

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Division of Aquatic Resources
Honolulu, Hawai'i 96813

September 26, 2025

Board of Land and Natural Resources
State of Hawai'i
Honolulu, Hawai'i

Delegation to the Chairperson for the Appointment and Selection of a Hearing Officer to Conduct all Hearings for the Court-Ordered Contested Case Hearing Regarding Agenda Item F-5 from the Board's April 26, 2024, Meeting: Enforcement Action Against Jim Jones, Noelani Yacht Charters, LLC, Kevin S. Albert, Kimberly L. Albert, and the Albert Revocable Trust for Unlawful Damage to Stony Coral and Live Rock Resulting from the February 20, 2023 *Nakoa* Anchoring Incident Outside of the Honolua-Mokulē'ia Bay Marine Life Conservation District, Island of Maui; and

Admission of Jim Jones and Noelani Yacht Charters, LLC, as Parties to the Court-Ordered Contested Case Hearing

SUMMARY

Petitioners Kevin S. Albert, Kimberly L. Albert, and the Albert Revocable Trust ("Petitioners") requested a Contested Case Hearing ("CCH") in writing¹ challenging the enforcement action against Jim Jones ("Jones"), Noelani Yacht Charters, LLC ("Noelani Yacht Charters"), and Petitioners (cumulatively, "Responsible Parties") for stony coral and live rock damage resulting from the February 20, 2023 *Nakoa* grounding incident that occurred outside of the Honolua-Mokulē'ia Bay Marine Life Conservation District, Island of Maui, which was scheduled and heard by the Board of Land and Natural Resources ("Board") at its April 26, 2024 Board Meeting (Agenda Item F-5).² Petitioners requested a CCH in writing on April 30, 2024, four days after the close of the Board meeting in which their matter was scheduled for disposition. Petitioners did not request a CCH orally (or in writing) by the close of the April 26, 2024 Board meeting.

¹ See Exhibit A – Contested Case Hearing Request – The Albert Trust, April 30, 2024 (attached)

² "Enforcement Action against Jim Jones, Noelani Yacht Charters, LLC, Kevin S. Albert, Kimberly L. Albert, and the Albert Revocable Trust for Stony Coral and Live Rock Damage resulting from the *Nakoa* grounding incident on February 20, 2023, outside of the Honolua-Mokulē'ia Bay Marine Life Conservation District, island of Maui," available at <https://dlnr.hawaii.gov/wp-content/uploads/2024/04/F-5.pdf>. This matter was originally brought before the Board on July 28, 2023 [Agenda Item F-1, available at: <https://dlnr.hawaii.gov/wp-content/uploads/2023/07/F-1.pdf>] and again on January 26, 2024 [Agenda Item F-1, available at <https://dlnr.hawaii.gov/wp-content/uploads/2024/01/F-1-1.pdf>].

On May 24, 2024, the Board voted to deny Petitioners' CCH request based on Division of Aquatic Resources (DAR) staff recommendations.³ In addition to filing a written petition "no later than ten calendar days after the close of the Board meeting at which the matter was scheduled for disposition," the Hawaii Administrative Rules (HAR) require that a person requesting a CCH by the Board must make an oral or written request for a CCH by "the close of the Board meeting at which the subject matter of the request is scheduled for [B]oard disposition." HAR § 13-1-29(a). For "good cause," the Board may waive these procedural requirements. Because Petitioners failed to make an oral or written request for the CCH by the close of the April 26, 2024 Board meeting, and because the Board did not find good cause for waiving this procedural defect, the Board voted to deny Petitioners' CCH request.

On June 21, 2024, Petitioners filed a Notice of Appeal to the First Circuit Court pursuant to Hawai'i Revised Statutes (HRS) § 91-14. On March 4, 2025, the Honorable Judge Shirley Kawamura issued an order reversing the Board's decision to deny Petitioners' CCH request and remanding the case back to the Board to conduct a CCH ("Court-Ordered Contested Case Hearing").⁴ The Judge's reasoning for this reversal was that the Board should have found "good cause" to waive the oral or written request requirement pursuant to the "principles of due process and fairness." Judge Kawamura's order remanding the matter to the Board is attached hereto as Exhibit B.

As Judge Kawamura has ordered the Board to hold a contested case hearing for Petitioners, DAR is bringing this matter back to the Board for the delegation of authority to the Chairperson to select and appoint a hearings officer for the Court-Ordered Contested Case Hearing and to add additional relevant parties to the hearing.

AUTHORITY FOR DESIGNATING HEARING OFFICERS

HAR § 13-1-32(b) provides that the Board may conduct the contested case hearing, or at its discretion, may delegate the conduct of the contested case hearing to a hearing officer, in which case the Chairperson shall select such hearing officer.

