three (3) photocopies. ✓

A. PETITIONER		
(If there are multiple petitioners, use one form for each.)		
1. Name Fred Fong	2. Contact Person Fred Fong	
3. Address 4361 Kaikoo Place	4. City Honolulu	5. State and ZIP Hawaii 96816
6. Email Fongf001@hawaii.rr.com	7. Phone 808-277-6786	8. Fax 808-537-3652

B. ATTORNEY (if represented)		
9. Attorney Name	10. Firm Name	
11. Address	12. City	13. State and ZIP
14. Email	15. Phone	16. Fax

**C. SUBJECT MATTER**

<b>17. Board Action Being Contested</b> Approval of Conservation District Use Application CDUA OA-3913 Shangri La Breakwater Safety Initiative and Shoreline Stabilization Project	
<b>18. Board Action Date</b> June 23, 2023	<b>19. Item No.</b> K-2
<b>20. Any Specific Statute or Rule That Entitles Petitioner to a Contested Case</b> Petitioner Fred Fong is an "interested person" under §13-1-28(a). Fong is also an "adjacent property owner" under Section 13-1-31(b)(2). Petitioner has used the subject and adjacent coastal areas for many decades	
<b>21. Any Specific Property Interest of Petitioner That Is Entitled to Due Process Protection</b> Petitioner asserts that, in addition to being an adjacent property owner, he will be so directly and immediately affected by the project proposed under CDUA OA-3913, including loss of safe use of the subject and adjacent coastal lands, threats to his constitutional and statutory rights to environmental quality and conservation and use of coastal resources, that his interest in the proceeding is clearly distinguishable from that of the general public.	
<b>22. Any Disagreement Petitioner May Have with an Application before the Board</b> Petitioner submits that proper procedures were not followed after the proposal was twice before rejected by BLNR due to concerns over safety and lack of sufficient environmental review, that DLNR had a conflict of interest in processing its own application, that there was no proper environmental review as required under HRS Ch. 343, that the proposal would destroy an important coastal cultural and recreational resource without appropriate mitigation in violation of HRS Chapters 205A and 343, that the proposed project would endanger the public, and that the DLNR has failed to consider appropriate rational alternatives.	
<b>23. Any Relief Petitioner Seeks or Deems Itself Entitled to</b> Petitioner requests denial and/or retraction of any permit for the project proposed under CDUA OA-3913, that the Hearing's Officer direct that the proposal be processed by some agency other than DLNR, and that a ruling be issued requiring said outside agency and DLNR to strictly follow the requirements of HRS Chapters 205A and 343 and all rules and regulations issued thereunder in any further consideration or processing thereof or of any related proposal.	
<b>24. How Petitioner's Participation in the Proceeding Would Serve the Public Interest</b> Petitioner is acting in the public interest to assure compliance with Hawaii State Constitution Article XI, Section 9, with Hawai'i laws assuring preservation and protection of the environment and coastal resources, and with principles of fair procedure and good, open, transparent governance.	
<b>25. Any Other Information That May Assist the Board in Determining Whether Petitioner Meets the Criteria to Be a Party under Section 13-1-31, HAR</b> Petitioner Fong owns and lives on property next door to the project, has regularly used the subject and adjacent submerged lands for recreation for many decades, qualifies as an "interested party" under HAR §13-1-28(a) and is entitled to be a party pursuant to HAR 13-1-31 (b)(2).	

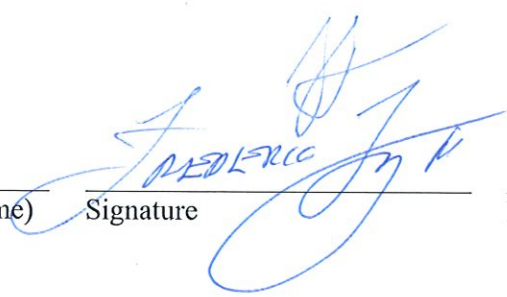
Check this box if Petitioner is submitting supporting documents with this form.

Check this box if Petitioner will submit additional supporting documents after filing this form.

Fred Fong

Petitioner or Representative (Print Name)

Signature



June 30, 2023

Date





October 26, 2023

Blake McElheny  
59-272 Pupukea Road  
Haleiwa, HI 96712  
(808)638-8484  
blakemcelheny@yahoo.com

Board of Land and Natural Resources

In the Matter of OA 23-02/CDUA OA-3913, Shangri La Breakwater Demolition ("Diamond Head Breakwater Safety Project")

**Testimony Supporting the Contested Case Request (OA 23-02) Regarding Conservation District Use Permit (CDUP) OA-3913 for the Shangri La Breakwater Demolition ("Diamond Head Breakwater Safety Project")**

I am a lifelong Oahu resident and although I live on the North Shore, I regularly swim at the Shangri La Breakwater location at Kaalawai with our three children. I strongly support the Contested Case Request on behalf of myself and the Friends of the Doris Duke Swim Basin.

My children and I (and their friends) have also engaged in other ocean and coastal activities in and adjacent to the project area including surfing, foiling, and diving. The calm area provided by the breakwater even allows for my daughters to practice waterpolo and we can safely throw the ball back and forth.

As someone who has enjoyed this area since I was a teenager, I am familiar with the ocean conditions in and around the Shangri La harbor and breakwater.

Based on my experiences, observations, and knowledge, this poorly thought-out and destructive project requires further analysis that a contested case will provide. This proposed project, while supposedly aimed at safety, will actually create significantly more hazardous swimming conditions for my children and I and will place other Oahu residents, swimmers, and surfers at substantially greater risk of harm. I strongly object to the approval of the CDUP.

In addition, the plan will drastically limit recreational ocean and coastal use of the harbor and will surely deprive the public of recreational resources they are entitled to as a matter of Hawaiian custom and constitutional and statutory law. This is not to mention the proposed project's adverse effects on the unique aquatic life in the area.

In conclusion, I must strongly object to the purposeful destruction of an invaluable swimming and recreational area enjoyed by Oahu's families and youth. I encourage members of the Board to come and swim in the area and observe the joy this area in its current state brings to children like my own. Common sense dictates that there are other less drastic and destructive steps the BLNR could take toward its stated goal of protecting public safety that are more in alignment with the BLNR's mission to care for Hawaii's sacred resources.

Please see my stated reasons to support the request for the contested case attached below.

Thank you.

Sincerely,

Blake McElheny  
(808)638-8484



Mission Statement of DLNR:

“Enhance, **protect, conserve** and manage Hawaii’s **unique and limited** natural, cultural and **historic resources held in public trust** for current and **future generations** of the people of Hawaii nei, and its visitors, in partnership with others from the public and private sectors.”  
(emphasis added)

Article XI, Section 9 of the Hawai’i State Constitution provides that:

**Each person has the right to** a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, **protection and enhancement of natural resources. Any person may enforce this right** against any party, public or private, **through appropriate legal proceedings**, subject to reasonable limitations and regulation as provided by law.

**The opening section of Chapter 343 sets forth the whole purpose of the environmental review process** embodied in that statute and makes clear the importance of public participation and economic considerations:

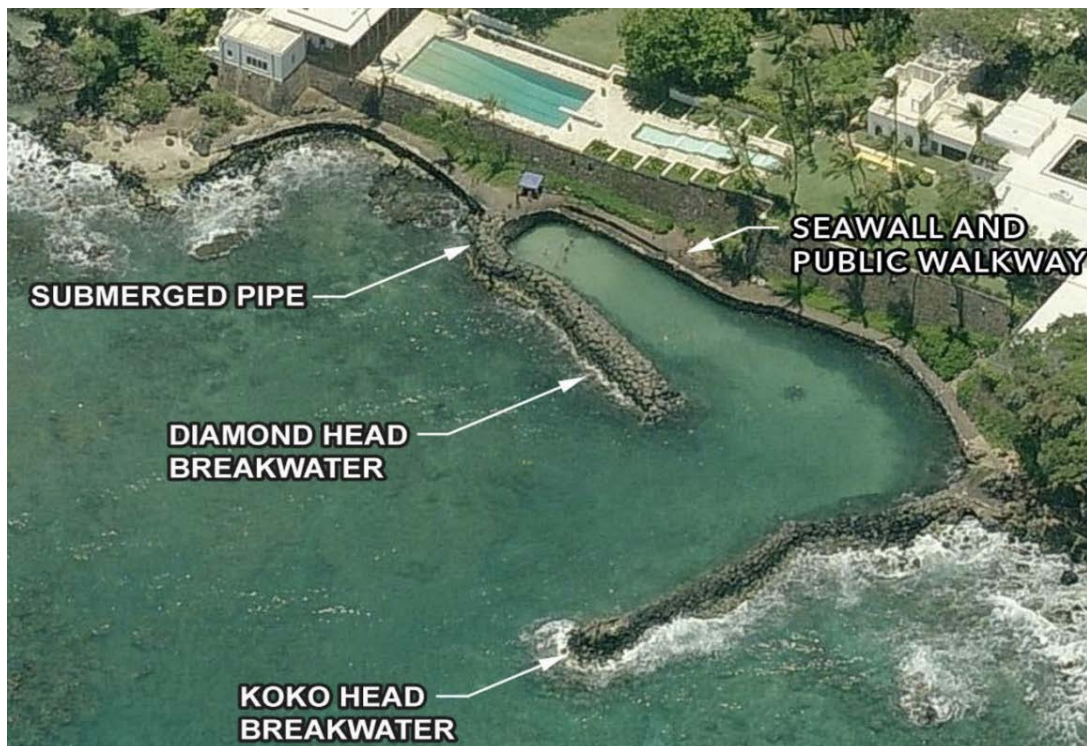
§343-1 Findings and purpose. The legislature finds that the **quality of humanity’s environment is critical to humanity’s well being**, that humanity’s activities have broad and profound effects upon the interrelations of all components of the environment, and that an environmental review process will integrate the review of environmental concerns with existing planning processes of the State and counties and **alert decision makers to significant environmental effects which may result from the implementation of certain actions**. The legislature further finds that the process of reviewing environmental effects is desirable because environmental consciousness is enhanced, cooperation and coordination are encouraged, and **public participation during the review process benefits all parties involved** and society as a whole. It is the purpose of this chapter to establish a system of environmental review which will ensure that **environmental concerns are given appropriate consideration in decision making** along with economic and technical consideration.





