No. _____

IN THE SUPREME COURT OF THE STATE OF HAWAI`I

KILAKILA ‘O HALEAKALĀ, Petitioner/Plaintiff-Appellant, vs. UNIVERSITY OF HAWAI`I, and THOMAS M. APPLE, in his official capacity as Chancellor of the University of Hawai`i at Mānoa, BOARD OF LAND AND NATURAL RESOURCES, WILLIAM AILA in his official capacity as the Interim Chairperson of the Board of Land and Natural Resources, and DEPARTMENT OF LAND AND NATURAL RESOURCES, Respondents/Defendants-Appellees.	CIVIL NO. 10-1-2510-11 RAN (Declaratory and Injunctive Relief) FIRST CIRCUIT COURT HONORABLE RHONDA A. NISHIMURA Judge

PETITIONER/PLAINTIFF-APPELLANT’S APPLICATION FOR WRIT OF CERTIORARI

APPENDIX A

NATIVE HAWAIIAN LEGAL CORPORATION
1164 Bishop Street, Suite 1205
Honolulu, Hawai`i 96813
Telephone: (808) 521-2302
Fax: (808) 537-4268

DAVID KIMO FRANKEL 5791 david.frankel@nhlchi.org
SHARLA ANN MANLEY 8868 sharla.manley@nhlchi.org
Attorneys for Petitioner/Plaintiff-Appellant

PETITIONER/PLAINTIFF-APPELLANT'S APPLICATION FOR WRIT OF CERTIORARI

Pursuant to HRAP Rule 40.1 and HRS §§ 602-5(a)(1) and 602-59, Petitioner/Plaintiff-Appellant Kilakila `O Haleakalā ("Plaintiff") applies for a writ of certiorari because the Intermediate Court of Appeals' decision involves grave errors and is inconsistent with several decisions of this Court. Its decision undermines HRS chapter 343 and decades of case law.

I. QUESTIONS PRESENTED

In the broadest sense, the questions presented are:

1. Did the Intermediate Court of Appeals err by affirming the Circuit Court's grant of summary judgment to Defendants at to count 1?
2. Did the Intermediate Court of Appeals and the Circuit Court err by refusing to grant summary judgment (and void all approvals) to Plaintiff as to count 1?

More specifically, the questions presented are:

3. Did the Intermediate Court of Appeals err when it discounted the decisions of this Court in *Unite Here! Local 5 v. City & County of Honolulu*, 123 Hawai`i 150, 231 P.3d 423 (2010) and in *Kepo`o v. Kane*, 106 Hawai`i 270, 103 P.3d 939 (2005) and limited judicial review in a declaratory action (i.e. not filed pursuant to HRS § 91-14) to an "administrative record"?
4. Is it procedural error under HRS chapter 343 for an agency to segment its analysis, refuse to disclose relevant information, fail to engage in a hard look, and neglect to assess all impacts of a project?
5. Does HRS chapter 343 require the preparation of an environmental impact statement (**EIS**) for a project when: (a) the agency has already admitted that a component of the project will have major impacts; (b) the environmental assessment (**EA**) for the project declares "there was overwhelming evidence, from a cultural and traditional standpoint, that" a component of the project "would result in a significant impact on some Native Hawaiian traditional cultural practices and beliefs." JEFS #98 SR: 38; (c) the EA deliberately refused to address the visual and noise impacts of that component; and (d) the evidence raised substantial questions that the project may have a significant effect on the environment?
6. Did the Intermediate Court of Appeals err by limiting its review of compliance

with HRS chapter 343 to assessing only whether specific procedures were followed and issues considered and refusing to consider whether a conclusion as to an insignificant impact itself was in fact correct?

II. PRIOR PROCEEDINGS

Plaintiff filed a one count complaint on November 22, 2010 against the University of Hawai`i and Virginia Hinshaw[1] (collectively, "the University") and the Board of Land and Natural Resources (**BLNR**), Laura Thielen[2], in her official capacity as chair of the BLNR, and the Department of Land and Natural Resources (collectively, "DLNR Defendants"). JEFS #37 RA: 20-31. Its complaint sought to ensure the preparation of an EIS for the Haleakalā High Altitude Observatory Site Management Plan ("**MP**"). *Id.* at 20 ¶ 1 (and at 48 ¶ 2). It alleged that the University improperly concluded that the MP would have no significant impact. *Id.* at 30 ¶ 83 and at 60 ¶ 110.

(Plaintiff amended its complaint twice to add additional counts. JEFS #37 RA: 47-65 and JEFS #59 RA: 363-385. The circuit court granted Defendants summary judgment as to Counts 2, 3, and 4. JEFS #49 RA: 464-466. The court also dismissed counts 5 and 6. JEFS #59 RA:640-43. Plaintiff chose not to challenge the circuit court's decision with respect to counts 5 and 6. JEFS #124 OB:9 n.4. And given the voiding of the December 2010 conservation district use permit for the advanced technology solar telescope (**ATST**) project, Plaintiff waived counts 2, 3 and 4 as moot. JEFS #240-245. The Intermediate Court of Appeals granted Plaintiff's motion to waive its challenge of the circuit courts' decision as to counts 2, 3 and 4 (although its opinion overlooks this fact). JEFS #249 ORD. Thus, the only relevant count at this point is count one.)

