

# CHAPTER 6

## THE HAWAII ADMINISTRATIVE PROCEDURES ACT AND CONTESTED CASE HEARINGS

*by Isaac Moriwake*

### ***INTRODUCTION***

In addition to making rules that affect a large number of people, some agencies or boards make decisions that affect the legal rights of an individual. One forum for the protection or denial of these rights is a contested case hearing. In a contested case hearing, an administrative agency hears testimony, considers evidence and makes a decision, much like a court would. These decisions may be later appealed in court. Not all agency hearings are "contested cases;" as noted above, agency hearings may also relate to rule-making or business of the agency.

The basic rules for a contested case hearing are contained in HAPA.<sup>1</sup> Unless the relevant law specifies otherwise, agencies must follow the requirements of HAPA when conducting a contested case.

As described above in Chapter 5, agencies also have their own "administrative regulations" which may establish procedures. This section will first review the basic elements of a contested case hearing under HAPA, and then look at the specific regulations for one important State agency, the Department of Health (DOH). We'll conclude this section with a brief discussion of a couple of famous court cases which started out as contested case hearings.

### ***The Parties***

For purposes of a contested case hearing, the term "party" refers to any person or agency that has a right to participate in a hearing. Each agency has its own

specific rules on who can participate in a contested case hearing. Parties may include the agency, the regulated developer or industry, neighboring property owners and members of the general community.

***Notice***

Under HAPA, all identified parties are given notice at least fifteen days before the hearing, either by registered or certified mail. A member of the public can request to be placed on the agency mailing list for hearing notifications. Otherwise, the agency typically informs the public, as well as any identified parties that it cannot locate or contact through reasonable effort, through publication in the newspaper for at least two weeks. The notice includes the date, time, place and nature of the hearing, the legal authority under which the hearing is to be held, the statutes and rules involved, and a plain-language statement of the issues.

***The Hearing***

Each party, with or without a lawyer, can present evidence and make arguments on the issues. The parties can also conduct cross-examination and produce additional evidence to disprove the other side's case. The presiding officer is usually the agency head (for example, Director of the Department of Health), a member of a Board or Commission (like the Chairman of the Board of Land and Natural Resources), or someone appointed to direct the hearing and make recommendations to the agency on the final decision. The presiding officer runs the hearing, performing functions such as administering oaths and ordering attendance of witnesses and production of documents. The presiding officer also has the power to exclude evidence if he or she decides it is irrelevant, immaterial, or redundant. In general, the procedure is quite informal and the rules for admission of evidence are relatively lenient.

The party which requested the contested case hearing has the "burden" of proving its position by the "preponderance of evidence." This basically means that it has to produce evidence of more weight supporting its side and persuade the agency its position is more probable than that of the other side.

### ***The Record***

When making its decision, the agency must consider the "record" only. The record includes: 1) all the documents submitted in the case that set out or argue a legal point and the rulings on these points; 2) evidence (testimony<sup>2</sup> and exhibits<sup>3</sup>); 3) offers of proof<sup>4</sup> and rulings on them; 4) proposed findings and exceptions; 5) the report of the officer who presided over the hearing (if the evidence was not taken directly by the agency head or board); and 6) agency staff memos. The agency cannot consider sources of information or arguments outside the record unless the parties had the opportunity to cross-examine them and present opposing evidence.

A court reporter records all of the oral testimony as it is given. A party may request a written copy of the record for the purpose of a rehearing or review of the agency decision; however, there is generally a fee charged by the court reporter. A party may also request a copy for itself from the agency, but will likely be charged a copying fee.

### ***The Decision***

The officials making the final decision for the agency should consider all the evidence. Decisions by the agency must be in writing and be sent to the parties. The decisions include both "findings of fact" and "conclusions of law." "Findings of fact" are the basic facts which are backed by the evidence produced by the parties and accepted as true by the agency. "Conclusions of law" are the results of applying the law to the "facts."

During the proceeding, the parties can propose findings of fact and conclusions of law of their own. Most parties do so. The decision by the agency must include its rulings on all these proposals.