The Board of Land and Natural Resources (**BLNR**) should not deny my “due process right to be heard at ‘a meaningful time and in a meaningful manner,’” *Mauna Kea Anaina Hou v. Bd. of Land & Natural Res.*, 136 Hawai‘i 376, 380, 363 P.3d 224, 228 (2015) by denying the Contested Case Hearing Petition from Fred Fong and the Friends of the Doris Duke Swim Basin, represented by Blake McElheny. I have a right to be heard regarding the proposed destruction of the Doris Duke Shangri La Breakwater (in re: the Conservation District Use Permit Application (hereinafter “CDUA”) for a so-called “Breakwater Safety Initiative and Shoreline Stabilization Project” at Kaalawai) which will in fact create a massive additional sea-wall benefitting the private property of the Doris Duke Foundation through a significant shoreline-hardening project at public expense.

A contested case is required by law to determine the legal rights, duties, or privileges of a myself, Mr. Fong and other users of the existing swim basin such as those considered Friends of the Doris Duke Swim Basin such as my family.



**I. STATEMENT OF THE CASE**

This is how the swim basin at Kaalawai looks today





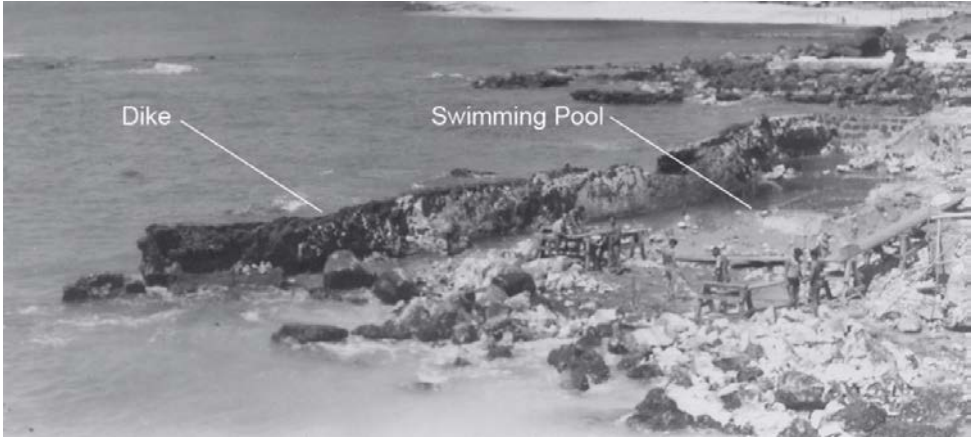
This image helps imagine and illustrate what destroying the breakwater and buttressing the existing sea-wall with 500 tons of boulders from the breakwater and 350 tons of boulders proposed to be brought to the site will result in.



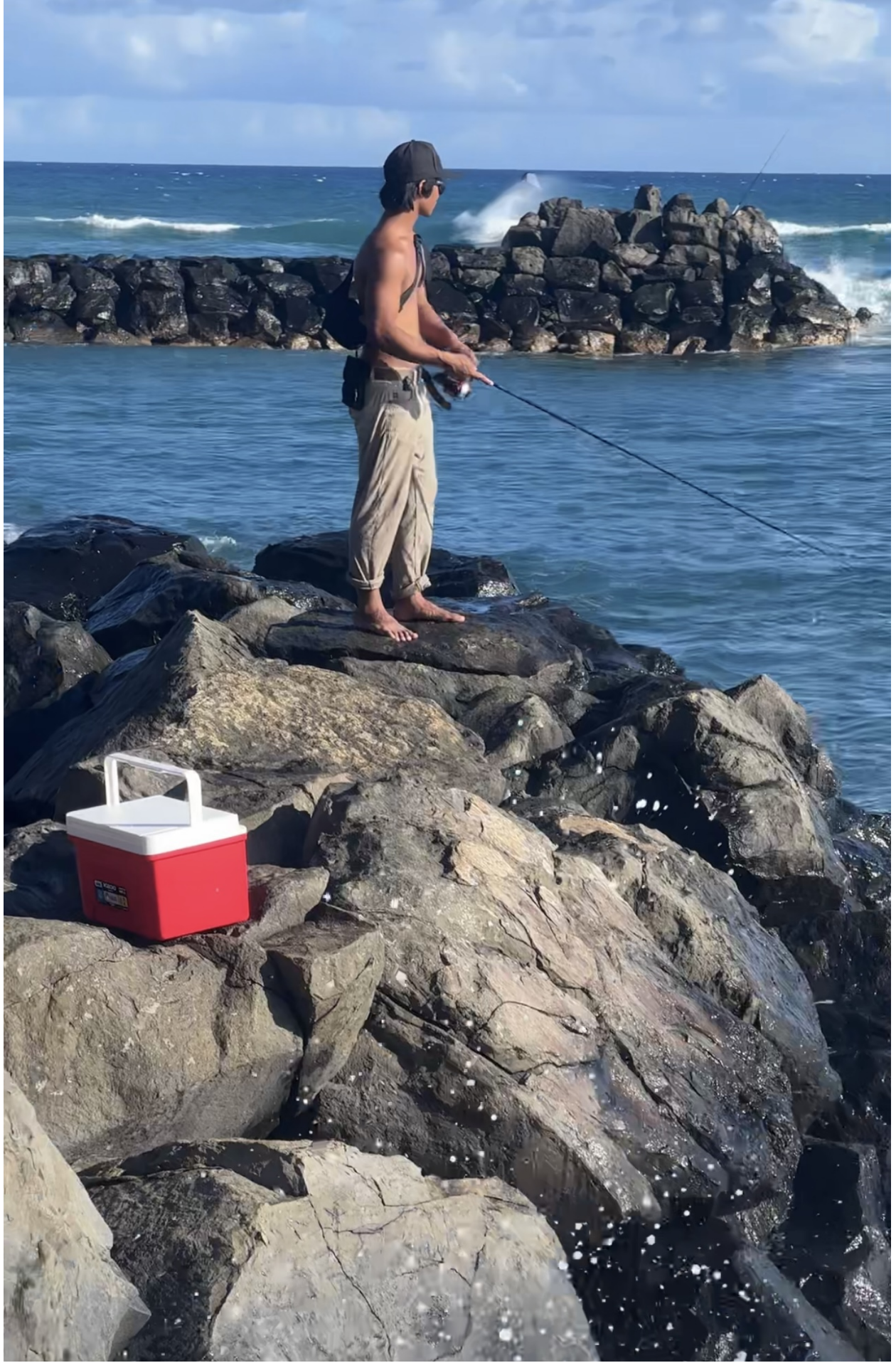
The safe and protected swim area as well as the breakwater, owned by the State runs parallel to the shoreline:



BLNR staff and the Doris Duke Foundation state that the area is somehow implicitly dangerous and unsuitable for public recreation. That implication is a falsehood and an attempt to confuse those that have not visited the area, much less utilized it with other members of the public that recreate there daily. For decades, the public has utilized this unique and special area for “recreational purposes” and “cultural purposes” including fishing, diving, swimming, and surfing. This photo illustrates that a pool suitable for swimming existed here even prior to the construction of the breakwater and the additional photos illustrate some contemporary uses.



