Soon after filling its complaint, Plaintiff served multiple discovery requests. JEFS #37 RA:255-311. On January 18, 2011, the University moved for a protective order, JEFS #37 RA: 225-291, which the DLNR Defendants joined. JEFS #37 RA: 388-396. On March 14, 2011, the Circuit Court granted the motion. JEFS #47 RA: 283-285.

On October 5, 2011, the parties each filed a motion for summary judgment as to count 1 of Plaintiff's first amended complaint. JEFS #49 RA: 505-671 (Plaintiff); JEFS #49 RA: 672-771 (DLNR Defendants); JEFS #51 RA: 8-101 (University). Over a year later, on January 17, 2013,

[1] During the pendency of this action, Thomas Apple replaced Virginia Hinshaw as chancellor.
[2] During the pendency of this action, William Aila, Jr. replaced Laura Thielen as Chair of the Board of Land and Natural Resources.

the Circuit Court granted Defendants' motions and denied Plaintiff's motion. JEFS #63 RA: 656-661. On February 20, 2013, the Circuit Court entered its Final Judgment. JEFS #63 RA: 669-671. Plaintiff filed its Notice of Appeal on March 14, 2013. JEFS #1.

The Intermediate Court of Appeals issued its published opinion on June 9, 2014, JEFS #269 OP, and judgment of appeal on July 7, 2014, JEFS #271 IJ.

Appellant filed four cases that relate to the development of the summit of Haleakalā. This was the first case that was brought. The second case, Civ. No. 10-1-2651, resulted in (a) this Court's decision in *Kilakila 'O Haleakalā v. Bd. of Land & Natural Res.*, 131 Hawai`i 193, 317 P.3d 27 (2013), (b) voiding of the December 2010 conservation district use permit for the ATST project, JEFS #243 APPX:2-3, and (c) judgment in favor of Kilakila `O Haleakalā regarding the need for a contested case hearing. The third case, *Kilakila 'O Haleakalā v. University of Hawai`i,* Civ. No. 12-1-1161-04 RAN, was an HRS chapter 92F case in which the Circuit Court ordered disclosure of public documents that the University had failed to provide (not the ones requested by Plaintiff through discovery in this case), and resulted in judgment in favor of Kilakila `O Haleakalā. The fourth case, *Kilakila 'O Haleakalā v. Bd. of Land & Natural Res.et. al.,* Civ. No. 12-1-3070-12 RAN, which challenges the BLNR's November 2012 grant of a conservation district use permit for the ATST project, has been fully briefed and awaits a decision from the Intermediate Court of Appeals.

III. STATEMENT OF THE CASE

A. Haleakalā

Haleakalā is considered a significant traditional cultural resource. JEFS #96 SR: 107; JEFS #110 SR: 48. A number of traditional cultural practices are conducted in the Haleakalā summit area. JEFS #96 SR: 108; JEFS #110 SR: 47; JEFS #49 RA: 651-669. This summit area, which includes the Haleakalā High Altitude Observatory Site (**HO**), JEFS #96 SR:90, is listed on the National Register of Historic Places as well as the State Inventory of Historic Places as part of the Crater Historic District. JEFS #110 SR: 197-198. The HO is virtually adjacent to Haleakalā National Park. JEFS #96 SR:90 and 100.

B. The University's Plans

The University plans to expand the astronomical facilities within the HO, including construction of the ATST project. *Id.* at 72; JEFS #108 SR: 15, 51, 54, 55; and JEFS #110 SR: 30 and 112. The ATST project includes: an observatory facility; a support and operations

building; a utilities building; a parking lot; a wastewater treatment plant; a new electrical transformer; and a diesel generator. *Id.* at 159-162. The building footprint consists of .74 acres. *Id.* at 160. The observatory structure for the ATST is proposed to rise more than 142 feet in height from the ground surface, *id.* at 161 – rising above the highest point on Haleakalā. JEFS #37: RA: 54 (¶51) and 133. The support and operations building would stand over 76 feet tall from the ground surface. JEFS #116 SR: 85-92.

The University previously concluded: "Construction and operation of the proposed ATST project . . . would result in major, adverse, short- and long-term, direct impacts on the traditional cultural resources" in the summit area. JEFS #110 SR: 65. Even with mitigation, the impacts of the proposed ATST to cultural resources "would remain major, adverse, long-term and direct." *Id.* It also agreed that construction noise from the proposed ATST project is "anticipated to be a major, adverse, short-term, direct impact." *Id.* at 72. Mitigation measures for the noise impacts from construction of the proposed ATST project "would not reduce the level of impact." *Id.* The construction of the ATST project would result in sound levels that could affect "Native Hawaiian cultural practitioners and those engaged in recreational activities, even when such levels comply with regulatory requirements." *Id.* From within the Haleakalā National Park, the prominence of the proposed ATST would result in major adverse and long-term impacts to visual resources. *Id.* at 86, JEFS #112 SR: 10 and 124. No mitigation would adequately reduce the impact of the proposed ATST to visual resources. JEFS #110 SR:86. The United States Department of Interior National Park Service was far more critical: "the impacts of the proposed ATST would be adverse, major and long-term on the visual resources at key points along the summit." JEFS #122 SR: 285. "Based on analysis the proposed action would not only hinder the NPS [National Park Service] but would prohibit our ability to conserve the scenery and other resources leaving them unimpaired for the enjoyment of future generations." *Id.* at 288. "The NPS believes that both during construction (short-term) and operation (long-term) the ATST will have a major adverse impact to the viewshed." *Id.* at 292.

