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DISSENTING OPINION BY ACOBA, J.,
IN WHICH DUFFY, J., JOINS

The effect of the majority's decision is that all agency dispositions, if denominated as orders to show cause, although final and binding, are unreviewable as to violations of Hawai'i Revised Statutes (HRS) § 91-14(g)(1) (1993),¹ a proposition plainly wrong and usurpative of the judicial review mandated under HRS Chapter 91. In my view, the hearing before Appellee-Appellee State of Hawai'i Land Use Commission (LUC) on the "Motion for an Order to Show Cause Regarding Enforcement of Conditions, Representations, or Commitments" (the motion) filed by Appellant-Appellant Aha Hui Malama O Kaniakapupu (Aha Hui) and held on January 15, 2004, was a contested case hearing held pursuant to HRS § 91-1(5) (1993) because it was "a proceeding in

¹ Hawai'i Revised Statutes (HRS) § 91-14(g) provides in relevant part:

Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedure; or
- (4) Affected by other error of law; or
- (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

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which the legal rights, duties, or privileges of specific parties [were] required by law to be determined after an opportunity for agency hearing."²

Because the hearing was one required under LUC rules, it was one "required by law." HRS § 91-1(5) (1993). In denying Aha Hui's request that an order to show cause "issue[] because [Elizabeth Midkiff Myers fka Elizabeth M. Morris (Myers)] failed to comply with . . . conditions in No. 4 and No. 8" to the LUC reclassification of the subject land, the LUC determined the "legal rights . . . of specific parties" under HRS 91-1(5). The LUC order denying the motion (the order) ended the proceedings and, thus, was a "final decision and order." HRS § 91-14(a) (1993). Aha Hui was plainly a "person aggrieved,"³ HRS § 91-14(a), by the LUC order. Accordingly, Aha Hui was entitled to judicial review of the order under HRS § 91-14(a).⁴ Hence, the circuit court of the first circuit (the court) had subject matter

² HRS § 91-1(5) (1993) defines a "contested case" as "a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing."

³ HRS § 91-1 defines "persons" as "individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies."

⁴ HRS § 91-14(a) (1993) provides in relevant part:

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

(Emphases added.)

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jurisdiction over Aha Hui's appeal.

I.

First, it should be observed that, in this case, a hearing was required and was not merely held at the discretion of the agency. Cf. Lingle v. Hawai'i Gov't Employees Ass'n, AFSCME, Local 152, 107 Hawai'i 178, 184, 111 P.3d 587, 593 (2005) (explaining that "[i]f the statute or rule governing the activity in question does not mandate a hearing prior to the administrative agency's decision-making, the actions of the administrative agency are not 'required by law' and do not amount to 'a final decision or order in a contested case' from which a direct appeal to circuit court is possible" (quoting Bush v. Hawaiian Homes Comm'n, 76 Hawai'i 128, 134, 870 P.2d 1272, 1278 (1994) (emphasis in original)). As the majority concedes, the LUC rules mandated a hearing "prior to the [LUC's] decision-making," id. at 184, 111 P.3d at 593, thus acknowledging that the hearing herein was "required by law," HRS § 91-1(5), and that the LUC's decision was one for which judicial review is possible, HRS § 91-14.

II.

A.

Second, the legal rights of specific parties were determined after the opportunity for an agency hearing. Aha Hui

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was formed in 2000⁵ for the purpose of acting as a "steward" of Kaniakapupu, the ruins of the summer home of King Kamehameha III, which abuts Myers' property.⁶ According to Aha Hui, "Kaniakapupu, a property steeped in Hawaiian culture and history, is located on the property immediately mauka⁷ of and borders [Myers'] property. Kaniakapupu and [Myers'] property share a common boundary. The [Midkiff/Myers] property consists of approximately 4.813 acres."

The LUC order recites that Aha Hui "argued that an Order to Show Cause should be issued because [Myers] failed to comply with representations and commitments made to the [LUC] with respect to conditions 4 and 8 during the original [LUC]

⁵ The minutes for the Land Use Commission (LUC) meeting held on March 27, 2003, indicates that counsel for Aha Hui Malama O Kaniakapupu (Aha Hui) represented that it was formed in 2002.