BLNR statements supporting the CDUP overlook important context, chronology, and content in the record. The Doris Duke Foundation has a long and troubled history of unsuccessfully attempting to secure approvals to destroy the breakwater and swim basin and to buttress their own sea-wall.

In contrast, I have frequented the area for recreation and enjoyment with my family and friends. My family and I have recreated and relaxed on the breakwater and in the swim basin. Both the Department of Land and Natural Resources and the Doris Duke Foundation have noted that the area is utilized by the public for recreation. One would be hard pressed to imagine a worse public policy for the State's lead conservation organization than purposefully destroying a beloved historic recreational resource based on false premises and for the benefit of a private organization.

The destruction of the breakwater and the filling in of the swim basin to buttress the sea-wall will impair my and the public's safe enjoyment of the area and will severely restrict public access to the shoreline as well as recreational and cultural uses. The proposed action will mar the beauty of the area.

The destruction and sea-wall construction will adversely affect my family's use and enjoyment of the surrounding area. We will be unable to safely use those areas that are occupied by the newly placed boulders. In short, it is simply bad public policy and it sets a dangerous precedent for the BLNR to bend to the will of a private organization whose interests lie in destroying public access and public resources for the benefit of their own sea-wall and the protection of

their own private property interests. Over the past few years, the public and I have repeatedly expressed these concerns to BLNR.

On June 23, 2023, the Board of Land and Natural Resources (BLNR) approved Conservation District Use Permit (CDUP) OA-3913 for destroying the historic breakwater and movement of nearly 1000 tons of boulders to buttress a privately owned sea-wall.

In testimony provided to the BLNR for the June 23, 2023 meeting I along with others provided in-depth testimony illustrating why the CDUP was not in the public interest and in fact would benefit a private party at the expense of the State and members of the public.

BLNR has not provided any findings of fact to the public in the form of written minutes from their June meeting.

On June 30, 2023, Dr. Fred Fong filed a contested case request. Dr. Fong requested the contested case because as “an adjacent property owner, he will be so directly and immediately affected by the project proposed under CDUP OA3913, including loss of safe use of the subject and adjacent coastal lands, threats to his constitutional and statutory rights to environmental quality and conservation and use of coastal resources.” On July 3, 2023, I filed a contested case request on behalf of the Friends of the Doris Duke Swim Basin. I requested the contested case because the Friends of the Doris Duke Swim Basin would “be so directly and immediately affected by the project proposed under CDUP OA-3913, including loss of safe use of the subject and adjacent coastal lands and threats to constitutional and statutory rights to environmental quality and

conservation and use of coastal resources.”

The CDUP authorizes the State to destroy the breakwater and to move nearly 1000 tons of boulders (some from the breakwater and others brought to the site) up against the Doris Duke Foundation’s private sea-wall.

Public access is allowed on a public easement over the wall, but safe entry points to the water will be demolished as the public will not be able to enter the water by walking down the breakwater boulders and will not be able to safely enter the water as boulders will be placed along the wall making entry unsafe.

These actions will deprive myself and other members of the public of the recreational use of coastal land and waters Constitutionally protected for public access and use, detracts from the area’s natural beauty, and does irreparable damage to coastal open space. In essence, the area will then serve exclusively as a buttress to the Doris Duke Foundation private property. This is public expenditure for private gain.

On July 3, 2023, I timely filed a contested case request to assure my “due process right to be heard at ‘a meaningful time and in a meaningful manner,’” *Mauna Kea Anaina Hou v. Bd. of Land & Natural Res.*, 136 Hawai‘i 376, 380, 363 P.3d 224, 228 (2015)

## **II. POINTS OF ERROR**

1. The BLNR erred when it issued the CDUP erred and when the BLNR staff recommended to (1) deny McElheny’s request for a contested case hearing in connection with the CDUP. McElheny points that out in his Petition.

2. The BLNR erred when its staff recommendation contends that no contested case hearing is required. McElheny makes the correct contentions in his Petition.

3. The BLNR applied an improper standard of review.

4. The BLNR erred when it characterizes the area as unsafe and unsuitable for public recreation. McElheny provided the BLNR with the correct information in his testimony and Petition.

5. The BLNR erred in approving the CDUP (without the benefit of any cross examination) when it suggested that there is a public purpose for the destruction of the breakwater. McElheny provided the correct private purpose in his testimony and Petition.

6. The BLNR staff mischaracterized the bases upon which Blake McElheny asserted that he is entitled to a contested case hearing in their recommendation. McElheny described the bases upon which he was entitled to a contested case hearing in his Petition.

## **III. STANDARD OF REVIEW**

Whether a contested case is required is reviewed *de novo* under the right/wrong standard. *In re*



*Hawai'i Elec. Light Co.*, 145 Hawai'i 1, 10-11, 445 P.3d 673, 682-83 (2019); *Protect & Pres. Kahoma Ahupua'a Ass'n v. Maui Planning Comm'n*, 149 Hawai'i 304, 311, 489 P.3d 408, 415 (2021). BLNR has not entered any findings of fact (and I have yet to have the opportunity to cross examine, or present witnesses that would allow for the entry of any such findings) and therefore standards regarding review of agency findings of fact are inapplicable. Likewise, BLNR did not enter any conclusions of law into the public record.

#### IV. ARGUMENT

“The Administrative Procedure Act is a remedial statute designed to give citizens a fair opportunity to be heard before the official of the agency who is charged with passing on that case.” *Hawai'i Laborer's Training Ctr. v. Agsalud*, 65 Haw. 257, 260, 650 P.2d 574, 576 (1982). One of the more common means of assuring that citizens are heard is through a contested case hearing on a permit application before a decision is granted. *See e.g. Pele Defense Fund v. Puna Geothermal Venture*, 77 Hawai'i 64, 881 P.2d 1210 (1994) (*PDF v. PGV*) (contested case hearing required before granting a clean air permit); *Public Access Shoreline Hawaii v. Hawaii County Planning Commission*, 79 Hawai'i 425, 903 P.2d 1246 (1995) (“*PASH*”) (contested case hearing required prior to granting a special management area permit); *Kaleikini v. Thielen*, 124 Hawai'i 1, 237 P.3d 1067 (2010) (contested case hearing required before approving the removal of burials); and *Kilakila 'O Haleakalā v. Bd of Land & Natural Res.*, 131 Hawai'i 193, 317 P.3d 27 (2013) (contested case required before decisionmaking on a conservation district use permit). A contested case hearing ensures that a party with due process rights is heard at “a meaningful time and in a meaningful manner.” *Mauna Kea*, 136 Hawai'i at 380, 363 P.3d at 228.

A contested case hearing is similar in many respects to a trial before a judge: the parties have the right to present evidence, testimony is taken under oath, and witnesses are

subject to cross-examination. It 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.

*Id.* “These procedures are designed to ensure that the record is fully developed and subjected to adversarial testing before a decision is made.” *Id.* at 391, 363 P.3d at 239.

“A contested case hearing is one that is (1) required by law and (2) determines the rights, duties, and privileges of specific parties. . . . In order for an administrative agency hearing to be required by law, it may be required by (1) agency rule, (2) statute, or (3) constitutional due process.” *In re Maui Electric*, 141 Hawai‘i 249, 258, 408 P.3d 1, 10 (2017) a contested case hearing was required on a utility power purchase agreement.

The central question in this instance is whether constitutional due process mandates a contested case hearing. The supreme court has set forth “a two-step analysis to determine whether there was a due process right to a contested case hearing.” *Kahoma*, 149 Hawai‘i at 312, 489 P.3d at 416. First, the court considers whether the particular interest that the claimant seeks to protect by a hearing is “property” within the meaning of the due process clauses of the federal and state constitutions. If the court concludes that the interest is a protected “property” interest, then the court considers what specific procedures are required to protect it. *Id.* This two-step analysis mandated a contested case here. This court has jurisdiction to hear this appeal. First, a hearing is required by law that determines the rights, duties and privileges of specific parties, as will be discussed herein. Second, BLNR’s decision was a final decision authorizing the destruction and conversion of public resources for private gain. Third, the Petitioners followed the applicable rules read into the record at the June 23 meeting by the Chair of BLNR by requesting a contested

case hearing . Finally, Blake McElheny has standing. *See e.g., Kilakila*, 131 Hawai‘i at 200, 317 P.3d at 27; *Kaleikini*, 124 Hawai‘i at 26-27, 237 P.3d at 1092-93; and *Akau v. Olohana Corp.*, 65 Haw. 383, 386-89, 652 P.2d 1130, 1133-34 (1982). Blake McElheny described the basis of his right to a contested case hearing in his written petition. He explained how his “right to a contested case hearing is constitutional based” on those pages.