C. MP

In June 2010, the University prepared its MP. JEFS #108 SR: 6-69. "Under this MP . . . new scientific experiment and research, **and new facilities would be developed** as appropriate." *Id.* at 9; *see also id.* at 54 ("new facility developments"). The MP includes a section titled "**Proposed Land Uses on Parcel**." *Id.*at 51. It specifically discusses the proposal to construct the

ATST within the Haleakalā High Altitude Observatory Site. *Id.* The MP foresees the development of new facilities. *Id.* and at 54 and 55. It includes criteria to be followed "when implementing development" for "future astronomical facilities." *Id.* at 55. It allows "for future expansion of the scope of activities." *Id.*. The MP prohibits new facilities from obscuring the observation function of existing facilities, but does not prohibit construction that impairs or obscures sight planes or views. JEFS #108 SR: 61.

The MP and the ATST are inextricably linked. In 2006, department of land and natural resources **(DLNR**) informed the University that the ATST would require a conservation district use permit and that, therefore, the "applicant should submit a Conservation District Use Application (**CDUA**), a Comprehensive Management Plan, and the Final EIS to OCCL." JEFS #120 SR: 241; JEFS #122 SR: 254. In its staff report on the CDUA for the ATST project, DLNR noted, "A management plan for the Haleakalā High Altitude Observatory Site is being processed concurrently with this application." JEFS #51 RA: 157. DLNR told the BLNR: "Staff is here to seek the Board's approval of the Management Plan. We will then discuss the proposed ATST Project which will be the first telescope approved under the Management Plan that the Board is considering." JEFS#51 RA: 239. At its decisionmaking meeting, the BLNR Chair stated that the ATST CDUA and the MP "will be taken together, but will be voted separately." JEFS #51 RA: 331. A primary purpose of the MP was to facilitate the ATST project.

D. <u>Final Environmental Assessment for the MP</u>

Because the University recognized that activities undertaken pursuant to the MP would involve the use of state lands or funds, it had a final environmental assessment (**FEA**) for the MP prepared "in accordance with Hawai`i Revised Statutes (HRS) Chapter 343." JEFS #96 SR: 72. It evaluated the MP

> for appropriate and reasonable **activities** that would be undertaken by the University of Hawai'i Institute for Astronomy (IfA) at the Haleakalā High Altitude Observatory Site (HO) in support of ongoing **and future astronomical research activities**, including those that would require a Conservation District Use Permit (CDUP), in accordance with HAR 13-5-39.

JEFS #96 SR: 72 (emphasis added). The FEA acknowledged that the proposed action includes construction activities involving the use of excavators, bulldozers, backhoes, graders, compactors, cranes, and petroleum-powered generators. JEFS #98 SR: 57, 44, 45, 49.

The FEA acknowledged that the ATST is a reasonably foreseeable action, but failed to

acknowledge that the University had already concluded that the ATST would likely have significant impacts, and did not consider the cumulative impact of the ATST together with other actions, *id.* at 68-73, 48. In fact, the FEA called for the impacts of foreseeable projects to be assessed individually and separately. *Id.* at 41-42, 62, 72.

The FEA for the MP stated "there was overwhelming evidence, from a cultural and traditional standpoint, that construction of a large, visible structure at [Haleakala High Altitude Observatory Site] would result in a significant impact on some Native Hawaiian traditional cultural practices and beliefs." JEFS #98 SR: 38. Nevertheless, the FEA concluded that the activities authorized by the MP will not have a significant impact. *Id.* at 78.

On November 8, 2010, the Office of Environmental Quality Control published notice that the University accepted the FEA for the MP. JEFS #96 RA:53-56. Two weeks later, Plaintiff filed its Complaint, asking the Court to declare, among other things, that: the University violated HRS chapter 343; the University's acceptance of the FEA was improper; and an EIS was necessary. JEFS #37 RA:20-31.

E. BLNR Action

On December 1, 2010, the BLNR approved the MP for which the challenged FEA was prepared. JEFS #37 RA:104 ¶34. The BLNR approved the conservation district use application for the ATST on that same day, *id.* at ¶33 and again in November 2012. JEFS #63 RA:610-13.

F. Discovery

In their Answer to the complaint, the University (despite obligations imposed pursuant to Rule 11) refused to admit to the authenticity of government documents that it had prepared and were posted on a government website. JEFS #37 RA: 133-36. They refused to admit that these documents contained various statements, instead responding that the documents speak for themselves.

Plaintiff attempted to authenticate these documents. Plaintiff also attempted to obtain admissions from the University as to various statements that are made in these documents. Plaintiff quoted from various portions of the University's own FEA as well as the Final Environmental Impact Statement (**FEIS**) for the ATST project. Plaintiff attempted to obtain all relevant documents. JEFS #37 RA: 258-298. Finally, Plaintiff attempted to discover the factual basis of all of the University's defenses. *Id.* at 306-310. The Circuit Court rebuffed those efforts. JEFS #47 RA: 283-285.