### ***Appeal***

A party not satisfied with a decision of the agency can seek "judicial review." In that case, a court reviews the record and determines if the decision was correct. Only a party with "standing"-- in other words, a party that participated in the prior contested case hearing and has been harmed by the agency decision has the right to appeal. Also, the parties usually cannot appeal until the agency makes a "final" decision.

Judicial review is initiated at the State circuit courts, except for certain cases which by law go straight to the State supreme court. The party challenging the agency decision has

to file its appeal within 30 days after the preliminary ruling or 30 days after receipt of the certified copy of the final decision and order of the agency.

During the pendency of judicial review, the agency can usually still enforce its decision. In other words, until the reviewing court makes its determination, the agency decision is law. However, the court may grant a request to hold (or "stay") agency action if the following conditions are met: 1) the appealing party will likely win; 2) the appealing party will suffer permanent injury if the agency is allowed to go ahead; 3) the public will not suffer permanent damage; and 4) public interest will be served by the delay in enforcement.

The agency must provide the court with a record of the hearing. The court can ask for corrections or additions to the record. Parties can also apply to the court to consider more evidence, if they give good reasons for why they didn't present it before and the court decides that it would be helpful. This evidence and any resulting modifications in the agency's findings and decision become part of the record on appeal.

In reviewing a case, the court looks only at the record, unless a new trial or more testimony is required by law. Rarely is there a jury. The court may also hear oral arguments and receive written briefs on the law, if requested by any party.

The court will either uphold the agency decision, send it back with instructions for more proceedings, or reverse or modify the decision. The agency's conclusions of law are reviewed anew (without reference to the agency's conclusions), but the agency's findings of fact are changed only if the court decides they are clearly wrong. In general, the courts give agency decisions a lot of respect and are hesitant to overrule them.

***SPECIFIC PROCEDURES: DEPARTMENT OF HEALTH***

The Department of Health ("DOH") has many responsibilities with respect to environmental matters, including monitoring and enforcement under statutes such as the Clean Water Act and the Solid Waste Disposal Act. In addition to HAPA requirements for contested case hearing procedures, it has specific department rules. Upon request, these rules may be suspended or waived by the DOH or the presiding officer to prevent unnecessary hardship in a specific case. The DOH can also adopt procedures which it determines would best serve the purposes of the hearings, as long as these procedures don't violate the rules in HAPA or the department rules. An example might help to show the way the rules might apply.

Suppose a company wanted to use property near your home for disposal of waste material. Under the Solid Waste Disposal Act (SWDA), it must apply for a permit from the DOH to operate the disposal facility. Under the HAPA rules, this "application" begins a contested case hearing in which the DOH decides whether to issue the permit.<sup>5</sup> In order for you to participate in this hearing, you must also file an application.<sup>6</sup> In this case, we assume that you received a letter notifying you of the hearing because the DOH determined that all neighbors had an interest in the matter.

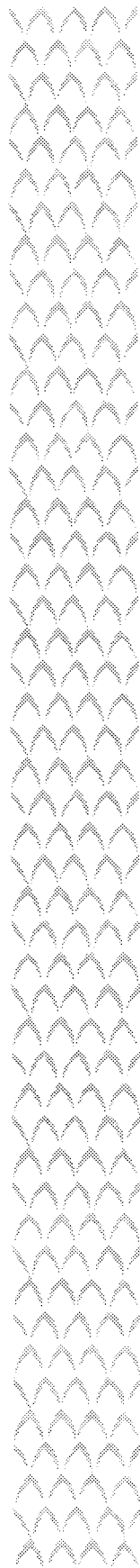
The application of both the party requesting the permit and any party seeking a contested case hearing to oppose the application must include: 1) the legal authority under which the hearing is to be held or action is to be taken (in this case, the SWDA); 2) the matter being contested by the applicant (whether or not the DOH should issue the permit); 3) the basic facts and issues; and 4) the relief to which the applicant feels entitled (the disposal company wants the permit, you don't).

Once the DOH accepts your application, you can participate in the hearing. A lawyer may assist you (at your expense), unless she has been disqualified by the agency from practicing before them. No person associated with the DOH as a current officer, employee or counsel may appear in the hearing on behalf of an applicant, unless the Director determines that the person had no knowledge of the subject matter of the hearing while associated with the DOH.