Additionally, HRS §§ 92-16 and 171-6 provide that the Board may delegate to the Chairperson the authority to select the hearing officer to conduct a contested case hearing.

BASIS FOR REQUEST TO DESIGNATE A HEARING OFFICER FOR THE COURT-ORDERED CONTESTED CASE HEARING

³ "Recommendation that the Board of Land and Natural Resources Deny the Written Contested Case Hearing Request by Kevin S. Albert and Kimberly L. Albert, Trustees of the Albert Revocable Trust UAD 06/03/1997 and Restated 01/07/2020, Regarding the Enforcement Action Against Jim Jones, Noelani Yacht Charters, LLC, Kevin S. Albert, Kimberly L. Albert, and the Albert Revocable Trust for Unlawful Damage to Stony Coral and Live Rock Resulting from the February 20, 2023 Nakoa Anchoring Incident outside of the Honolulu-Mokulē'ia Bay Marine Life Conservation District, Island of Maui," available at: <https://dlnr.hawaii.gov/wp-content/uploads/2024/05/F-1-1.pdf>

⁴ See Exhibit B - Amended Order Remanding Appellants Kevin V. Albert, Kimberly L. Albert, and the Albert Revocable Trust AUD's Agency Appeal filed June 21, 2024, docket no. 115 in civil no. 1CCV-24-0000818 (attached)

Conducting a CCH may involve: giving notice of hearings, administering oaths, compelling attendance of witnesses, examining witnesses, certifying acts, issuing subpoenas, making rules, receiving evidence, holding conferences and hearings, fixing filing deadlines, and disposing of other matters that may arise during the orderly and just conduct of a hearing. History suggests that designating a hearing officer to perform these actions may provide a more expeditious resolution of the matter than having the full Board conduct the hearing.

DISCUSSION:

By designating a hearing officer to conduct the Court-Ordered Contested Case Hearing, the Board does not relinquish its authority to ultimately decide the matters being contested. At the conclusion of the contested case, the Board would act with its own discretion on the hearing officer's Findings of Fact, Conclusions of Law, and Decision and Order.

ADDITION OF JONES AND NOELANI YACHT CHARTERS AS PARTIES TO THE COURT-ORDERED CONTESTED CASE HEARING

The Court ordered the Board to hold a contested case hearing for the Alberts on the Agenda Item F-5 from the Board's April 26, 2024 meeting. However, the Alberts were not the only alleged violators that the Board voted to impose fines upon for the violations discussed in Agenda Item F-5. HAR Title 13, Subchapter 5 governs the DLNR's rules of practice and procedure regarding Contested Case Hearings. Although Jones and Noelani Yacht Charters have not meaningfully participated in any of the Board actions or in civil number 1CCV-24-0000818, and although Jones and Noelani Yacht Charters have not requested a contested case hearing, DAR staff believes it would be appropriate to add Jones and Noelani Yacht Charters as parties to the Court-Ordered Contested Case Hearing.

The Hawaii Administrative Rules describe who can be admitted as a party to a CCH. HAR § 13-1-31(a) states: "...Without a hearing, an applicant *or an alleged violator* shall be a party." (emphasis added). Because Jones and Noelani Yacht Charters are "alleged violators," the rule states that they "shall" be a party to a CCH in which they allegedly violated a statute or rule. DAR maintains that Jones and Noelani Yacht Charters are some of the responsible parties for the natural resource damage that is the subject of the Court-Ordered Contested Case Hearing and therefore requests that this Board order Jones and Noelani Yacht Charters to be admitted to the Court-Ordered Contested Case Hearing as parties.

CONCLUSION

The Board is required to provide a CCH to Petitioners because the First Circuit Court has ordered the Board to grant Petitioners' CCH request. Because Petitioners' CCH request must be granted, staff recommends that Jim Jones and Noelani Yacht Charters be added as parties to the CCH pursuant to HAR 13-1-31(a) as Jones and Noelani Yacht Charters are "alleged violators" in the present controversy.

RECOMMENDATION:

1. The Board add Jim Jones and Noelani Yacht Charters, LLC, as parties to the Court-Ordered Contested Case Hearing; and
2. The Board authorize the appointment of a Hearing Officer and delegate authority for the selection of the Hearing Officer to the Chairperson for the Court-Ordered Contested Case Hearing.