IV. ARGUMENT

Judicial review of a declaratory action is not confined to a fictitious administrative record. The University violated HRS chapter 343.

A. Judicial Review of This Case Is NOT Confined to an Administrative Record.

On page 19 of the PDF version of its decision, the Intermediate Court of Appeals held that whether an EA and its negative declaration "complied with HRS Chapter 343 is a question of law that does not require factual determinations beyond the administrative record." There is no such thing as an "administrative record" in a case like this.

First, the Intermediate Court of Appeals' holding is inconsistent with legislative intent. When the legislature has intended to confine judicial review to an administrative record, it has had no difficulty in expressing its intent: HRS §§ 91-14(f) (review of contested case hearing), 103D-710(d) (review of procurement decisions), 128D-17(b) (review of environmental response order), 291E-40(b) (review of driver's license revocation). There is no language (plain or otherwise) suggesting that actions brought to ensure compliance with HRS chapter 343 are limited to an administrative record. Nor does the legislative history or intent of HRS chapter 343 reveal any indication that judicial review is confined to an administrative record. Nor are the contents of an "administrative record" itemized by any authority in a case like this. This case is **not** an HRS Chapter 91 appeal.[3] This action for declaratory and injunctive relief was **not** filed pursuant to HRS chapter 91. Therefore, there is no such limitation to an administrative record.

Second, confining judicial review to an "administrative record" in this case conflicts with this Court's practice. In *Kepo`o v. Kane*, 106 Hawai`i 270, 281, 103 P.3d 939, 950 (2005), this Court did not hold that its review was confined to an administrative record. That case – like this one – challenged the agency's failure to prepare an EIS, *see* HRS § 343-7(b). *Kepo`o*, 106 Hawai`i at 284, 103 P.3d at 954. This Court specifically stated that its review pursuant to the summary judgment standard was based upon "depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any." *Id.* at 287, 103 P.3d at 956. This Court did not hold that its review was restricted to an administrative record. In *Unite Here! Local 5 v. City & County of Honolulu*, 123 Hawai`i 150, 231 P.3d 423 (2010), this Court considered a

[3] State law does **not** require that challenges to the failure to prepare an EIS be brought pursuant to HRS chapter 91. *Sierra Club v. DOT*, 115 Hawai`i 299, 315 n.21, 167 P.3d 292, 308 n.21 (2007)("*Superferry*").

claim that a county planning department failed to require preparation of a supplemental environmental impact statement (**SEIS**), *see* HRS § 343-7(a). At the trial court level, the plaintiff submitted, and the court considered: (1) deposition testimony by three Defendant agency employees knowledgeable about their environmental review procedures, *id.* at 162-4, 231 P.3d at 435-7; (2) an expert opinion on the applicant's traffic studies, *id.* at 164-5, 231 P.3d at 437-8; (3) a report on marine life in the project area, obtained through a Freedom of Information Act request, *id.* at 165, 231 P.3d at 438; and (4) deposition testimony by a marine mammal ecologist, *id.* at 166, 231 P.3d at 439. In deciding that an SEIS was required, this Court relied on (1) the deposition testimony of an agency employee, *id.* at 178, 231 P.3d at 451, and (2) plaintiff's evidence concerning the change in the presence of marine mammals in the project area. *Id.* at 179, 231 P.3d at 452. Clearly, judicial review of compliance with HRS Chapter 343 is **not** limited to an administrative record. The central issue in *Unite Here!* was whether Plaintiff raised substantial questions as to whether the project may have a significant effect. *Unite Here!* at 178, 231 P.3d at 451. That is the same central issue here.

Part of the confusion is that the University has conflated the analysis as to whether an EA is necessary with the analysis as to whether an EIS is adequate. Those questions are very different questions. In *Unite Here!* and in *Kepo`o,* the issue was whether an EIS or an SEIS was necessary; i.e. whether substantial questions have been raised as to whether the project may have a significant effect. That is precisely the question raised in this case. In contrast, the adequacy of an EIS – whether an EIS is sufficient to enable the decision-maker to consider fully the environmental factors involved – is an entirely different question, which was addressed in *Price v. Obayashi Hawaii Corp.*, 81 Hawai'i 171, 182-84, 914 P.2d 1364, 1375-77 (1996).[4]

Finally, nothing in the Hawai`i Rules of Civil Procedure or the Rules of Circuit Court prohibits Plaintiff from presenting evidence relating to a motion for summary judgment.[5]

---

[4] Furthermore, the circuit court should not have barred discovery because Defendant failed to offer any evidence or argument that it would be injured in any way -- as required by Hawai`i Rule of Civil Procedure Rule 26(c).

[5] Even compliance with the National Environmental Policy Act, in which review is restricted by the federal Administrative Procedures Act, *Ctr. for Biological Diversity v. United States Forest Serv.*, 349 F.3d 1157, 1165 (9th Cir. 2003) – in contrast to state declaratory actions -- may be determined "by looking outside the administrative record to see what the agency may have ignored." *County of Suffolk v. Secretary of Interior*, 562 F.2d 1368, 1384 (2d Cir. N.Y. 1977); *Webb v. Gorsuch*, 699 F.2d 157, 159 n.2 (4th Cir. 1983).