If the hearing has already started and you have not applied to be a party, the DOH rules still allow you to participate through "intervention." In order to intervene in a hearing, you must first send your application to all the parties. The Director will then admit you as a party if she decides you have a legal interest in the case.

All documents must be filed as directed by the Director.<sup>7</sup> Unless specified otherwise, an original and five copies must be filed, written in ink, typewritten, xeroxed or printed on paper no larger than 8 1/2" x 14". Maps, tables, and charts, etc. can be larger, but should be folded, if possible, to the size of the documents to which they are attached. All papers must be signed in ink by the party or her agent/attorney, to certify that the person signing has read the document and every statement is true to the best of her knowledge, information and belief.

The DOH may strike or require amendment of a document which does not substantially conform to the rules. If it is stricken from the record, it will not be considered



by the agency. Any document filed with the DOH may be retained by the DOH for its own files. These documents also become public information, unless good cause is shown for confidential treatment.

***THE LAW IN ACTION: A TALE OF TWO CASES***

The courts also have prescribed procedures for contested case hearings, in their decisions on appeal from contested case hearings. Two famous court cases started out as contested case hearings.

***Pele Defense Fund v. Puna Geothermal Venture (1994), (Pele)***

In this case, a number of Puna residents of the Big Island opposed the granting of permits by the DOH for geothermal development in the area. The DOH held "public informational hearings" where these individuals testified and requested contested case hearings.

The geothermal company opposed the residents' requests for a contested case hearing, arguing that the DOH permit statute (remember, contested case hearings must be "required by law") did not provide for such. The DOH agreed and denied the request. The DOH then granted the permits.

The residents appealed to the circuit court. The company, however, argued that the residents had no right to appeal because there had not been a contested case hearing. According to the company, the agency's decision was final and no right to appeal was provided by the relevant law.

This issue went to the Hawai'i Supreme Court, which decided that the "informational" hearing was a "contested case hearing" for purposes of review by the circuit court. The court said that although the HAPA and the DOH rules did not require a contested case hearing, the constitutional principle of "due process" did.<sup>8</sup> As the residents followed all the agency rules and a record for the decision existed, the informational hearing was, for purposes of the right to appeal, a "contested case." Also, because the residents 1) showed they would suffer a harm, and 2) participated in the hearing, the Hawai'i Supreme Court held that the residents had "standing" to appeal the DOH decision to the circuit court. The case was sent back to the agency, with instructions to hold another contested case hearing--a real one this time.

In the end, the agency held another contested case hearing which included the plaintiffs and decided to grant the permits anyway. Thus, the residents were not successful in blocking the permits. Nevertheless, the residents succeeded in forcing the DOH to at least give attention to their views. Based on the decision in Pele, the DOH no longer issues permits without holding a full contested case hearing in which all the interested parties participate.

**Public Access Shoreline Hawai`i v. Hawai'i County Planning Commission (1995), (Kohanaiki)**

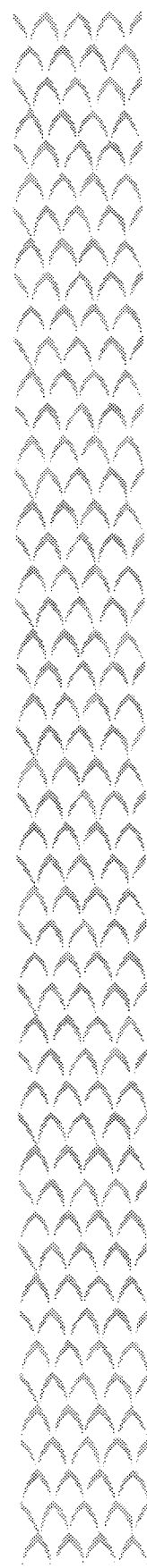
Many have heard that the Hawai'i Supreme Court in the Kohanaiki decision upheld Native Hawaiian rights to access and gathering. A hard-fought battle over procedure was won before the court could consider the access issues.