Respectfully submitted,



Brian J. Neilson
Division of Aquatic Resources

APPROVED FOR SUBMITTAL:



Dawn N.S. Chang, Chairperson
Board of Land and Natural Resources

Attachments:

Exhibit A – Contested Case Hearing Request – The Albert Trust – April 30, 2024

Exhibit B – Amended Order Remanding Appellants Kevin V. Albert, Kimberly L. Albert, and the Albert Revocable Trust AUD's Agency Appeal filed June 21, 2024, filed as docket 115 in civil number 1CCV-24-0000818

EXHIBIT A –
CONTESTED CASE HEARING REQUEST –
THE ALBERT TRUST – APRIL 30, 2024



RANDALL K. SCHMITT
ATTORNEY

McCORRISTON MILLER MUKAI MACKINNON LLP

ATTORNEYS AT LAW

DIRECT #S:

PHONE - (808) 529-7422

FAX - (808) 535-8018

E-MAIL - SCHMITT@M4LAW.COM

April 30, 2024

VIA EMAIL ONLY

Board of Land and Natural Resources

P.O. Box 621

Honolulu, HI 96809

blnr.testimony@hawaii.gov

Re: Contested Case Hearing Request – The Albert Trust
April 26, 2024 Hearing Item F-5
Proposed DLNR Enforcement Action

Dear Sir/Madam:

As you know, this law firm represents Kevin S. Albert and Kimberley L. Albert (the “**Alberts**”), Trustees of the Albert Revocable Trust (the “**Trust**”) with respect to a proposed enforcement action being brought before the Board of Land and Natural Resources (“**Board**”) by the Hawaii Department of Land and Natural Resources (“**DLNR**”), Division of Aquatic Resources (“**DAR**”).

On April 26, 2024, the Board approved an administrative penalty of \$1,818,851.97 to purportedly compensate the State of Hawaii for damage to natural resources on public lands, restoration of such natural resources, and the cost of the investigation. Based on the Board’s decision to increase the proposed administrative penalty by more than ten times, the Alberts hereby request a contested case hearing on the above referenced matter. *See* Hawaii Administrative Rules (“**HAR**”) § 13-1-29(a) (“On its own motion, the board may hold a contested case hearing. Others must both request a contested case and petition the board to hold a contested case hearing.”). A petition will be submitted on or before May 6, 2024, within the “ten calendar days after the close of the board meeting at which the matter was scheduled for disposition.” *Id.*

To be clear, the Alberts maintain that: (1) there is no basis to impose liability against either the Alberts or the Trust because the grounding took place following the **theft** of the Vessel, and neither the Alberts nor the Trust violated any provisions of the Hawaii Administrative Rules; (2) the damage related to the initial grounding must be separated from the damage related to salvage; and (3) DLNR and its chosen salvor were the cause of the much greater damage and they should be responsible for the damage caused by their choices and conduct. The Alberts intend to present these positions in greater detail in their petition to the Board for a contested case hearing pursuant to HAR § 13-1-29.

Board of Land and Natural Resources

April 30, 2024

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Please do not hesitate to contact me if you have any questions.

Sincerely,

McCORRISTON MILLER MUKAI MacKINNON LLP

A handwritten signature in blue ink that reads "Randall K. Schmitt". The signature is written in a cursive, flowing style.

Randall K. Schmitt

cc: Client (via email only)

EXHIBIT B –

AMENDED ORDER REMANDING APPELLANTS
KEVIN V. ALBERT, KIMBERLY L. ALBERT, AND
THE ALBERT REVOCABLE TRUST AUD'S
AGENCY APPEAL FILED JUNE 21, 2024

Electronically Filed
FIRST CIRCUIT
1CCV-24-0000818
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Dkt. 115 ORD

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

KEVIN V. ALBERT and KIMBERLY L.
ALBERT, Individually and as Trustees of the
ALBERT REVOCABLE TRUST AUD; and
the ALBERT REVOCABLE TRUST AUD

Appellants,

vs.

BOARD OF LAND AND NATURAL
RESOURCES, and THE DEPARTMENT
OF LAND AND NATURAL RESOURCES

Appellees.

CIVIL NO. 1CCV-24-0000818
(Agency Appeal)

AMENDED ORDER REMANDING
APPELLANTS KEVIN V. ALBERT,
KIMBERLY L. ALBERT, and the ALBERT
REVOCABLE TRUST AUD'S AGENCY
APPEAL FILED JUNE 21, 2024

JUDGE: SHIRLEY M. KAWAMURA
TRIAL DATE: NOT YET SET

**AMENDED ORDER REMANDING APPELLANTS KEVIN V. ALBERT, KIMBERLY
L. ALBERT, AND THE ALBERT REVOCABLE TRUST AUD'S AGENCY APPEAL
FILED JUNE 21, 2024**

On June 21, 2024, KEVIN S. ALBERT and KIMBERLY L. ALBERT, Individually and as Trustees of the ALBERT REVOCABLE TRUST AUD, and the ALBERT REVOCABLE TRUST AUD (collectively, "Appellants") filed their Notice of Appeal to the Circuit Court ("Notice") as Docket No. 1. Appellants filed their First Amended Opening Brief on August 26, 2024 as Docket No. 57. On September 30, 2024, the BOARD OF LAND AND NATURAL RESOURCES ("BLNR") and the DEPARTMENT OF LAND AND NATURAL RESOURCES (collectively, "Appellees") filed their Answering Brief as Docket No. 61. Appellants filed their Reply to Appellees' Answering Brief ("Reply") on October 14, 2024 as Docket No. 71. Oral argument was

held before this Court in Courtroom 12 at Ka‘ahumanu Hale at 777 Punchbowl Street, Honolulu, Hawai‘i 96813 on November 20, 2024. Sabrina N. Gouveia, Brett R. Tobin, and Randall K. Schmitt appeared on behalf of Appellants, and Danica L. Swenson appeared on behalf of Appellees.