Confining review to an administrative record not only set a dangerous precedent for future HRS chapter 343 litigation, but also limited the Intermediate Court of Appeals' analysis here – allowing it to ignore the significant impacts disclosed in the ATST FEIS.

B. An EIS is Required.

The Intermediate Court of Appeals upheld the University's decision, concluding that the record "does not show that the University failed to follow the proper procedures or failed to consider §11-200-12 when it made the Negative Declaration for the Management Plan." Page 18 of the PDF version of the decision. This conclusion is flawed. First, the University's refusal to disclose the impacts of a component (or secondary impact or cumulative impact) of its action and its segmentation of its analysis of impacts violate "proper procedures." Second, the Intermediate Court of Appeals failed to consider the separate question: whether the University's conclusion that the management plan would have no significant impact was, in fact, accurate.

1. The University Violated HRS Chapter 343's Procedures.

The Intermediate Court of Appeals appears to have ignored at least four procedural requirements of HRS chapter 343. First, agencies must avoid improper segmentation or piecemealing. *Kahana Sunset Owners Ass'n v. County of Maui*, 86 Hawai`i 66, 74, 947 P.2d 378, 386 (1997) and *Superferry*, 115 Hawai`i at 338, 167 P.3d at 331. Second, an EA must "provide sufficient information" for the agency to determine whether anticipated effects constitute a significant effect. *Kahana Sunset*, 86 Hawai`i at 70, 947 P.2d at 382. Given that purpose of preparing an EA is to provide both the public and the agency "with the information necessary" to evaluate the effects of an action, *id.* at 72, an agency's failure to include information necessary for a decision violates procedures. The "appropriate consideration" mandated by HRS § 343-1 must be thorough and honest. *Cf.* the state motto, ua mau ke ea o ka `āina i ka pono; *Filipo v. Chang*, 62 Haw. 626, 635, 618 P.2d 295, 300 (1980) ("Government, above all, must be above reproach."). Third, the analysis of this information must involve a "hard look." *Unite Here!*, 123 Hawai`i at 171, 231 P.3d at 444. Finally, all impacts of a project must be assessed and disclosed in an EA. The components, cumulative impact and secondary impacts of a project all must be considered. HAR § 11-200-2 (definition of "Effects"). "In considering the significance of potential environmental effects, agencies shall consider the sum of effects on the quality of the environment, and shall evaluate the overall and cumulative effects of an action." HAR § 11-200-

12(A); *Molokai Homesteaders Coop. Ass'n v. Cobb*, 63 Haw. 453, 466, 629 P.2d 1134, 1144 (1981); *McGlone v. Inaba*, 64 Haw. 27, 35, 636 P.2d 158, 164 (1981).

These four overlapping procedural requirements mandate that FEA include a thorough discussion of the impacts of the ATST project. After all, the ATST project is a component of the MP. It is specifically identified in the MP's "**Description of Proposed Land Use.**" JEFS # 108 SR:51. Because the MP is a necessary precedent for the ATST, HAR §§ 13-5-24(c)(R-3), 13-5-30, 13-5-39(a) and its preparation was required by DLNR in order to process the conservation district use application for the ATST, JEFS #120 SR: 241; JEFS #122 SR: 254, it is a secondary impact. Finally, the FEA itself confesses that the ATST is reasonably foreseeable action – and therefore the cumulative impacts must be assessed. JEFS #98 SR:68.

The University, however, deliberately refused to acknowledge or consider the impacts of the ATST. When considering the cumulative impact on visual resources and viewplanes, the FEA states: "The proposed ATST Project is a project that would have adverse impacts on visual resources beyond those addressed in the MP, and those have been analyzed elsewhere." JEFS #98 SR:72. Yet, the University had already agreed[6] that the proposed ATST would result in major unmitigable adverse and long-term impacts to visual resources.[7] JEFS #110 SR:86; JEFS #112, SR:10 and 124. "Changes in the viewshed during the operations phase would result in major, adverse, and long-term impacts on the visitor experience from locations where the proposed ATST Project would be prominently seen." JEFS #112 SR:10. Similarly, the FEA states "[r]easonably foreseeable future actions within HO would require analysis of noise impacts from construction and operations." JEFS #98 SR:77. Yet, the University had already concluded that noise from construction of the proposed ATST project is "anticipated to be a major, adverse, short-term, direct impact." JEFS #110 SR:72. When considering cultural impacts, the University concluded in its FEA, "the cumulative impacts of the MP, along with past and ongoing actions would still be adverse, but less than significant." JEFS #98 SR:70. The University's FEA failed to acknowledge that it had already concluded that "[c]onstruction and

[6] The University accepted the ATST FEIS. JEFS #108 SR:116; JEFS #37 RA:112 admitting to ¶ 43 of the first amended complaint found at JEFS #37 RA:53. HAR § 11-200-23(A).