⁶ In a letter dated March 1, 2002, the Administrator of the Department of Land and Natural Resources discussed Aha Hui's role as a "steward" of Kaniakapupu. In relevant part, the letter stated:

It was good meeting with you on December 12, 2001, to discuss Kaniakapupu, and the involvement of your organization with this significant historic property associated with the reign of King Kamehameha III. The State Historic Preservation Division appreciates all the hard work and time your organization has voluntarily dedicated to helping to protect and preserve this location, especially the maintenance of the grounds and the clearing of the ever encroaching jungle.

As we discussed at our meeting the State is not giving exclusive control of Kaniakapupu to your organization. However, we are most comfortable to continue working with you in a cooperative effort to preserve this historic place.

We greatly appreciate [Aha Hui's] willingness to step forward and assume a stewardship responsibility for this property, and again thank you for all you have accomplished to date.

⁷ "Mauka" is defined as "inland." M. Pukui & S. Elbert, Hawaiian Dictionary 242 (rev. ed. 1986).

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proceedings." Condition No. 4⁸ proscribes Myers from selling the property to the public unless the property was first offered to Midkiff or conveyed to any of their respective children.

Condition No. 8⁹ states that Myers shall develop the Property only in substantial compliance with their previous representations to the LUC. According to Aha Hui, by "listing of the [Myers parcel] for sale," Myers "had failed the commitment to keep the properties in family residential use."¹⁰ As a result, Aha Hui stated that it was concerned about adverse "i) potential impacts to the restoration of Kaniakapupu from new landowners;" and ii) the loss of 'good stewards' of the land (Midkiff [and]

⁸ Condition No. 4 provides:

4. That [Midkiff and Myers] shall agree to a covenant, said covenant to run with the land and in a form agreeable to the Office of State Planning that, with respect to the Midkiff/Myers [Parcel (TMK: 2-2-55:04), for a period of 20 years after the date of this [order, if [Midkiff] or [Myers] desires to sell or convey all or portions of their ownership interest in said parcel, he or she shall first offer such interest each to the other or in the alternate convey such interest to any of his or her children, as the case may be; and if any of the children so acquiring said interest desires to sell or convey all or portion[s] of their interest in said parcel, they shall first offer such interest in the parcel to their siblings and/or [Midkiff] and [Myers], as the case may be, however, provided that the holder of interest in the Midkiff/Myers [Parcel] may mortgage the interest at any time.

(Emphases added.)

⁹ Condition No. 8 states that "[Midkiff and Myers] shall develop the Property in substantial compliance with representations made to the [LUC] in obtaining the reclassification of the Property." (Emphasis added.)

¹⁰ Aha Hui contends that the description of the property in the Real Estate Buyer's Guide "distastefully attempts to use the historic Kaniakapupu, the summer home of Kamehameha III, as a selling point," with the inclusion of the phrase "[n]earby was once the site of a summer home of King Kamehameha III, in the neighborhood."

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Myers) [who] protected natural and cultural resources in the area, including Kaniakapupu and outlying burial mounds around the Nuuanu Stream."

Aha Hui requested that "[the LUC] issue an Order to Show Cause [as to] why [the property] should not revert to its former land use classification or be changed to a more appropriate classification consistent with its surrounding environmental and cultural sensitivities." (Internal quotation marks omitted.) Aha Hui, as a party with an interest in adjoining land, had a right to have its claim that it was adversely affected determined in a contested case hearing. See Town v. Land Use Comm'n, 55 Haw. 538, 548, 524 P.2d 84, 91 (1974) (holding that proceedings involving a grant of a petition to amend district designation was a "contested case" within the meaning of HRS § 91-1 inasmuch as appellant had "a property interest in the amend[ment] of a district boundary when his property adjoins the property that is being redistricted" and that "any action taken on the petition for boundary change is a proceeding in which appellant has legal rights as a specific and interested party and is entitled by law to have a determination on those rights"); East Diamond Head Ass'n v. Zoning Bd. of Appeals of the City & County of Honolulu, 52 Haw. 518, 519-20, 479 P.2d 796, 797 (1971) (holding, in a case involving a petition for a variance from residential to industrial use of property, that adjoining landowners were "person(s) aggrieved" within the

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meaning of HRS § 91-14(a) inasmuch as each landowner had sufficiently alleged that they had "a legal interest worthy of judicial recognition . . . to preserve the continued enjoyment of his [or her] realty by protecting it from threatening neighborhood change" (brackets in original)).