**A. Blake McElheny’s Rights Are Constitutionally Protected.**

Constitutional 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. . . . **Furthermore, 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 persons who have followed the agency’s rules governing participation in contested cases.**

*PDF v. PGV*, 77 Hawai‘i at 68, 881 P.2d at 1214 (emphasis added). In *PDF v. PGV*, a developer of a geothermal powerplant applied to a government agency for authority to construct. Although no statute or agency rule required a public hearing, *PDF v. PGV*, 77 Hawai‘i at 66 and n.6, 881 P.2d at 1212 and n.6, the Court held that constitutional due process required a hearing. *Id.* at 68, 881 P.2d at 1214. In this case, without BLNR’s vote to approve the CDUP, the natural resources and the public use of the swim basin would not be destroyed. HRS §171-55. BLNR’s vote granted legal rights and privileges to a private foundation and adversely affected Blake McElheny’s rights.

The Hawai‘i Supreme Court has concluded that constitutional due process mandated a contested case in seven environmental cases: *PDF v. PGV*, *In Re Water Use Permit Applications*, 94 Hawai‘i 97, 120 n.15, 9 P.3d 409, 432 n.15 (2000) (“*Waiāhole*”), *In re ‘Īao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications*, 128 Hawai‘i 228, 287 P.3d 129 (2012),

*Mauna Kea, Maui Electric, Hawai‘i Elec. and Kahoma*. Traditional and customary practices, protected by Article XII section 7, were the constitutional basis in *‘Īao*, 128 Hawai‘i at 240-41, 287 P.3d at 141-42 and *Mauna Kea*, 136 Hawai‘i at 390, 363 P.3d at 238. Article XI section 9 was the constitutional basis in *Maui Electric, Hawai‘i Elec and Kahoma*.

Constitutional due process requires that Blake McElheny be given a contested case hearing with the required procedural protections. The interests Blake McElheny seeks to protect in a contested case hearing are founded upon four independent sources of law: (1) Article XI section 9 of the state constitution, (2) Article XII section 4 of the state constitution, (3) Article XI section 1 of the state constitution, and (4) Article I section 2 of the state constitution.

**1. Blake McElheny’s rights pursuant to Article XI Section 9 of the state constitution are a protectable property interest.**

Article XI, section 9 of the Hawai‘i State Constitution states:

Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and **conservation, protection** and enhancement of **natural resources**. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.

(Emphasis added). This right “is a substantive right,” which “is a legitimate entitlement stemming from and shaped by independent sources of state law, and is thus a property interest protected by due process.” *Maui Elec.*, 141 Hawai‘i at 260-61, 408 P.3d at 12-13.<sup>1</sup>

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<sup>1</sup>

Property interests may take many forms because courts have long recognized that property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money. A property interest does not need to be "tangible" to be protected by the due process clause. Rather, a protected property interest exists in a benefit—tangible or otherwise—to which a party has a legitimate claim of entitlement. We have thus recognized protected property interests in a range of intangible entitlements, including driving privileges, and the continued practice of medicine at a publicly funded hospital. *Maui Electric*, 141 Hawai‘i at 260, 408 P.3d at 12.

Thus, where a source of state law—such as article XI, section 9—grants any party a substantive right to a benefit—such as a clean and healthful environment—that party gains a legitimate entitlement to that benefit as defined by state law, and a property interest protected by due process is created. In other words, the substantive component of article XI, section 9 that we recognized in *Ala Loop* is a protectable property interest under our precedents. . . . [T]he property interest created by article XI, section 9 is shaped by all state laws relating to environmental quality. . . . Article XI, section 9 thus guarantees to '[e]ach person' an individual, private right to share in the benefit of environmental laws—regardless of whether the regulation describes a 'tangible property interest.'”

*Id.* at 264, 408 P.3d at 16.

In *Maui Elec.*, the supreme court held that the Public Utilities Commission violated the Sierra Club’s due process rights by approving a power purchase agreement between a utility company and a producer of electricity without holding a contested case hearing to consider a variety of environmental factors as required by an environmental statute, HRS chapter 269. *Maui Elec.*, 141 Hawai‘i at 260-65, 408 P.3d at 12-17. The supreme court employed this same analysis in *Hawai‘i Elec.* and *Kahoma*, in which the court held that contested case hearings were required because an environmental statute required that agencies consider a variety of environmental factors.

The supreme court has had the opportunity to hold that the following laws relate to “environmental quality, including control of pollution and conservation, protection and enhancement of natural resources”: the Land Use Law, HRS chapter 205, *City of Haw. v. Ala Loop Homeowners*, 123 Hawai‘i 391, 410 and 420, 235 P.3d 1103, 1122 and 1132 (2010); the Public Utilities Commission Law, HRS chapter 269, *Maui Elec.* 141 Hawai‘i at 264, 408 P.3d at 16 and *Hawai‘i Elec* 145 Hawai‘i at 16, 445 P.3d at 688; and the Coastal Zone Management Act HRS chapter 205A, *Kahoma*, 149 Hawai‘i at 313, 489 P.3d at 417.

In this case, BLNR would violate Blake McElheny's due process rights by voting to allow the State to take actions that will allow the Doris Duke Foundation to use, and in essence effectively exclude the public from, portions of public coastal lands and coastal waters to protect their private property interests without holding a contested case hearing to consider the criteria required by two environmental statutes. Blake McElheny and the Friends of the Swim Basin have the right to a clean and healthful environment (including "conservation, protection and enhancement of natural resources") as defined by HRS chapters 171, 205A, and 343 —just as the Sierra Club had rights pursuant to HRS chapter 269 in *Maui Elec.*

a. HRS chapter 171 is a law relating to environmental quality.

HRS chapter 171 is a law relating to environmental quality, including the "conservation, protection and enhancement of natural resources." The approval of the CDUP appears to have been issued pursuant to HRS § 171-2 and HRS § 171-3.

First, in determining whether a law is related to environmental quality, the Hawai'i Supreme Court has relied on the legislature's identification of laws related to environmental quality. *Ala Loop*, 123 Hawai'i at 410, 235 P.3d at 1122. In an extended discussion, the supreme court explained that the legislature's identification of a law within the ambit of HRS § 607-25 means that it is intended to implement the constitutional "guarantee of a clean and healthful environment established by article XI, section 9." *Id. See also* 1986 Haw. Sess. Laws Act 80, § 1 at 104-105. Last year, the supreme court again examined HRS § 607-25 to find that HRS chapter

205A is also a law relating to environmental quality.

Additionally, HRS § 607-25 (Supp. 1997), which authorizes the recovery of attorney's fees against private parties who undertake development without the approvals required under various laws, including chapter 205A, also "reflects the legislature's determination that chapter 205[A] is an environmental quality law." *Ala Loop*, 123 Hawai'i at 410, 235 P.3d at 1122. As we recognized in *Ala Loop*, the legislative purpose of HRS § 607-25 was to allow the award of attorney's fees in cases involving illegal development by private parties "to improve the implementation of laws **to protect health, environmental quality, and natural resources**[" *Id.* (quoting 1986 Haw. Sess. Laws Act 80, § 1 at 104-05) (emphasis added). In enacting HRS § 607-25, the legislature recognized that HRS ch. 205A "implements the guarantee of a clean and healthful environment established by article XI, section 9." *Id.* Therefore, HRS ch. 205A is a "law relating to environmental quality" for the purposes of article XI, section 9.

*Kahoma*, 149 Hawai'i at 313, 489 P.3d at 417. Thus, the citation of HRS chapter 171 in HRS § 607-25(c) renders it a law relating to environmental quality, including conservation, protection and enhancement of natural resources. HRS § 607-25(c) identifies HRS chapter 171.

Second, the legislature specified that all cases arising from title 12—of which HRS chapter 171 is a part—are subject to the jurisdiction of the environmental court. HRS § 604A-2(a). Title 12 is itself titled "Conservation and Resources." This legislative determination also demonstrates that this law that governs the use of the state land is a law relating to environmental quality.

Third, HRS chapter 171 implements Hawai'i State Constitution Art. XI, section 2, which reads in relevant part: "The legislature shall vest in one or more executive boards or commissions powers for the management of natural resources owned or controlled by the State, and such powers of disposition thereof as may be provided by law." This provision was drafted by the framers of the first state constitution in 1950 and went into effect at statehood. The framers were concerned about "the preservation of certain natural resources. . . . Hence, the importance of placing fairly rigid restrictions on the administration of these assets." Committee of the Whole Report No. 22

in 1 Proceedings of the Constitutional Convention of Hawaii of 1950 at 335 (1950). Pursuant to Article XI section 2, the 1962 state legislature codified the laws that govern the administration and management of the state's lands into RLH chapter 103A, which later became HRS chapter 171. *See* 1963 Supplement to Revised Laws of Hawaii 1955 at 485; 1962 Haw. Sess. Laws Act 32. Thus, HRS chapter 171 is a law relating to the preservation of natural resources.