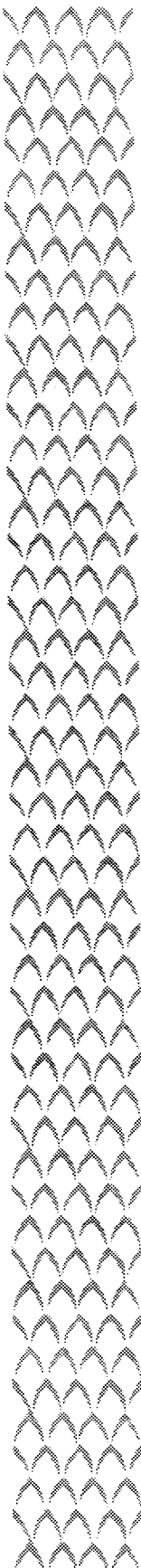
The case resulted from a public hearing held by the Hawai'i County Planning Commission (HPC) on the permit application for a huge resort development in Kohanaiki on the Big Island. At the hearing, a number of concerned individuals testified and requested contested case hearings. Under the HPC's administrative rules, to participate in a contested case hearing a party must show that his or her interests in the case are distinguishable from those of the general public, that is, that they have "standing" to request the contested case hearing. The HPC denied the requests for a contested case hearing due to "lack of standing" and granted the development permit.

One group of individuals that had been denied the contested case hearing, Public Access Shoreline Hawai'i (PASH), then appealed to the circuit court under HAPA's rules of appeal. The court decided that PASH did have interests distinguishable from the general public -- their rights as Native Hawaiians. HPC and the developer appealed the circuit court decision to the Intermediate Court of Appeals and finally to the State Supreme Court.

Following its decision in the Pele case, the Supreme Court first decided that the circuit court had jurisdiction over the agency decision under HAPA. The Supreme Court then upheld the circuit court's decision that members of PASH had standing to request a contested case hearing (and to appeal its denial) based on their interests as Native Hawaiians.

The only issue actually before the court for decision was whether a contested case hearing was required. The Supreme Court did not decide whether the permit was properly issued. If after a contested case hearing, the agency still grants the permit, PASH would have





the option of another appeal. Courts are limited in the scope of their review of agency decisions. In the Kohanaiki case, the appeal presented for review only the preliminary question of whether a contested case hearing should be held. Nonetheless, the Supreme Court took the opportunity to make a very strong, positive statement in support of Native Hawaiian rights.

### **CONCLUSION**

Participation in contested case hearings can be an important way of protecting your interests. A number of contested case hearings have resulted in important new law in Hawai'i. Participating in those proceedings can be time consuming and demanding. A good understanding of the specific rules that will apply will help to prevent missing a deadline or not meeting requirements necessary to initiate the proceedings.

---

<sup>1</sup> See H.R.S. § 91-1 for definitions of terms such as “agency,” and “contested case hearing,” as well as court decisions clarifying these definitions. For example, the court has decided that the City Council is not an “agency” under Chapter 91. *Sandy Beach Defense Fund v. City Council*, 70 Haw. 361, 773 P.2d 250 (1989).

<sup>2</sup> “Testimony” is proof offered in a proceeding by a party or witness. Such testimony can be made orally in person or in the form of a written statement called an “affidavit.”

<sup>3</sup> “Exhibits” include physical evidence such as photographs, charts/tables, and documents.

<sup>4</sup> A party trying to admit certain evidence makes an “offer of proof” in response to a decision by the presiding official that the evidence be excluded. In its offer of proof, the party explains why the evidence should be let in.

<sup>5</sup> If a disposal company went ahead without applying for a permit, or violated the terms of a permit which it did receive, the DOH or anyone else can issue a “complaint” which would also begin a hearing (focusing on enforcement rather than permit approval).

<sup>6</sup> Although the DOH is quite lenient on deciding who can participate in contested case hearings, other agencies have stricter rules on admissible parties, often allowing someone to participate only if she can show that her interest in the hearing is clearly different from that of the general public. See the discussion of the KOHANAIKI case below.

<sup>7</sup> The DOH and other agencies have extensive requirements for filed documents. Please refer to the administrative rules themselves for all the accurate detail.

<sup>8</sup> “Due process” is a vague concept of constitutional law which people have been arguing over for years. Section 1 of the 14th Amendment to the Constitution of the United States says: “nor shall any State deprive any person of life, liberty, or property, without due process of law.” (emphasis added)