B.

At the agency hearing, the President of Aha Hui was present and represented by counsel. Counsel for Myers, as well as for the Department of Planning and Permitting and the State Office of Planning were also present. Russell Kumabe (Kumabe), a Staff Planner for the LUC, summarized a staff report¹¹ and presented a "GIS" map orientation and photographs of the area in aid of his summary. John Chang (Chang), an Executive Officer of the Office of Planning, provided video footage to indicate the boundary between the subject property and Myers' property. Although she indicated that she would prefer to submit her testimony in writing, Michelle Matson, a "public witness," was also called to comment.

¹¹ The staff report provided by the State's Office of Planning sets forth the general background of the properties involved and the status of these properties with respect to ownership, improvements made, zoning changes, and any pending permit applications that affect the said properties. It also makes three recommendations to the LUC as to the disposition of Aha Hui's motion for an order to show cause including (1) issuance of an order to show cause, if the LUC believed there has been a failure to perform, (2) continuance of the LUC's action, if it determined that additional information may be needed, and (3) the denial of the motion on the basis that no failure to perform was evident from the evidence, information, and arguments filed with the LUC.

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Counsel for Aha Hui argued that Myers had not complied with Condition Nos. 4 and 8 and presented photos and a map of the area. Counsel for Myers asserted that Myers had complied with Condition No. 4 prior to listing the subject property for sale. LUC Chairman Lawrence Ing stated that the language of Condition No. 4 was "not as clear as it should have been" and "commented that [Myers] could have possibly worked something out rather than selling it to the outside." Commissioner Kyong-Su Im stated that he interpreted Condition No. 4 as allowing Myers to make an offer to sell her property only to Midkiff or her children and not to third parties.

Chang related that the Office of Planning believed Aha Hui's motion was premature, presumably since Myers had withdrawn her listing, and that the property should remain in its current classification. Counsel for Myers was then questioned by Commissioner Bruce Coppa as to the actual value and the real property tax assessment of the subject property. Commissioner Pravin Desai of the LUC expressed concern as to whether the \$12,000,000 sales price to Midkiff was "sincere," apparently in light of the \$2,000,000 tax assessed value of the property. Counsel for both parties presented argument to the LUC.

C.

Following the hearing, the LUC voted that Aha Hui had not met its burden of proof by a vote of seven to one, with one member absent. The LUC issued a twelve-page written "Order

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Denying [Aha Hui's] Motion for an Order to Show Cause Regarding Enforcement of Conditions, Representations or Commitments" on March 18, 2004. The order set forth the background of the reclassification, the assertions of the parties, the events that took place in the proceeding, and the LUC's decision. The LUC observed that "[t]hrough the evidence and arguments provided by [Aha Hui] and the parties, the [LUC] was concerned that [Aha Hui] did not meet its burden[] in demonstrating that [Midkiff or Myers] had not satisfied Condition Nos. 4 and 8." The LUC concluded that "having considered [the motion, the LUC] concludes that [Aha Hui] has not met its burden in showing there has been a failure to perform a condition, representation, or commitment on the part of [Myers]." (Emphasis added.) A final decision and order was thus filed by the LUC. The LUC, then, did decide the merits of Aha Hui's claim.

D.