Finally, just as HRS chapter 269 required consideration of environmental factors, HRS § 171-2 requires that BLNR consider conditions that “best serve the interests of the State.” The supreme court has emphasized that ensuring public access to our beaches is in the interest of the State. *Hawaii County v. Sotomura*, 55 Haw. 176, 182, 517 P.2d 57, 61-62 (1973) (“Public policy, as interpreted by this court, favors extending to **public use** and ownership as much of Hawaii's shoreline as is reasonably possible.”). Moreover, the legislature had already declared that the “interests of the State” include environmental quality. All BLNR decisionmaking “shall be in conformance with the overall theme, goals, objectives, and policies” of HRS chapter 226 and shall use the priority guidelines contained in HRS chapter 226. HRS § 226-52(b)(2)(E). These environmental objectives, policies and priority guidelines are identified in HRS §§ 226-11(9), 226-23(b)(4), 226-23(b)(5), 226-23(b)(10), and 226-104(13). In its decisionmaking, BLNR was required to consider promotion of “increased accessibility and prudent use of inland and shoreline areas for public recreational. . . purposes,” HRS § 226-11(9), promotion of “recreational . . . potential of natural resources having scenic [or] open space . . . values while ensuring that their inherent values are preserved,” HRS § 226-23(b)(4), ensuring “opportunities for everyone to use and enjoy Hawaii's recreational resources,” HRS § 226-23(b)(5), assuring “adequate access to significant natural and cultural resources in public ownership,” HRS §



226-23(b)(10), and protecting “Hawaii's shoreline, open spaces, and scenic resources,” HRS § 226-104(13). “In pursuance of the state policy to conserve the natural resources and enhance the quality of life, all agencies, in the development of programs, shall, insofar as practicable, consider the following guidelines[.]” HRS § 344-4. Those include: conservation and protection of “open space areas,” HRS § 344-4(2)(D), preservation of “recreation areas, including the shorelines, for public recreational . . . uses,” HRS § 344-4(4)(A), promotion of “open space in view of its natural beauty not only as a natural resource but as an ennobling, living environment for its people,” HRS § 344-4(4)(C).

When BLNR approves a CDUP pursuant to HRS § 171-2 and HRS § 171-3, it must specifically consider all these environmental interests. Thus, there can be no question that HRS § 171-2 and HRS § 171-3, which govern “public lands, the water resources, ocean waters, navigable streams, coastal areas (excluding commercial harbor areas), and minerals and all other interests therein” is a law relating to environmental quality, including the “conservation, protection and enhancement of natural resources.”

b. HRS chapter 205A is a law relating to environmental quality.

In rendering any decision made pursuant to HRS chapter 171, BLNR must also comply with HRS chapter 205A.<sup>2</sup> HRS § 205A-4(a) requires that BLNR “give full consideration to . . . recreational, scenic, and open space values[.]” Moreover, the objectives and policies of HRS chapter 205A are binding on BLNR’s actions and BLNR must enforce them. HRS §§ 205A-4(b) and -5(b).<sup>3</sup> These objectives and policies call for BLNR to:

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<sup>2</sup> HRS § 205A-1 defines an agency as “**any** agency, board, commission, department, or officer of a county government **or the state government**, including the authority as defined in part II.” (Emphasis added.)

<sup>3</sup> “The **objectives and policies** of this chapter and any guidelines enacted by the legislature **shall be binding** upon actions within the coastal zone management area by **all agencies**, within the

- “[p]rovide coastal recreational opportunities accessible to the public,” HRS § 205A-2(b)(1)(A);
- “[p]rotect, preserve, and, where desirable, restore or improve the quality of coastal scenic and open space resources,” HRS § 205A-2(b)(3)(A);
- “[p]rotect beaches for public use and recreation,” HRS § 205A-2(b)(9)(A);
- “[p]rovide adequate, accessible, and diverse recreational opportunities in the coastal zone management area by . . . [p]rotecting coastal resources uniquely suited for recreational activities that cannot be provided in other areas,” HRS § 205A-2(c)(1)(B)(i);
- “[p]rovide adequate, accessible, and diverse recreational opportunities in the coastal zone management area by . . . [p]roviding and managing adequate public access, consistent with conservation of natural resources, to and along shorelines with recreational value,” HRS § 205A-2(c)(1)(B)(iii);
- “[p]rovide adequate, accessible, and diverse recreational opportunities in the coastal zone management area by . . . [p]roviding an adequate supply of shoreline parks and other recreational facilities suitable for public recreation,” HRS § 205A-2(c)(1)(B)(iv);
- “[p]rovide adequate, accessible, and diverse recreational opportunities in the coastal zone management area by . . . [e]nsuring public recreational uses of county, state, and

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scope of their authority.” HRS § 205A-4(b). “All agencies **shall enforce the objectives and policies** of this chapter and any rules adopted pursuant to this chapter.” HRS § 205A-5(b). The “coastal zone management area” is defined as “**all lands of the State** and the area extending seaward from the shoreline to the limit of the State's police power and management authority, including the United States territorial sea.” HRS § 205A-1. (Emphasis added to statutory quotations.). As the Senate Committee on Planning, Land and Water Use Management explained in 1993, the bill removed the “exclusion of state forest reserve lands from the definition of “coastal zone management areas.” S Stand. Comm Rep. No. 1142, 1993 Senate Journal at 1189. HRS chapter 205A applies to the entire land mass of the State and to BLNR. *Id.*

- federally owned or controlled shoreline lands and waters having recreational value consistent with public safety standards and conservation of natural resources,” HRS § 205A-2(c)(1)(B)(v);
- “[p]rovide adequate, accessible, and diverse recreational opportunities in the coastal zone management area by . . . [e]ncouraging reasonable dedication of shoreline areas with recreational value for public use as part of discretionary approvals or permits by the land use commission, board of land and natural resources, and county authorities; and crediting such dedication against the requirements of section 46-6,” HRS § 205A-2(c)(1)(B)(viii);
  - “[e]nsure that new developments are compatible with their visual environment by designing and locating such developments to minimize the alteration of natural landforms and existing public views to and along the shoreline,” HRS § 205A-2(c)(3)(B);
  - “[p]reserve, maintain, and, where desirable, improve and restore shoreline open space and scenic resources,” HRS § 205A-2(c)(3)(C);
  - “[e]ncourage those developments that are not coastal dependent to locate in inland areas,” HRS § 205A-2(c)(3)(D); and
  - “[l]ocate new structures inland from the shoreline setback to conserve open space, minimize interference with natural shoreline processes, and minimize loss of improvements due to erosion,” HRS § 205A-2(c)(9)(A).

The Hawai‘i Supreme Court recently held that “HRS ch. 205A is a law ‘relating to environmental quality’ for the purposes of article XI, section 9.” *Kahoma*, 149 Hawai‘i at 313, 489 P.3d at 417.

The provisions of HRS ch. 205A also “expressly require consideration of issues relating to the preservation or conservation of natural resources.” *Ala Loop*, 123 Hawai‘i at 410, 235 P.3d at 1122; see HRS § 205A-4 (Supp. 1989) (providing that agencies “shall give full consideration to ecological, cultural, historic, esthetic, recreational, scenic, and open space values” in implementing the CZMA program). . .

*Id.* The “right to a clean and healthful environment includes the right that specific consideration be given to” recreational, scenic, and open space values. *See Maui Elec.*, 141 Hawai‘i at 265, 408 P.3d at 17.

Just as the public utilities commission was required to consider greenhouse emissions pursuant to HRS § 269-6(b), *Maui Elec.*, 141 Hawai‘i at 261, 408 P.3d at 13, BLNR is required to consider the objectives, policies and values identified in HRS chapter 205A prior to rendering a decision. McElheny is entitled to an opportunity to present evidence and cross examine witnesses to demonstrate that the issuance of the CDUP is inconsistent with HRS chapter 205A’s objectives and policies.

c. HRS chapter 343 is a law relating to environmental quality.

Like HRS chapter 171, HRS chapter 343 is referred to in both HRS § 607-25 and 604A-2(a). There can be doubt that its content relates to environmental quality. *Kahana Sunset Owners Ass’n v. County of Maui*, 86 Hawai‘i 66, 72, 947 P.2d 378, 384 (1997) (“The purpose of preparing an environmental assessment is to provide the agency and any concerned member of the public with the information necessary to evaluate the potential environmental effects of a proposed action.”). The “right to a clean and healthful environment includes the right that explicit consideration be given to” environmental issues in BLNR’s decision-making, as

provided for in HRS chapter 343. See Maui Elec., 141 Hawai‘i at 265, 408 P.3d at 17.

McElheny’s right included the right that with an adequate, updated EA or a full EIS be prepared pursuant to HRS chapter 343, and that information be considered, before state land and coastal resources are destroyed and utilized for private purposes.