[7] Given that the ATST FEIS defines impacts as either negligible, minor, moderate or major (for the purpose of determining significance pursuant to HAR § 11-200-12, JEFS ##110 SR:272-74), the Intermediate Court of Appeals' suggestion in its footnote 10 that the "major" impacts are not "significant" is a semantic exercise that not even the University has argued.

operation of the proposed ATST project . . . would result in major, adverse, short- and long-term, direct impacts on the traditional cultural resources" in the summit area, which could not be mitigated. JEFS #110 SR:65. In contrast, the FEA considered the ATST's impacts on drainage. "The two known potential future projects – SLR 2000 and the proposed ATST Project – would not have significant impacts on runoff or drainage patterns." JEFS #98 SR:73. The FEA disclosed the ATST's impacts on drainage, but failed to disclose its impacts to cultural resources, visual resources and quiet. The failure to include this information in the FEA: (a) segmented the analysis; (b) omitted necessary information; (c) violated "hard look" requirements; (d) failed to acknowledge all impacts; and (e) led to an inaccurate conclusion. The FEA's failure to disclose this information violated the procedural requirements of HRS chapter 343.

2. The University's Conclusion Was Clearly Erroneous.

The *Superferry* Court explained that following proper procedures and considering appropriate factors are **not** the only issues involved in determining whether an agency complied with HRS chapter 343. *Superferry*, 115 Hawai`i at 313-15, 167 P.3d at 306-8. An agency's conclusion may be clearly erroneous. Even under the "clearly erroneous" standard, the University's conclusion cannot stand.

The University could not honestly determine that "the Proposed Action will not have a significant impact on the environment within HO." JEFS #98 RA:78. The FEA for the MP stated "there was overwhelming evidence, from a cultural and traditional standpoint, that construction of a large, visible structure at [Haleakala High Altitude Observatory Site] would result in a significant impact on some Native Hawaiian traditional cultural practices and beliefs," JEFS #98 SR: 38. Furthermore, the University cannot conclude that the cumulative impact would be less than significant if one of the reasonably foreseeable projects will have a significant impact. The University cannot disregard its own prior conclusions without any analysis. *Cf In Re Water Use Permit Applications*, 94 Hawai`i 97, 163-64, 9 P.3d 409, 475-76 (2000) ("where the record demonstrates considerable conflict or uncertainty in the evidence, the agency must articulate its factual analysis with reasonable clarity, giving some reason for discounting the evidence rejected."). The University had already agreed that the impacts from the ATST project were major and could not be mitigated, JEFS #110 SR: 65, 72, 86; JEFS #112, SR: 10 and 124. The University cannot conclude, "the cumulative impacts of the MP, along with past and ongoing actions would still be adverse, but less than significant." JEFS #98 SR: 70 when it has already

admitted that "[c]onstruction and operation of the proposed ATST project . . . would result in major, adverse, short- and long-term, direct impacts on the traditional cultural resources" in the summit area. JEFS #110 SR: 65. Finally, substantial questions had been raised as to the impact of this project when a federal agency concluded that "the impacts of the proposed ATST would be adverse, major and long-term on the visual resources at key points along the summit." JEFS #122 SR: 285; *see also id.* at 288 and at 292. The further urbanization of Haleakalā, as enabled by its MP, constitutes an irrevocable commitment of this unique cultural and natural resource, resulting in significant impacts on viewplanes, quiet and cultural practices. Given these facts, the University's decision was clearly erroneous.

Although clothed in the rhetoric of conservation, the MP is **not** a plan to simply conserve resources. The plan's primary purpose is to allow the ATST to be constructed. After all, the plan was not even prepared until DLNR informed the University that a MP was necessary in order for the ATST to be approved. JEFS #120 SR: 241; JEFS #122 SR: 254. The FEA acknowledged that the proposed action includes construction activities involving the use of excavators, bulldozers, backhoes, graders, compactors, cranes, and petroleum-powered generators. JEFS #98 SR: 57, 43, 44, 45, 49, and 50. If no MP had been prepared, no more construction activities could take place at the summit of Haleakalā. HAR §§ 13-5-24 and 13-5-30(b). Under this MP "new facilities would be developed." JEFS #108 RA:9. It identifies the location for these facilities. *Id.* at 51. Curiously, the MP prohibits new facilities from obscuring the observation function of existing facilities, but does not prohibit construction that impairs or obscures sight planes or views. JEFS #108 SR: 61. It specifically calls for solar observatories to be painted white, *id.*, even though the color white has even greater visual impacts. JEFS #100 SR:67; JEFS #98 SR:40. In other words, the resources the MP allegedly protects are not even an after-thought in a plan intended to foster more development of the summit.

V. CONCLUSION

Based on the above and its briefs filed with the Intermediate Court of Appeals, Plaintiff respectfully requests that this Court accept this application for a writ of certiorari.

Dated: Honolulu, Hawai`i, August 1, 2014.

/s /DAVID KIMO FRANKEL
David Kimo Frankel
Sharla Ann Manley
Attorneys for Petitioner/Plaintiff-Appellant Kilakila 'O Haleakalā

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

---o0o---

KILAKILA ʻO HALEAKALĀ, Plaintiff/Appellant-Appellant,
v.
UNIVERSITY OF HAWAIʻI, and THOMAS M. APPLE,[1]
in his official capacity as Chancellor of the
University of Hawaiʻi at Manoa; BOARD OF LAND AND
NATURAL RESOURCES, WILLIAM AILA, in his capacity as
the Interim Chairperson of the Board of Land
and Natural Resources; and DEPARTMENT OF
LAND AND NATURAL RESOURCES, Defendants/Appellees-Appellees

NO. CAAP-13-0000182

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 10-1-2510)

JUNE 9, 2014

FOLEY, PRESIDING J., REIFURTH, J. AND
CIRCUIT JUDGE NAKASONE,
IN PLACE OF NAKAMURA, C.J., FUJISE, LEONARD,
AND GINOZA, JJ., ALL RECUSED

OPINION OF THE COURT BY FOLEY, J.