Hence, in line with HRS § 91-1(5), the proceeding involved "specific parties," here, Myers and Aha Hui. In determining that the motion should be denied, the LUC decided the "legal rights," HRS § 91-1(5), of these parties. As required by HRS § 91-1(5), "these rights" were "determined after an opportunity for agency hearing." Aha Hui plainly was "aggrieved," HRS § 91-14(a), by this ruling. See Life of the Land v. Land Use Comm'n, 61 Haw. 3, 8-9, 594 P.2d 1979, 1082-83 (1979) (recognizing that persons living near property sought to

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be reclassified and those with "personal" and "special" "aesthetic and environmental interests" are "person[s] aggrieved" pursuant to HRS § 91-14(a)).

III.

It is noteworthy that in deciding whether or not Aha Hui had met its "burden" based upon the evidence, the LUC was performing an adjudicatory function which is inherent in a contested case hearing. Hawai'i Gov't Employees' Ass'n, AFSCME Local 152 v. Pub. Employees Comp. Appeals Bd. of the State of Hawaii, 10 Haw. App. 99, 107, 861 P.2d 747, 752 (1993) (defining a contested case hearing as "one in which the agency performs an adjudicative as compared to an administrative function" although noting that "[t]he line between [the rulemaking and adjudicating] functions is not always a clear one and in fact the two functions merge at many points" (internal quotation marks and citations omitted)); Shoreline Transp., Inc. v. Robert's Tours and Transp., Inc., 70 Haw. 585, 591, 779 P.2d 868, 872 (1989) (opining that adjudication is "concerned with the determination of past and present rights and liabilities[]" and that "[t]ypically, there is involved a determination as to whether past conduct was unlawful, so that the proceeding is characterized by an accusatory flavor and may result in disciplinary action" (internal quotation marks and citations omitted) (emphasis added)). As we have said, "adjudication" is defined as "[t]he legal process of resolving a dispute" or "the process of judicially deciding a case." RGIS

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Inventory Specialist v. Hawai'i Civil Rights Comm'n, 104 Hawai'i 158, 161, 86 P.3d 449, 452 (2004) (quoting Black's Law Dictionary 42 (7th ed. 1999)).

In the instant case, the LUC had to determine whether Myers' "past conduct was unlawful," Shoreline, 70 Haw. at 591, 779 P.2d at 872, in terms of whether Myers had previously violated Condition Nos. 4 and 8. Further, the hearing on the motion "was characterized by an accusatory flavor," id., inasmuch as Aha Hui asserted that Myers had in fact breached such conditions. The hearing on the motion could have resulted in a form of "disciplinary action," id., because the relief requested by Aha Hui was an order that the subject property revert back to conservation district or be reclassified "to a more appropriate classification". As indicated in its written order, the LUC considered "evidence and arguments" in assessing whether Aha Hui had met its "burden" that Myers had breached her duty to use the property consistent with conditions imposed by the LUC.

By denying the motion, the LUC adjudicated Aha Hui's right to preclude Myers from proceeding in her efforts to sell her property. With its decision, the LUC rejected the objections of Aha Hui, a party with an interest in adjacent land. Cf. Pub. Access Shoreline Hawai'i v. Hawai'i County Planning Comm'n, 79 Hawai'i 425, 432, 903 P.2d 1246, 1253 (1995) (holding that a special management area use permit application proceeding was a contested case hearing because the applicant "sought to have the

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legal rights, duties, or privileges of land in which it held an interest declared over the objections of other landowners and residents" (internal quotation marks and citation omitted)).

Hence, the LUC's denial of the motion was more than just a "threshold motion or procedural vehicle." Majority opinion at 23. The hearing was "typical[]" of an adjudicatory proceeding, Shoreline, 70 Haw. at 591, 779 P.2d at 872, because the LUC had "resolv[ed] a dispute" through a "legal process," RGIS, 104 Hawai'i at 161, 86 P.3d at 452, i.e., the hearing mandated by the LUC rules, and based on the evidence submitted, determined the "legal rights" of the parties, HRS § 91-1(5), to the controversy.

IV.