Clearly the CDUP contemplates an action that constituted action that proposed the use of state or county lands within the meaning of HRS § 343-5(a)(1).” Thus, BLNR was required to comply with HRS chapter 343, and BLNR was required to update the EA, before approving the CDUP in June 2023. In public testimony those opposed to the CDUP it was explicitly pointed out that its rights include “the right that an environmental impact statement be prepared pursuant to HRS chapter 343 before state land and resources are irretrievably committed.

BLNR’s decision-making appears to have been made pursuant to three statutes related to the conservation and protection of natural resources, HRS chapters 205A, 171, and 343. Pursuant to article XI, section 9 of the Hawai‘i Constitution and HRS chapters 205A, 171, and 343, Blake McElheny has a constitutionally cognizable property interest in the disposition of the CDUP permit.

2. **Blake McElheny’s rights pursuant to Article XII Section 4 of the state constitution are a protectable constitutional interest.**

Blake McElheny also enjoys constitutionally protected rights as a beneficiary of the public trust

pursuant to Article XII section 4 of the State Constitution. Article XII section 4 of the Hawai‘i State Constitution states that ceded lands “shall be held by the State as a public trust for native Hawaiians and the general public.” “Article XII, § 4 imposes a fiduciary duty on Hawaii's officials to hold ceded lands in accordance with the § 5(f) trust provisions, and the citizens of the state must have a means to mandate compliance.” *Pele Def. Fund v. Paty*, 73 Haw. 578, 605, 837 P.2d 1247, 1264 (1992). *See also Napeahi v. Paty*, 921 F.2d 897 (9th Cir. 1990) (recognizing that ceded lands are subject to trust duty). Citizens of the state “must have a means to mandate compliance” with Article XII section 4 of the state constitution. *Pele Def Fund*, 73 Haw. at 605, 837 P.2d at 1264. More recently, the Hawai‘i Supreme Court held with respect to ceded lands:

the constitution specifies that the public lands ceded to the United States following the overthrow of the Hawaiian Monarchy and returned to Hawai‘i upon its admission to the Union hold a special status under our law. These lands are held by the State in trust for the benefit of Native Hawaiians and the general public. Accordingly, our constitution places upon the State duties with respect to these trusts much like those of a common law trustee, including an obligation to protect and preserve the resources however they are utilized.

*Ching v. Case*, 145 Hawai‘i 148, 152, 449 P.3d 1146, 1150 (2019) (*Pōhakuloa*). BLNR admits that the area affected by the CDUP is ceded land.

Blake McElheny has the right to ensure that the lands and waters affected by the CDUP which is ceded land pursuant to Article XII section 4, is appropriately managed. He cannot be deprived of this right absent due process. The supreme court has recognized the public’s right to enforce this constitutional provision. His constitutional interest is adversely affected when the BLNR authorizes the destruction of public assets, the effective exclusion of the public from portions of public coastal lands and waters, and the elimination of coastal recreation and cultural opportunities.

**3. Blake McElheny's rights pursuant to Article XI Section 1 of the state constitution are a protectable constitutional interest.**

“Article XI, section 1 of the Hawai‘i Constitution places upon the State a fiduciary duty analogous to the common law duty of a trustee with respect to lands held in public trust.” *Pōhakuloa*, 145 Hawai‘i at 170, 449 P.3d at 1168. Article XI section 1 of the Hawai‘i State Constitution provides that “all public natural resources are held in trust by the State for the benefit of the people.”<sup>4</sup> The first paragraph of this provision states that “land” is a natural resource. “The plain language of Article XI § 1 provides that all public natural resources, including land, are held in trust for the benefit of the people.” *Mauna Kea*, 143 Hawai‘i at 400, 431 P.3d at 773. Among the parcels of land encompassed by Article XI section 1 is the area contemplated under the CDUP. “Under public trust principles, the State as trustee has the duty to protect and maintain the trust property and regulate its use. Presumptively, this duty is to be implemented by devoting the land to actual public uses, e.g., recreation.” *State by Kobayashi v. Zimring*, 58 Haw. 106, 121, 566 P.2d 725, 735 (1977). *See also Kelly v. 1250 Oceanside Partners*, 111 Hawai‘i 205, 231, 140 P.3d 985, 1011 (2006) (public trust duty requires agency to “ensure that the prescribed measures are actually being implemented”).

Blake McElheny has the right to ensure that the swim basin and the breakwater as well as the surrounding coastal waters, which are natural resources pursuant to Article XI section 1, are appropriately managed. BLNR cannot allow a portion of land that has been dedicated to be used

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<sup>4</sup> “For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.

All public natural resources are held in trust by the State for the benefit of the people.”

as a public swimming and recreation area to instead be used exclusively for the benefit of a private foundation without providing Blake McElheny due process.

The issue with respect to both Article XI section 1 and Article XII section 4 of the State Constitution is whether a decision to allow the exclusive use of portions of public trust land should be made without cross examination of experts and government officials, without the ability to present witnesses and evidence, and without BLNR having to render any findings. Or should such a decision be made after a contested case hearing?

**4. Blake McElheny's rights pursuant to Article I Section 2 of the state constitution are a protectable constitutional interest.**

Article I Section 2 of the State Constitution provides:

All persons are free by nature and are equal in their inherent and inalienable rights. Among these rights are the enjoyment of life, liberty and the pursuit of happiness, and the acquiring and possessing of property. These rights cannot endure unless the people recognize their corresponding obligations and responsibilities.

Decades ago, the supreme court eloquently articulated the rights protected by this provision of our constitution.

Freedom would be incomplete if it does not include the right of men to move from place to place, to walk in the fields in the country or on the streets of a city, **to stand under open sky in a public park and enjoy the fresh air, to lie down on a public beach and enjoy a sunbath**, to visit a friend in his home and enjoy an evening together, and the right to associate with others in the enjoyment of an avocation or a vocation.

*State v. Shigematsu*, 52 Haw. 604, 610, 483 P.2d 997, 1001 (1971) (emphasis added).<sup>5</sup>

In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom. This court's attention has been called to possible legislative abridgment of fundamental personal rights and liberties and we 'should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support

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<sup>5</sup> The supreme court's analysis should not be cavalierly dismissed as dicta. *See Robinson v. Ariyoshi*, 65 Haw. 641, 654, 658 P.2d 287, 298 (1982).



regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions.

*Id.* at 611, 483 P.2d at 1011. BLNR must provide Blake McElheny due process before it can deprive him and his family of their rights to access and utilize areas utilized for decades for coastal and ocean access, but now planned to be utilized almost exclusively for the benefit of coastal sea-wall buttressing by a private foundation.

**B. Due Process Required a Contested Case Hearing.**

BLNR's decision to allow a hotel to exclude members of the public (including Tyler McElheny) from land dedicated to be used as a public beach implicates rights protected by Article XI section 9, Article XI section 1, Article XII section 4, and Article I section 2 of the state constitution.

Whenever constitutional interests are affected by decision-making, as they are here, the supreme court has consistently required a contested case hearing be held to satisfy due process. *PDF v. PGV, Waiāhole, 'Iao, Mauna Kea, Maui Electric, Hawai'i Elec, and Kahoma.*

The only time the court has not required a contested case hearing when someone's constitutional rights were implicated was in *Flores v. Bd. of Land & Natural Res.*, 143 Hawai'i 114, 424 P.3d 469 (2018). The *Flores* court recognized the important role that contested case hearings play when constitutional rights are involved. The court, however, held that Flores was not entitled to a **second** contested case hearing on the impacts of telescope construction because Flores had "already been afforded a full opportunity to participate in a contested case hearing and express his views and concerns on the matter." *Flores*, 143 Hawai'i at 127, 424 P.3d at 482. Flores had "participated extensively in the separate contested case" on the effects of telescope construction.

*Id.* The court concluded that for “BLNR to hold another contested case hearing in such circumstances would require BLNR to shoulder **duplicative** administrative burdens and comply with additional procedural requirements that would offer no further protective value.” *Id.* at 128, 424 P.3d at 483 (emphasis added). Unlike *Flores*, Blake McElheny has **not** been afforded any opportunity to participate in a contested case hearing on the CDUP permit. He has not been able to cross examine witnesses. He has not been provided any findings of fact that justify a private foundation’s exclusive use of portions of natural resources, lands, and coastal waters for use as a buttress to their sea-wall.

A long-standing three factor analysis is used to determine whether a contested case is required.

(1) the private interest which will be affected; (2) the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards; and (3) the governmental interest, including the burden that additional procedural safeguards would entail.

*Maui Elec*, 141 Hawai‘i at 265, 408 P.3d at 17. The three factors established in caselaw that warrant a contested case hearing are present in this case.