Plaintiff/Appellant-Appellant Kilakila ʻO Haleakalā (**Kilakila**) appeals from:

[1] During the pendency of this case, Thomas M. Apple succeeded Virginia Hinshaw as the Chancellor of the University of Hawaiʻi and was substituted as a defendant.

1) the February 20, 2013 "Final Judgment";

2) the March 14, 2011 "Order Granting Defendants University of Hawai'i and [Thomas M. Apple's] Motion for Protective Order [Filed January 18, 2011]" (**Protective Order**);

3) the May 9, 2011 "Order Granting Defendants University of Hawai'i and [Thomas M. Apple's] Motion to Dismiss or in the Alternative for Summary Judgment as to Counts 2, 3, and 4 of Plaintiff's First Amended Complaint for Declaratory and Injunctive Relief [Filed December 13, 2010]";

4) the May 9, 2011 "Order Denying Plaintiff's Motion for Partial Summary Judgment as to Counts 3 and 4";

5) the May 29, 2012 "Order Denying Plaintiff's Motion to Reconsider the May 9, 2011 Order Granting Defendants University of Hawai'i and [Thomas M. Apple's] Motion to Dismiss or in the Alternative for Summary Judgment as to Counts 2, 3, and 4 of Plaintiff's First Amended Complaint for Declaratory and Injunctive Relief";

6) the July 17, 2012 "Order Granting University of Hawai'i and [Thomas M. Apple's] Motion to Dismiss the Second Amended Complaint or in the Alternative for Summary Judgment as to Counts 5 and 6 of the Second Amended Complaint [Filed May 25, 2012]"; and

7) the January 17, 2013 "Order (1) Granting [the University's] Motion for Summary Judgment as to Count 1 of [Kilakila's] First Amended Complaint for Declaratory and Injunctive Relief; (2) Granting Defendants Board of Land and Natural Resources, Department of Land and Natural Resources, and William Aila's [(collectively, **DLNR**)] Motion for Summary Judgment as to Count 1 of [Kilakila's] First Amended Complaint for Declaratory and Injunctive Relief [Filed December 13, 2010]; (3) Granting [the University's] Joinder in [DLNR's] Motion for Summary Judgment as to Count 1 of [Kilakila's] First Amended Complaint for Declaratory and Injunctive Relief [Filed December 13, 2010]; and (4) Denying [Kilakila's] Motion for Summary Judgment as to Count 1" ((1)-(7) collectively, **Judgment and**

Orders). The Judgment and Orders were entered in the Circuit Court of the First Circuit[2] (**circuit court**).

On appeal, Kilakila contends the circuit court erred when it:

(1) concluded an environmental impact statement[3] (**EIS**) was not required for the Haleakalā High Altitude Observatories Management Plan (**Management Plan**);

(2) concluded it lacked jurisdiction and dismissed counts 2,3 and 4, the counts challenging Defendant/Appellee-Appellee Board of Land and Natural Resources (**Board**) approval of a conservation district use permit (**CDU Permit**) for the Advanced Technology Solar Telescope (**Telescope Project**);

(3) denied Kilakila's motion for partial summary judgment on counts 3 and 4, and denied its motion to reconsider the court's dismissal of counts 2, 3 and 4; and

(4) granted Defendant/Appellee-Appellee University of Hawai'i and Thomas M. Apple's (together, **University**) motion for Protective Order.

I. BACKGROUND

A. The Management Plan

In 1961, the State of Hawai'i (**State**) transferred approximately eighteen acres of land on the summit of Haleakalā, on the island of Maui, to the University on the condition that the land be set aside for the Haleakalā High Altitude Observatory Site (**Observatory Site**). The Observatory Site, located within a conservation district, is in a subzone which specifically permits astronomy facilities. See Hawai'i Administrative Rules (**HAR**) §§ 13-5-24(c) (effective 1994) and 13-5-25(a) (effective 1994). The University published the Management Plan for the Observatory Site in June, 2010. The Management Plan is "implemented to regulate land use in the Conservation District for the purpose of

---

[2] The Honorable Rhonda A. Nishimura.

[3] The EIS is an "informational document" that discloses the environmental, economic, social, and cultural effects of a proposed action on the community and State, the "measures proposed to minimize adverse effects, and alternatives to the action and their environmental effects." Hawaii Revised Statutes (**HRS**) § 343-2 (2010 Repl.).

conserving, protecting, and preserving the important natural resources of the State" and provides over-arching monitoring strategies, as well as design and construction guidelines, for the Observatory Site. The Management Plan is a prerequisite for building astronomy facilities at the Observatory Site. See HAR § 13-5-24(c)(4)(R-3) and (astronomy facilities may be constructed in a conservation district general subzone only if the project receives approval of a board permit and management plan).