The Court, having reviewed the Opening Brief, Answering Brief, Reply, and Certified Record on Appeal (“CROA”), and having heard and considered the arguments of counsel presented at the hearing, and good cause appearing therefor, makes the following findings and order remanding the case to BLNR with instructions for further proceedings.

I. Factual Background

A. Ownership of the *Nakoa*

1. On December 29, 2022, Appellants entered into a Vessel Installment Purchase and Management Agreement (“Purchase Agreement”), with Noelani Yacht Charters (“NYC”) and Jim Jones (“Jones”), which required NYC and Jones to pay Appellants \$1.45 million over a fifteen (15) year period for the purchase of the vessel *MV Nakoa* (“*Nakoa*”), a 94-foot luxury yacht. Dkt. 1, *Notice of Appeal* at ¶¶ 16-18; *Certified Record on Appeal* [hereinafter, “CROA”] 447.
2. The Purchase Agreement provided that during the installment payment period, the *Nakoa* was to be used by NYC and Jones only for commercial charters. *Id.* at ¶ 21; CROA 171, 623-24. Under the terms of the *Nakoa*’s insurance policy, the *Nakoa* was only to be captained by an approved, licensed, captain, a first mate and a crew member. CROA 183 at ¶ 20. The listed and approved captain on the insurance policy was Captain Joe Bardouche. *Id.* at ¶ 19.

3. The Albert Revocable Trust was the owner of the *Nakoa* during the incident giving rise to the present case. CROA 171.
4. On February 17, 2023, Appellants reported the *Nakoa* as stolen. CROA 112. On July 27, 2023, Special Agent Stacey R. Yamashita with the State of Hawai‘i Department of the Attorney General Investigations Division initiated an investigation into the alleged theft of the *Nakoa* by Jones. CROA 488, 666 at ¶ 10 n.1. As of the May 6, 2024, the investigation was ongoing. CROA 666-67 at ¶ 10 n.1.

B. The Grounding Incident

5. From February 18 to February 20, 2023, Jones was using the *Nakoa* for a personal trip. CROA 449. Jones was accompanied by his wife, Captain Kimberly Kalalani Higa (“Captain Higa”), a first mate, crew member, and four juvenile family members and friends. *Id.*
6. On February 18 and 19, 2023, the *Nakoa* moored overnight inside Honolua Bay, Maui. *Id.* On February 20, 2023, the *Nakoa* detached from its mooring and ultimately grounded upon the rocky shoreline between Honolua Bay and Lipoa Point, Maui outside the Honolua-Mokule‘ia Bay Marine Life Conservation District (“Grounding Incident”). *Id.* at 444, 450.
7. On February 21, 2023, the Maui Division of Aquatic Resources (“DAR”) conducted an initial site inspection of the grounding area to determine the extent of damage caused by the grounding. CROA 450-51. DAR documented damage to 35.5 square meters of live rock and 18 coral colonies. CROA 451, 461-62.
8. On March 5, 2023, the salvage ship *Kahi*, operated by Visionary Marine LLC, and the tugboat *Mary Catherine*, operated by Sause Brothers Inc. (“Salvors”), moved the

- Nakoa* off the shoreline and into open water where the *Nakoa* ultimately sank. CROA 450.
9. DLNR selected the Salvors and approved their towing plan. CROA 47, 81-83. The Albert Revocable Trust's insurance carrier paid for the salvage. CROA 113.
 10. On March 7, 2023, after the *Nakoa* was removed from the shoreline by the Salvors, DAR conducted a second site inspection. *Id.* DAR reported that 1,640.5 square meters of live rock and at least 119 coral colonies were damaged. CROA 451, 455, 466-70.