1. **BLNR’s decision, the CDUP, and the private use by the Doris Duke Foundation adversely affect McElheny.**

BLNR’s decisionmaking adversely affects McElheny’s constitutional interests in two ways. First, it will deny him the ability to ensure that BLNR properly considered statutorily-mandated environmental criteria such as those referenced in public testimony regarding HRS 343. Second, BLNR’s decision directly affects the public’s use (including Blake McElheny’s use) of the area affected by the CDUP.

a. **McElheny’s Article XI Section 9 rights will be and were adversely affected.**

McElheny’s assertion of a right to a clean and healthful environment, as defined by HRS

chapters 171 and 205A, established a protectable property interest. *Hawai‘i Elec.*, 145 Hawai‘i at 16, 445 P.3d at 688.

“The private interest to be affected in this case is the right to a clean and healthful environment, which is a substantive right guaranteed by the Hawai‘i Constitution.” *Maui Elec.*, 141 Hawai‘i at 265, 408 P.3d at 17; *Kahoma*, 149 Hawai‘i at 313-14, 489 P.3d 417-18 (“the private interest was PPKAA's constitutional right to a clean and healthful environment”).

The Standing Committee Report from the 1978 Constitutional Convention specifically observed that “a clean and healthful environment is an important right of every citizen and that this right deserves constitutional protection.” Stand. Comm. Rep. No. 77, in 1 Proceedings of the Constitutional Convention of Hawai‘i of 1978, at 689 (emphasis added).

*Maui Elec.*, 141 Hawai‘i at 263, 408 P.3d at 15. The affected private interest here is identical to the interest involved in *Hawai‘i Elec.*, *Maui Elec.* and *Kahoma*: the right to a clean and healthful environment. In this case, the right includes (among other provisions) the right to:

- consideration of the public interest, including protection of open space, scenic resources and public recreational opportunities pursuant to HRS §§ 171-55, 226-23(b)(4), 226-104(13), 344-4(2)(D);
- full consideration of recreational, scenic, and open space values pursuant to HRS § 205A-4(a);
- protection of coastal scenic and open space resources pursuant to HRS § 205A-2(b)(3)(A);
- protection of beaches for public use and recreation, pursuant to HRS § 205A-2(b)(9)(A);
- ensuring public recreational uses of state owned shoreline lands and waters having recreational value, pursuant to HRS § 205A-2(c)(1)(B)(v);

- minimizing the alteration of existing public views to and along the shoreline pursuant to HRS § 205A-2(c)(3)(B); and
- preserving shoreline open space and scenic resources pursuant to HRS § 205A-2(c)(3)(C).

BLNR’s June 2023 decision and later staff recommendation specifically involved determinations related to HRS chapters 171 and 205A and, by extension, BLNR’s decision also involved a determination of McElheny’s interest in a clean and healthful environment as defined by HRS chapters 171 and 205A. BLNR’s proceeding “directly affected the right to a clean and healthful environment of” Blake McElheny. *See Maui Elec.* 141 Hawai‘i at 266, 408 P.3d at 18. For the purposes of due process analysis, the court examines how issuance of the CDUP implicates McElheny’s **constitutional** interests (including his right to a clean and healthful environment).

b. McElheny’s use of public land will be adversely affected.

BLNR’s decision to grant the CDUP directly affects the public’s use of the area affected by the CDUP. As such, it directly and adversely affects Blake McElheny. As a trust beneficiary, McElheny has an interest in ensuring that ceded land and public trust land are properly managed – for the benefit of the public rather than for a private foundation. He also has the right “to stand under open sky in a public park and enjoy the fresh air, [or] to lie down on a public beach and enjoy a sunbath,” *Shigematsu*, 52 Haw. at 610, 483 P.2d at 1001, without obstruction from tons of boulders and the elimination of public areas to do so.

BLNR and the courts are not required to definitively and conclusively determine that the private interest will be substantially affected. All that is required is evidence that a substantial interest may be affected. *Mauna Kea* involved construction on a portion of the Mauna Kea astronomy

precinct. *Mauna Kea*, 136 Hawai‘i at 381, 363 P.3d at 229. The court examined the appellant’s allegations. It was sufficient for the appellants to argue that the project would have significant negative effects on their cultural practices. *Id.* at 390, 363 P.3d at 238. The court did not conclusively determine that the project would have an adverse impact; that issue is relevant to the merits as to whether a permit should be granted, to be resolved after a contested case. *Accord Kilakila*, 131 Hawai‘i at 205, 317 P.3d at 39 (on a motion to dismiss). In fact, although the impact to cultural practices was key to the supreme court’s holding that a contested case was required, ultimately, after the contested case hearing was held, the court held that cultural practices would not be affected. *In Matter of Conservation District Use Application HA-3568*, 143 Hawai‘i 379, 396-97, 431 P.3d 752, 769-70 (2018) (*Mauna Kea II*). Thus, the critical issue here is whether the permitted activity may implicate someone’s constitutional rights. McElheny contends that his use of a portion of the premises is and will be adversely affected by Doris Duke’s exclusive uses and benefits derived from the areas and natural resources affected by the CDUP

There is no case law that suggests, as the BLNR appears to do so in its CDUP application supporting documents, that the public’s ability to use a part of a parcel or part of some set of natural resources, renders the impacts to constitutional interests insignificant. In fact, the TMT project excluded practitioners from less than one percent of the astronomy precinct, yet they were entitled to a contested case hearing.<sup>6</sup> The supreme court has found constitutional violations when the public’s use of just a portion of an area is adversely affected. The Land Use Commission violated the constitutional rights of cultural practitioners who hiked on trails and gathered salt on portions of a 1,009 acre proposed development. *Ka Pa‘akai O Ka‘aina v. Land*

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<sup>6</sup> The project consisted of five acres. *Mauna Kea*, 136 Hawai‘i at 381, 363 P.3d at 229. The astronomy precinct consists of 525-acres. *Mauna Kea II*, 143 Hawai‘i at 385, 401, 431 P.3d at 758. Five acres divided by 525 acres is less than one percent.

*Use Comm'n*, 94 Hawai'i 31, 34 and 43, 7 P.3d. 1068, 1071 and 1080 (2000). In *Pōhakuloa*, the plaintiffs never claimed that they used all 22,900 acres at issue. Moreover, their rights were affected even though more than 77% of the land was free of litter. *Pōhakuloa*, 145 Hawai'i at 182 n.55, 449 P.3d at 1180 n.55.

In this case, the CDUP will result in the Doris Duke Foundation reaping the benefits of having their private sea-wall buttressed by publicly owned boulders in a fashion that destroys and eliminates public access to the water. Every day the Foundation will benefit from a strengthened sea wall. Public access will be allowed over the seawall, but safe access to the water will have been eliminated by the placement of the boulders. McElheny's constitutionally protected interests are adversely affected by the destruction of the breakwater, the destruction of the swim basin, the buttressing of the private sea wall, and the reduction of public access to the near shore waters and public lands in the areas covered by the CDUP.

**2. The risk of erroneous deprivation is high.**

“The risks of an erroneous deprivation are high in this case absent the protections provided by a contested case hearing, particularly in light of” the impact on public trust ceded land and the absence of other proceedings in which McElheny could have a meaningful opportunity to be heard concerning the CDUP, the impact on public recreation, open space, public access, cultural practices and traditions, and scenic views. *See Maui Elec.* 141 Hawai'i at 266, 408 P.3d at 18. The risk of an erroneous deprivation of McElheny's interest is high absent his participation in a contested case hearing because the CDUP significantly diminishes public recreational opportunities, open space and scenic views. *Kahoma*, 149 Hawai'i at 314, 489 P.3d 418.

“By voting on the permit before the contested case hearing was held, the Board denied the Appellants their due process right to be heard at ‘a meaningful time and in a meaningful manner.’” *Mauna Kea*, 136 Hawai‘i at 380, 363 P.3d at 228. The risk in this case is no different than the risk in *Maui Elec.*, *Kahoma* and *Mauna Kea*.

A contested case hearing is similar in many respects to a trial before a judge: the parties have the right to present evidence, testimony is taken under oath, and witnesses are subject to cross-examination. It 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.”

*Id.* “These procedures are designed to ensure that the record is fully developed and subjected to adversarial testing before a decision is made.” *Id.* at 391, 363 P.3d at 239.

The supreme court has already held that a public open meeting is no substitute for a contested case hearing. *Kahoma* involved construction of affordable housing on private property. Multiple members of the Protect & Preserve Kahoma Ahupua‘a Association testified at the planning commission’s regular meeting regarding the project’s impacts. *Kahoma*, 149 Hawai‘i at 308, 489 P.3d at 412. The court held that this opportunity was not sufficient for due process. “While PPKAA members testified about the Project at the public hearing and the hearing on its petition to intervene, they were not able to submit evidence or cross-examine opposing witnesses, which the Commission’s rules would have allowed them the opportunity to do had their petition been granted.” *Id.* at 314, 489 P.3d at 418. Similarly here, a BLNR public meeting on the exclusive private benefit and use of a portion of public land, natural resources, and waters is not an adequate substitute for a contested case hearing.