Additionally, it cannot be disputed that the LUC's decision was final. For the purposes of an agency appeal under HRS § 91-14, a "final order" is "an order ending the proceedings, leaving nothing further to be accomplished." Gealon v. Keala, 60 Haw. 513, 520, 591 P.2d 621, 626 (1979). As stated by this court in Gealon, "an order is not final if the rights of a party involved remain undetermined or if the matter is retained for further action." Id. We have also stated that "[w]hat determines the finality of an order . . . is the nature and effect of the order." Lindinha v. Hilo Coast Processing Co., 104 Hawai'i 164, 168, 86 P.3d 973, 977 (2004) (quoting In re Hawaii Gov't Employees' Ass'n, 63 Haw. 85, 88, 621 P.2d 361, 363

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(1980)). The Supreme Court in Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 71 (1970), has also elaborated that "the relevant considerations in determining finality are whether the process of administrative decision-making has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined or legal consequences will flow from the agency action." (Emphasis added.)

In effect, the LUC's order left "nothing further to be accomplished," Gealon, 60 Haw. at 520, 591 P.2d at 626. Under the terms of the LUC's order, nothing was left for adjudication. Thus, neither Aha Hui's or Myers' rights "remain[ed] undetermined," id., nor was "the matter retained for further action[,]" id. Because the LUC resolved the dispute and completed the matter, "judicial review will not disrupt the orderly process of adjudication." Port of Boston, 400 U.S. at 71. The "rights or obligations," id., of Myers and Aha Hui, then, have been determined and "legal consequences," id., will flow from the LUC's decision.

V.

Thus, I cannot agree with the majority's assertion that "the LUC did not determine Myers' and Midkiff's^[12] 'duty to use

¹² The motion for an order to show cause lists Midkiff, Myers, and the Henry H. Shigekane Revocable Trust as parties. However, although the majority refers to Midkiff, the motion only relates to Myers' sale of her land and she was the only party to file a memorandum in opposition.

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their property consistent with their representations and commitments made in 1989' at the January 2004 hearing on the motion for order to show cause[,]” majority opinion at 23-24, or with its conclusion that “the most the LUC determined at the January 2004 hearing was that Myers and Midkiff did not breach their duties set forth in the November 1989 order,” id. at 24 (emphases in original).

At the hearing on the motion, the LUC reaffirmed the duties required of Myers by Condition Nos. 4 and 8. In discussing the “interpretations of compliance,” the LUC decided to reject Aha Hui’s claim of breach.¹³ This necessarily involved an affirmation of Myers’ rights, duties, and privileges and a final adverse determination of Aha Hui’s claim. Indeed, contrary to the majority’s characterization, the LUC stated “it determined that the offer of first refusal requirement [imposed on Myers] was satisfied.” (Emphasis added.) The LUC’s decision thus

¹³ The LUC’s order stated:

The [LUC] discussed the interpretations of compliance with Condition No. 4, and concluded that the intent of the condition was to enforce the representations of [Midkiff and Myers] to keep the [subject property] for family use purposes. It determined that the offer of first refusal requirement was satisfied, but it raised the concerns that the \$12,000,000 listed sales price in relation to current infrastructure costs and tax assessment of the properties called into question the sincerity of the offer and refusal on the sales price between Myers and Midkiff; and if the property were sold for near the list price the significant financial gain would be contrary to [Myers’] representations.

(Emphases added.)

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effectively paves the way for sale of the property and ends Aha Hui's objective of blocking the sale.

Thus, with all due respect, the majority's contention that "the possible reversion of Myers' property to conservation district was not at stake in the [motion] inasmuch as the LUC could not revert Myers' property to its former land use classification, i.e., conservation district, on a motion for an order to show cause[,] " majority opinion at 23 (emphases in original), is erroneous. A proposed reversion or reclassification was indeed "at stake" because the LUC by its decision could and did preclude such reversion or reclassification as requested by Aha Hui. In denying Aha Hui's motion, the LUC in effect determined the reversion/reclassification question adverse to Aha Hui in a decision and order that was final. If the LUC's decision is in fact wrong, Aha Hui has been erroneously deprived of its rights. The effect of the majority's decision is to make that deprivation unreviewable, contrary to the "entitle[ment]" to judicial review guaranteed under HRS § 91-14.

VI.