II. DLNR Enforcement Action & BLNR Proceedings

11. On July 28, 2023, the State of Hawai'i Department of Land and Natural Resources ("DLNR") brought an administrative enforcement action before BLNR against Appellants, Jones, and NYC for violations of Hawai'i Administrative Rules ("HAR") §§ 13-95-70 and 71 in relation to the Grounding Incident ("Enforcement Action"). CROA 11.
12. DAR recommended that BLNR find that Appellants, Jones, and NYC violated HAR §§ 13-95-70 and 71 by breaking and damaging 119 specimens of stony coral and 1,640.5 square meters of live rock when the *Nakoa* grounded on the shoreline outside the Honolulu-Mokule'ia Bay Marine Life Conservation District on February 20, 2023. *Id.* DAR further recommended that BLNR impose an administrative penalty of \$117,471.97 on Appellants, Jones, and NYC to compensate the State of Hawai'i for said natural resource damage, restoration, and investigation costs. *Id.*
13. The Enforcement Action was brought before BLNR on July 28, 2023, January 26, 2024, and April 26, 2024. CROA 4, 105, 117, 428, 441, 524. The matter was deferred at both the July 28, 2023 and January 26, 2024 Meetings. CROA 105, 428.

14. The Agenda for each BLNR Meeting included instructions on how to submit written testimony and request a contested case hearing on any agenda item. CROA 4, 117, 441.

At the beginning of each BLNR Meeting in which the Enforcement Action was discussed, BLNR Chairperson also read aloud the instructions for requesting a contested case hearing:

In some of the matters before the Board, a person may wish to request a contested case hearing. If such a request is made before the Board's decision, then the Board will consider the request first - before considering the merits of the item before it. A person who wants a contested case may also wait until the Board decides the issue, then request the contested case after the decision. It is up to you. Any request must be made in writing within ten days. If no request for contested case is made, the Board will make a decision. The Department will treat the decision as final and proceed accordingly.

CROA 2, 116, 437.

15. Appellants' counsel submitted written testimony and appeared on their behalf for all three Meetings where the Enforcement Action was considered. CROA 44-69, 111, 169-96, 430, 488-89, 527, 593.

16. At the April 26, 2024 Meeting, BLNR unanimously voted to impose the maximum fine of \$1,818,851.97 against Appellants, Jones, and NYC. CROA 527 at 8:03:37.

17. It is undisputed that Appellants did not request a contested case hearing orally or in writing before the close of BLNR Meeting on April 26, 2024. Dkt. 71, *Reply* at 1.

18. Appellants' counsel claims that at the April 26, 2024 Meeting all participants in the Zoom were muted and the chat function was disabled at the close of public testimony so we he was unable to dispute BLNR's imposition of the \$1,818,851.97 penalty. Dkt. 57, *First Amended Opening Brief* at 5.

19. At the Meeting, DAR Representatives Charles Taylor (“Taylor”) and Brian Neilson (“Neilson”) reaffirmed their recommendation for the \$117,471.97 fine. CROA 527 at 7:00:55-7:16:00. Taylor and Neilson explained that this amount was “based on precedent,” DAR’s practice of “trying to treat all of these cases the same,” and the small size and “low value” of the damaged coral and live rock in terms of “ecosystem services.” CROA 527 at 7:02:00-7:02:07, 7:13:00-7:15:25; *see also* CROA 92 (DAR Coral Penalty Matrix and Live Rock Penalty Matrix). The \$1,818,851.97 penalty amount is presented as the highest possible fine BLNR could levy in this case if BLNR chose to pursue every violation at its statutory maximum, despite the fact that “in practice [DAR] usually do[es]n’t pursue full maximum amount[s].” CROA 527 at 7:13:04-7:13:30.
20. Appellees have not disputed Appellants’ claims that: (1) Appellants were unaware of Jones’ personal use of the *Nakoa*, (2) Appellants were not onboard the *Nakoa* at the time of the Grounding Incident, (3) Jones’ personal use of the *Nakoa* at the time of the Grounding Incident was not authorized by Appellants, and (4) Captain Higa was not authorized by Appellants to operate the *Nakoa*. *See* Dkt. 57, *First Amended Opening Brief* at 3; *see also* CROA 616.
21. In fact, at the April 26, 2024 BLNR Meeting, one BLNR Member acknowledged that Appellants “had turned the boat over to the culprits” of the environmental damage and that Jones’ use of the *Nakoa* at the time of the Grounding Incident was “unauthorized.” CROA 527 at 7:06:04 - 7:06:40.
22. There is also no evidence in the CROA demonstrating that BLNR at any point formally considered the issue of liability in this case, or more specifically, whether and to what

extent Appellants are liable for the fine imposed in the Enforcement Action. The only mention of liability comes from DAR at the April 26, 2024 Meeting when Taylor stated:

If [BLNR is] going to go for a higher [fine] amount than we recommended . . . [then] we would recommend this fine be apportioned . . . We're not denying that both parties have liability, but we would like to apportion that in terms of culpability. And we would suggest a 90% fine towards Mr. Jones and a 10% fine towards the Alberts if [BLNR] were going to go to a higher amount.