In *Mauna Kea*, the supreme court emphasized the importance of the “extensive procedural protections” afforded parties in a contested case hearing. *Mauna Kea*, 136 Hawai‘i at

391, 363 P.3d at 239. Nor was “restricted” participation” sufficient in *Hawai‘i Elec.*, 145 Hawai‘i at 17, 445 P.3d at 689. The supreme court has consistently rejected the idea that a sunshine meeting can substitute for a contested case hearing when constitutional rights are involved.<sup>7</sup>

**3. BLNR has substantial interests in conducting a contested case.**

BLNR has a substantial interest in conducting a contested case hearing. The legislature emphasized the important role played by permits issued by BLNR. H. Stand. Comm. Rep. No. 522, 1967 House Journal at 670; *Carmichael v. Bd. of Land & Nat. Res.*, 150 Hawai‘i 547, 565-66, 506 P.3d 211, 229-39 (2022). As public trustee, BLNR is obligated to render findings that permits served the “best interests of the State.” HRS § 171-55; *Carmichael*, 150 Hawai‘i at 564, 506 P.3d at 228. A contested case hearing that introduces evidence never considered before by BLNR, and allows for cross examination, helps to ensure that the review is done carefully and that appropriate findings are entered.

BLNR is constitutionally bound to make its decision “with a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state.” *Waiāhole*, 94 Hawai‘i at 143, 9 P.3d at 455. BLNR must ensure that public trust resources are protected. *Id.*; *Pila‘a 400, LLC v. Bd. of Land & Natural Res.*, 132 Hawai‘i 247, 250, 320 P.3d 912, 915 (2014) (“The BLNR is constitutionally mandated to conserve and protect Hawai‘i’s

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<sup>7</sup> The Intermediate Court of Appeals’ decision in *Medeiros v. Hawaii County Planning Com’n*, 8 Haw.App. 183, 797 P.2d 59 (1990) is of dubious vitality given the plethora of subsequent supreme court decisions regarding the need to conduct contested cases. Nevertheless, in that case, the appellants were given the opportunity to testify at a public hearing conducted over two days and participate in several mediation sessions. *Id.* at 191-92, 797 P.2d at 64. “The public hearing, **together with the mediation process**, was viewed by the legislature as a reasonable alternative to the contested case.” *Id.* at 197-98, 797 P.2d at 67 (emphasis added). The Intermediate Court of Appeals did not hold that testifying for a couple of minutes at a public meeting is sufficient to protect constitutional rights.



natural resources.”). It must ensure that trust land is devoted to “actual public uses, e.g., recreation.” *Zimring*, 58 Haw. at 121, 566 P.2d at 735. A contested case would allow BLNR to ensure that “the prescribed measures are actually being implemented” *Kelly*, 111 Hawai‘i at 231 140 P.3d at 1011. BLNR is also statutorily bound to give full consideration of recreational, scenic, and open space values. HRS § 205A-4(a). A contested case allows BLNR to fulfill its obligations through the development of a complete record, cross examination of witnesses, thorough analysis of the evidence, and specific findings of fact. *Waiāhole*, 94 Hawai‘i at 158-59, 9 P.3d at 469-70; *Mauna Kea* 136 Hawai‘i at 380, 363 P.3d at 228. A contested case would ensure that BLNR held itself to its burden before allowing private benefits to accrue from the elimination of the public benefits at the swim basin and breakwater. There is no evidence in the record that BLNR cannot hold a contested case hearing, or that it would be burdensome to do so.

Instead of rubberstamping, this issue deserves the kind of attention that a power purchase agreement, or a special management area permit, or a development near the coast demands. A contested case hearing would ensure that BLNR had a complete record to assess whether the destruction of the treasured public recreation area is consistent with the constitution, state statutes, and the “best interests of the State.”

**C. The June 23, 2023 Decision Must be Vacated.**

BLNR’s June 2023 decision to allow the CDUP must be vacated.

Quite simply, the Board put the cart before the horse when it issued the permit before the request for a contested case hearing was resolved and the hearing was held. Accordingly, the permit cannot stand. We therefore vacate the judgment of the circuit court and the permit issued by the Board, and remand so that a contested case hearing can be conducted before the Board or a new hearing officer, or for other proceedings consistent with this opinion.

*Mauna Kea.*, 136 Hawai‘i at 380-81, 363 P.3d at 228-29. *See also PASH*, 79 Hawai‘i at 429, 903 at 1250 (affirming the circuit court’s decision voiding permit granted without conducting a contested case hearing) and *Hawai‘i Elec.* (vacating Public Utilities Commission decision made without conducting a contested case hearing). The supreme court vacated approvals when agencies violated HRS chapter 205A,<sup>8</sup> chapter 343,<sup>9</sup> chapter 205,<sup>10</sup> and the Hawai‘i county subdivision control code.<sup>11</sup> Pursuant to HRS § 91-14(g), and *Mauna Kea*, the BLNR must reverse the BLNR’s decision and invalidate the permit. This is not to mention that BLNR also put the cart before the horse when it signed the MOU several years ago with the Doris Duke Foundation - essentially committing to the approval of the CDUP in question.

#### IV. CONCLUSION

Constitutional due process requires that BLNR grant the request for a contested case hearing because the CDUP “adversely affects the constitutionally protected rights of” Blake McElheny and the other Petitioners, *PDF v. PGV*, 77 Hawai‘i at 68, 881 P.2d at 1214. Those constitutionally protected rights include the right to a clean and healthful environment, as defined by HRS chapters 171 and 205A, which are laws relating to environmental quality, including conservation, protection and enhancement of natural resources, Article XI section 9 of the state constitution. Blake McElheny has the right to ensure that BLNR properly (1) considers the public interest, including protection of open space and public recreational opportunities pursuant to HRS § 171-55, HRS § 171-2, and HRS § 171-3 (2) considers recreational, scenic, and open

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<sup>8</sup> *Hui Alaloe v. Planning Comm'n*, 68 Haw. 135, 137, 705 P.2d 1042, 1044 (1985); *Mahuiki v. Planning Comm'n*, 65 Haw. 506, 519-520, 654 P.2d 874, 882-3 (1982).

<sup>9</sup> *Kahana Sunset Owners Ass'n v. County of Maui*, 86 Hawai‘i 66, 947 P.2d 378 (1997); *Kepo`o v. Kane*, 106 Hawai‘i 270, 103 P.3d 939 (2005).

<sup>10</sup> *Town v. Land Use Commission*, 55 Haw. 538, 545, 524 P.2d 84, 89 (1974).

<sup>11</sup> *Leslie v. Board of Appeals*, 109 Hawai‘i 384, 126 P.3d 1071 (2006).

space values pursuant to HRS § 205A-4(a); (3) protects coastal scenic and open space resources pursuant to HRS § 205A-2(b)(3)(A); (4) protects beaches for public use and recreation pursuant to HRS § 205A-2(b)(9)(A); (5) ensures public recreational uses of state owned shoreline lands and waters having recreational value pursuant to HRS § 205A-2(c)(1)(B)(v); (6) minimizes the alteration of existing public views to and along the shoreline pursuant to HRS § 205A-2(c)(3)(B); and (7) preserves shoreline open space and scenic resources pursuant to HRS § 205A-2(c)(3)(C). McElheny's interest in his 'right to a clean and healthful environment, as defined by laws relating to environmental quality, is a property interest protected by due process, as it is a substantive right guaranteed by the Hawai'i Constitution.'" *Hawai'i Elec.*, 145 Hawai'i at 16, 445 P.3d at 688. His constitutionally protected rights also include public trust rights pursuant to Article XI section 1, Article XII section 4 of the state constitution as well as the right to enjoy the beach pursuant to Article I section 2 of the State Constitution.

BLNR cannot deny McElheny's due process rights by denying his request for a contested case hearing and approval of the CDUP. The due process violation is no different than it was in *Maui Elec., PDF v. PGV, Waiāhole, 'Iao, Mauna Kea, Hawai'i Elec.*, and *Kahoma*. BLNR's denial of McElheny's request for a contested case hearing would deny him the ability to be heard at "a meaningful time and in a meaningful manner," *Mauna Kea*, 136 Hawai'i at 380, 363 P.3d at 228. BLNR must grant McElheny's request for a contested case hearing; reverse BLNR's decision approving the CDUP; invalidate the CDUP; and instruct BLNR to promptly conduct and conclude a contested case hearing.

Dated: Honolulu, Hawai'i, October 26, 2023.

/s/ Blake McElheny