The majority concludes that the "court did not err in dismissing [Aha Hui's] appeal for lack of subject matter jurisdiction." Majority opinion at 24. It seemingly rests this holding on the view that inasmuch as the LUC denied the motion, a contested case was not held; however, if the LUC had granted the

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motion, a subsequent contested case hearing would have been held and this court would then have jurisdiction pursuant to HRS § 91-14(a). Majority opinion at 23-24. In other words, under the majority's rationale, if the LUC had granted the motion, its ultimate decision would be subject to this court's review, but since it denied the motion, its decision is unreviewable.

But the fallacy of the majority's position is that the outcome of the present case is the same as it would have been had a contested case hearing been held and Aha Hui not prevailed. Undoubtedly, in the latter case, as the majority indicates, the order would be subject to judicial review. The effect of the LUC's order in this case is the same and the consequences flowing from it -- defeat of Aha Hui's claim for reclassification -- identical. Yet in an anomalous holding, the majority would reject judicial review. To so decide deprives Aha Hui of the judicial review mandated by HRS § 91-14(a).

VII.

In this case, whether or not a requested remedy -- a "possible reversion," according to the majority, majority opinion at 23, was or could have been granted by the LUC is wholly irrelevant to the determination of whether the January 15, 2004 hearing was a contested case hearing. The fact is that such a possibility was foreclosed by the LUC's order and, thus, the rights of the parties as to that claim was finally decided by the agency. In concluding that "[Aha Hui's] motion for an order to

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show cause was essentially a threshold motion or procedural vehicle to obtain a show cause hearing in order for the LUC to determine the rights, duties, or privileges of specific parties[,]” majority opinion at 23 (emphasis in original), the majority misstates the effect of the LUC’s decision and elevates form over substance. See Coon v. City & County of Honolulu, 98 Hawai’i 233, 254, 47 P.3d 348, 369 (2002) (stating that elevating form over substance is an approach the Supreme Court has repeatedly eschewed).¹⁴ But it must be the substance of the agency proceeding, not its form, that controls. The controlling principle is not the label accorded the motion or proceeding, but the effect of the agency’s decision.

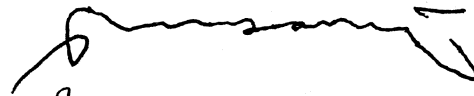
VIII.

It bears repeating that we have held that the judicial review provision of HRS § 91-14 is to be given broad application. See Kinkaid v. Bd. of Review of the City & County of Honolulu, 106 Hawai’i 318, 323, 104 P.3d 905, 911 (2004) (stating that “HRS § 91-14 . . . is a statute of broad application, governing judicial review of contested proceedings before government agencies generally” (emphasis added)); Jordan v. Hamada, 62 Haw.

¹⁴ See also, Konno v. County of Hawaii, 85 Hawai’i 61, 72, 937 P.2d 397, 408 (1997) (explaining that elevating form over substance effectively renders a statute’s provisions void); Kauai Hotel, L.P. v. County of Kauai, 81 Hawai’i 257, 262, 915 P.2d 1358, 1363 (1996) (holding that court is not willing to elevate form over substance); Sussel v. Civil Serv. Comm’n, 74 Hawai’i 599, 615, 851 P.2d 311, 319 (1993) (concluding that a trial court decision was clearly erroneous when it elevated form over substance); In re Taxes of Kobayashi, 44 Haw. 584, 590, 358 P.2d 539, 543 (1961) (holding that substance rather than the form of a transaction governs).

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444, 447, 616 P.2d 1368, 1371 (1980) (noting that "HRS § 91-14 evinces a purpose to grant broad rights to judicial review as it permits 'any person aggrieved' by a final decision or order of a government agency to seek review, provided he institutes proceedings in the circuit court within thirty days of service of the decision or order" (emphasis added)). HRS § 91-14(a) was not intended to stifle a review of an agency decision simply because the proceeding was initiated by a motion for an order to show cause. Aha Hui is entitled to judicial review because it participated in what amounted to a contested case. Therefore, I would remand this case to the court for exercise of its subject matter jurisdiction.


James E. Duggan Sr.