CROA 527 at 7:07:40-7:08:38. However, aside from one BLNR member expressing his preference for keeping the fine amount at \$117,471.97, there is no response to Taylor's statement or further discussion regarding liability before the Meeting concludes. *Id.* at 7:08:39-7:10:40; *see also id.* at 7:10:40-8:09:05.

III. Appellants' Request for a Contested Case Hearing

23. On April 30, 2024, Appellants sent a letter to BLNR ("Request Letter") requesting a contested case hearing under HAR § 13-1-29(a) "[b]ased on the Board's decision to increase the proposed administrative penalty by more than ten times." CROA 528.

24. In the Request Letter, Appellants argued:

(1) there is no basis to impose liability against either the Alberts or the Trust because the grounding took place following the theft of the Vessel, and neither the Alberts nor the Trust violated any provisions of the Hawaii Administrative Rules; (2) the damage related to the initial grounding must be separated from the damage related to salvage; and (3) DLNR and its chosen salvor were the cause of the much greater damage and they should be responsible for the damage caused by their choices and conduct.

Id.

25. On May 6, 2024, Appellants submitted a Petition for Contested Case Hearing to BLNR ("Petition"). The Petition lists the relief requested as:

(1) A finding by the Board of Land and Natural Resources that there is no basis to impose liability against either the Alberts or the Trust because the grounding took place following the theft of the Vessel, and neither the

Alberts nor the Trust violated an provisions of the HAR; (2) A finding that the damage related to the initial grounding must be separated from the damage related to the damage caused by the salvage; (3) A finding that DLNR and its chosen salvor were the cause of the much greater salvage damage and they should be responsible for the damage caused by their choices and conduct; (4) Any other relief as set forth in our supporting and supplemental documents; and (5) Any other relief requested the contested case hearing deemed just and equitable.

Id. at 531.

26. The Petition came before BLNR at its May 24, 2024 Meeting. CROA 588.

27. DAR recommended that BLNR deny Appellants' Petition for failure to comply with the procedural requirements to request a contested case hearing. CROA 592-93.

28. Under HAR § 13-1-29, to request a contested case hearing, a party "must both request a contested case and petition the board to hold a contested case hearing." Haw. Admin.

R. § 13-1-29(a). HAR § 13-1-29(a) also imposes the following deadlines for making such request:

An oral or written request for a contested case hearing must be made to the board no later than the close of the board meeting at which the subject matter of the request is scheduled for board disposition. An agency or person so requesting a contested case must also file (or mail a postmarked) written petition with the board for a contested case no later than ten calendar days after the close of the board meeting at which the matter was scheduled for disposition.

Id. However, "[f]or good cause, the time for making the oral or written request or submitting a written petition or both may be waived." *Id.*

29. BLNR "may deny a request . . . when it is clear as a matter of law that the request concerns a subject that is not within the adjudicatory jurisdiction of the board or . . . that the petitioner does not have a legal right, duty, or privilege entitling one to a contested case proceeding." Haw. Admin. R. § 13-1-29.1.

30. In its recommendation to BLNR, DAR argued that Appellants did not comply with the requirements of HAR § 13-1-29 because they did not request a contested case hearing orally or in writing prior to the close of the April 26, 2024 Meeting and failed to provide good cause in their Petition for why BLNR should waive this procedural requirement. CROA 593-94. Thus, DAR concluded BLNR was not required to provide Appellants a contested case hearing. CROA 594.
31. At the May 24, 2024 Meeting, BLNR adopted DAR's recommendation and unanimously voted to deny Appellants' request for a contested case hearing. CROA 678.

IV. Present Appeal

32. On June 21, 2024, Appellants filed their Notice of Appeal alleging that BLNR's May 24, 2024 decision to deny Appellants' Written Contest Case Hearing Request violated Appellants' right to due process of law under both the Fourteenth Amendment to the U.S. Constitution and Article I, Section 5 of the Hawai'i State Constitution, and constitutes reversible error under HRS § 91-14(g). Notice of Appeal ¶¶ 97-99.
33. Appellants ask this Court to remand the case to BLNR so that a contested case hearing may be held or, in the alternative, award Appellants declaratory and injunctive relief in the form of an order stating Appellants are not required to pay any portion of the fine imposed in the Enforcement Action until BLNR holds a contested case hearing. Dkt. 57, *First Amended Opening Brief* at 31; Dkt. 71, *Reply* at 10.
34. On September 30, 2024, Appellees filed their Answering Brief.
35. On October 14, 2024, Appellants filed their Reply.
36. The Court heard oral arguments from the parties on November 20, 2024.

37. Pursuant to Hawaii Revised Statutes (“HRS”) §91-14(a), “[a]ny person aggrieved by a final decision and order in a contested case or by a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief is entitled to judicial review thereof.” Haw. Rev. Stat. §91-14(a).
38. “The review shall be conducted by the appropriate court without a jury and shall be confined to the record.” Haw. Rev. Stat. §91-14(f).
39. “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; (2) In excess of the statutory authority or jurisdiction of the agency; (3) Made upon unlawful procedure; (4) Affected by other error of law; (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.” Haw. Rev. Stat. §91-14(g).
40. HAR §13-1-28(a) states, “[w]hen required by law, the board shall hold a contested case hearing upon its own motion or on a written petition of any government agency or any interested person.” Haw. Admin. R. §13-1-28(a).
41. HAR § 13-1-29 sets forth the procedural requirements for requesting a hearing:
- On its own motion, the board may hold a contested case hearing. Others must both request a contested case and petition the board to hold a contested case hearing. An oral or written request for a contested case hearing must be made to the board no later than the close of the board meeting at which the subject matter of the request is scheduled for board disposition. An agency or person so requesting a contested case must also file (or mail a

postmarked) written petition with the board for a contested case no later than ten calendar days after the close of the board meeting at which the matter was scheduled for disposition. For good cause, the time for making the oral or written request or submitting a written petition or both may be waived.

Haw. Admin. R. §13-1-29(a).

V. “Good Cause” to Waive “Oral or Written Request” Requirement

42. In the instant case, Appellees argue that this court lacks subject matter jurisdiction because Appellants did not meet the procedural requirements to request a contested case hearing, namely, Appellants did not orally or in writing request a contested case hearing “no later than the close of the [April 26, 2024] board meeting at which the matter was scheduled for disposition.” Haw. Admin. R. §13-1-29(a).

43. However, “[f]or good cause, the time for making the oral or written request or submitting a written petition or both may be waived.” Haw. Admin. R. §13-1-29(a); *Sierra Club v. Bd. of Land and Nat. Res.*, 154 Haw. 264 (Ct. App. 2024).

44. Here, on May 24, 2024, BLNR denied Appellants’ request for a contested case hearing on the basis that the Appellants failed to follow HAR §13-1-29(a) and request a contested case hearing during the meeting at which the subject matter was discussed. Dkt. 43-49. At the same time, BLNR refused to find good cause to extend or waive the time for making the request. *Id.*

45. In Appellee’s Supplemental Briefing, it concedes that “[t]his Court [o]nly [h]as [j]urisdiction to [r]eview [w]hether [the] Board [a]bused its [d]iscretion in [n]ot [w]aiving the [p]rocedural [d]effects of Appellants’ Petition for a Contested Case hearing.” Dkt. 80, *Appellees’ Supplemental Briefing* 12.

46. “[W]hen reviewing a determination of an administrative agency, we first decide whether the legislature granted the agency discretion to make the determination being reviewed. If the legislature has granted the agency discretion over a particular matter, then we review the agency's action pursuant to the deferential abuse of discretion standard (bearing in mind the legislature determines the boundaries of that discretion).” *Paul’s Elec. Service, Inc. v. Befitel*, 104 Haw. 412, 419-20 (2004).
47. Here, the plain language of HAR §13-1-29(a) makes clear that the legislature has granted BLNR discretion over whether “good cause” exists for waiving the time for making the oral or written request. Haw. Admin. R. §13-1-29(a).
48. Next, the Court reviews BLNR’s decision to not waive the HAR §13-1-29(a) timing requirements and evaluates whether BLNR “clearly exceed[ed] the bounds of reason or disregard[ed] rules or principles of law or practice to the substantial detriment of a party litigant.” *Brescia v. North Shore Ohana*, 115 Haw. 477, 492 (2007).
49. Here, DAR initially recommended that “the Board assess an administrative fine of \$60,220 for the value of resources lost, \$400 for HAR violations, \$56,851.97 for administrative costs, and a yet to be determined fine for damages to the public for a total assessment of at least \$117,471.97 against JIM JONES, NOELANI TACHT CHARTERS, LLC, KEVIN S. ALBERT, KIMBERLY L. ALBERT, and the ALBERT REVOCABLE TRUST.” CROA 513.
50. At the April 26, 2024 BLNR meeting, after several minutes of public comment, the Board went into executive session for fifteen (15) minutes to “discuss [their] roles, duties and responsibilities, liabilities and privileges” with respect to the instant enforcement action. CROA 526.

51. Without first affording Appellants an opportunity to submit further evidence or argument, the Board “closed formal comment and testimony” and voted to approve a \$1,818,851.97 fine, more than 15 times the DAR recommendation, against Appellants, Jim Jones, and Noelani Yacht Charters, LLC. CROA 526.
52. This was in spite of allegations that Appellants reported the *Nakoa* as stolen on February 17, 2023, Appellants were unaware of Jones’ personal use of the *Nakoa*, Appellants were not onboard the *Nakoa* at the time of the Grounding Incident, Jones’ personal use of the *Nakoa* at the time of the Grounding Incident was not authorized by Appellants, and Captain Higa was not authorized by Appellants to operate the *Nakoa*, as well as the fact that BLNR did not make a formal finding of liability specifically against Appellants or order any apportionment of the \$1,818,851.97 fine¹. CROA 526.
53. Prior to the May 24, 2024 BLNR meeting, Appellants submitted written testimony claiming that (1) the issue of liability against Appellants had not yet been scheduled for disposition and, in the alternative, that (2) good cause existed to waive the “oral or written request requirement of HAR § 13-1-29(a).” CROA 608-13.
54. Appellants claimed that “good cause” existed to waive the “oral or written request” requirement because (1) Appellants had been participating in the BLNR proceedings and had previously indicated their intent to request a contested case hearing and (2) upon voting and rendering its decision on April 26, 2024, the Board stated that they were not taking any

¹ Indeed, at the May 24, 2024 BLNR hearing, Board Member Char inquired “whether DAR or DLNR has taken any action against the other parties who have not all [sic] the contested case. And really the individuals that are more culpable in this situation . . . It seems to me that DAR should be able to pursue remedies against the others.” CROA 681. Board Member Char ultimately abstained from the May 24, 2024 vote on *Nakoa* Item F-1. *Id.*

more testimony and immediately closed the agenda item, leaving [Appellants'] counsel no viable opportunity to request a contested case hearing. CROA 608-13.

55. Appellants' counsel testified at the May 24, 2024 BLNR hearing that he was present via Zoom at the April 26, 2024 BLNR hearing, but was unable to request a contested case hearing *after* the Board announced its decision because “immediately after that, [the Board] closed all public hearing and since [he] was appearing via Zoom, [the Board] controlled the ability for [him] to say anything.” CROA 681. Counsel, appearing via Zoom, testified that he “was cut off” from saying anything. *Id.*

56. “An agency's interpretation of its own rules is generally entitled to deference unless ‘plainly erroneous or inconsistent with the underlying legislative purpose.’” *Kilakila ‘O Haleakala v. Bd. of Land & Nat. Res.*, 138 Haw. 383, 396 (2016) (quoting *Panado v. Bd. of Trs., Emps.’ Ret. Sys.*, 134 Haw. 1, 11 (2014)). “This deference arises from the fact that agencies possess and exercise subject-matter expertise and experience the courts generally lack.” *Keep the North Shore Country v. Bd. of Land & Nat. Res.*, 150 Haw. 486, 504 (2022) (citation omitted). Therefore, “deference will be given to the agency's expertise and experience in the particular field and the court should not substitute its own judgment for that of the agency.” *AlohaCare v. Ito*, 126 Haw. 326, 341 (2012) (quoting *Peroutka v. Cronin*, 117 Haw. 323, 326 (2008)). “This is particularly true where the law to be applied is not a statute but an administrative rule promulgated by the same agency interpreting it.” *Kilakila ‘O Haleakala*, 138 Haw. at 403 (quoting *Camara v. Agsalud*, 67 Haw. 212, 216 (1984)).

57. Here, even applying this deferential standard, and having reviewed the record on appeal and considered the arguments of counsel, the Court finds that the Appellees clearly

exceeded the bounds of reason and disregarded principles of due process and fairness when it did not find “good cause” to waive the “oral or written request” requirement of HAR § 13-1-29(a) to the substantial detriment of Appellants.

58. Although the substantive merits of the Enforcement Action is initially the *kuleana* of BLNR, fairness and due process dictate a decision following an opportunity to be heard. *See Davis v. Bissen*, 154 Haw. 68 (2024) (in an agency appeal, the Court held that the County violated the procedural due process rights of unhoused individuals, who had unabandoned personal possessions seized by the County during a sweep of an encampment located on County property, by failing to provide individuals whose personal possessions were seized with a pre-deprivation contested case hearing before the County summarily destroyed said possessions).²

THEREFORE, IT IS HEREBY ORDERED that BLNR’s decision to forego a contested case hearing in the underlying Enforcement Action is reversed; that BLNR’s decision to deny Appellants’ request for a contested case hearing is reversed; and that the case is **remanded** to BLNR to conduct a contested case hearing pursuant to HRS Chapter 91.

DATED: Honolulu, Hawai‘i, April 10, 2025.

/s/ Shirley M. Kawamura 
JUDGE OF THE ABOVE-ENTITLED COURT

² Although the Court finds that Appellants’ due process rights are implicated herein, given the procedural history of this matter, the Court respectfully declines to (1) construe the Notice of Appeal and documents filed concurrently in this matter as an original complaint and (2) exercise original jurisdiction as requested by Appellants under the Due Process Clauses of the Hawai‘i and U.S. Constitutions.