On October 25, 2010, the University issued a Final Environmental Assessment[4] **(Final EA)** for the Management Plan. The Final EA lists the University as the proposing and approving agency, and provides that the Final EA review triggers are the use of State lands or funds and the use of conservation district lands. The Final EA defined the proposed action as "the implementation of a [Management Plan], which would regulate land use in the Conservation District . . . ." The Final EA also provides that the implementation of the Management Plan "is intended to comply with Exhibit 3 of HAR § 13-5[5] and is not intended to assess impacts from construction or operation of any new project at [the Observatory Site] . . . ."

Based on the Final EA, the University determined the implementation of the Management Plan would not have a significant effect on the environment (**Negative Declaration**) and did not require the preparation of an EIS as a result. See HAR § 11-200-9(A)(4) (effective 1996); see also Kepo'o v. Kane, 106 Hawai'i 270, 289, 103 P.3d 939, 958 (2005) (the proper inquiry for determining the necessity of an EIS is whether the proposed action will likely have a significant effect on the environment). The Board approved the Management Plan on December 1, 2010.

B. Kilakila's Challenge of the Management Plan

On November 22, 2010, Kilakila filed a "Complaint for Declaratory Judgment and Injunctive Relief" against the University. Count 1 of the complaint challenged the University's

---

[4] An EA is a "written evaluation to determine whether an action may have a significant effect." HRS § 343-2.

[5] Exhibit 3 of HAR § 13-5 provides management plan requirements. See HAR § 13-5-39(a).

Negative Declaration. On December 13, 2010, Kilakila amended its complaint to allege three additional counts. Counts 2, 3 and 4 raised various challenges against the Telescope Project, a proposed astronomy facility submitted with the Management Plan. Kilakila's prayer for relief requested the circuit court:

> A. Declare that [the University] violated HRS Chapter 343.
>
> B. Declare that [the University] must prepare an EIS for the [Management Plan].
>
> C. Declare that the [University] improperly accepted the [Final EA] for [the Management Plan].
>
> D. Declare that [the Management Plan] may have a significant impact.
>
> E. Declare that any approvals granted pursuant to the [Final EA] for the [Management Plan] are null and void.
>
> F. Declare that [the Management Plan] is null and void.
>
> G. Declare that all permits granted pursuant to the [Management Plan], including the [CDU permit] for the [Telescope Project], are null and void.
>
> . . . .
>
> L. Order [the University] to prepare an EIS for the [Management Plan] if they wish for the plan to be approved.

On January 18, 2011, the University moved for a protective order barring all discovery requests by Kilakila under Hawai'i Rules of Civil Procedure (**HRCP**) Rule 26(c). The University argued discovery was not required to resolve the matter because the question of whether the University had complied with HRS Chapter 343 was a question of law, not fact, and the circuit court's review was limited to the administrative record. The circuit court granted the Protective Order on March 14, 2011.

On May 9, 2011, the circuit court granted summary judgment against Kilakila and dismissed counts 2, 3 and 4, concluding the court lacked jurisdiction.[6] On April 18, 2012, Kilakila filed a motion to reconsider this decision and the circuit court denied the motion on May 29, 2012. On October 5,

[6] On May 25, 2012, Kilakila filed a second amended complaint raising two additional counts which the circuit court dismissed July 12, 2012. Kilakila does not challenge this dismissal on appeal.

2011, the University filed a motion for summary judgment on count 1, contending primarily that an EA was not required but was conducted to allow informed decision-making and such action complied with the "rule of reason." On January 17, 2013, the circuit court entered an order granting the University's motions and joinder for summary judgment on count 1. The circuit court concluded:

> The [circuit court] finds that under the notice pleading standard, Count 1 of the Second Amended Complaint alleges that the [Telescope Project] is a component of the [Management Plan], and that an [EIS] should have been prepared for the Management Plan pursuant to [HRS] Chapter 343. In making its determination, the [circuit court] looks to the [HRS], the [HAR], the Management Plan and case law including Mauna Kea Anaina Hou v. University of Hawai'i.
>
> The [circuit court] finds that an [EA] was prepared for the Management Plan and that an EIS was not required. The Management Plan is a guideline, a planning tool, that sets certain policies with respect to if there are future actions or projects one must consider certain monitoring strategies and take into consideration [the] cultural, religious and other resources. The Management Plan does not authorize specific projects, such as the [Telescope Project]. A future project requires its own environmental review. The [Telescope Project] did a separate EIS.
>
> The [circuit court] finds that an EIS was not required for the Management Plan. Nevertheless an [EA] for the Management Plan was prepared and complied with [HRS] Chapter 343 under the rule of reason standard set forth in case law including Unite Here! Local 5 v. City and County of Honolulu, 124 [Hawai'i] 171, 238 P.3d 698 (2010).
>
> With respect to the [DLNR's] motion, the [circuit court] further finds that notwithstanding notice pleading, a multi-step process is propounded regarding why the [DLNR is] a party. This process does not concern the Management Plan or whether [HRS] Chapter 343 was violated, and the [circuit court] grants the [DLNR's] Motion on that ground as well as on the merits. The [University's] joinder is granted for the same reason.

Judgment was entered on February 20, 2013 and Kilakila filed a notice of appeal on March 14, 2013.

C. The Telescope Project

The Telescope Project is a proposed land use described by the Management Plan as a reasonably foreseeable project. A final EIS for the Telescope Project was prepared in July of 2009, before the University published the Management Plan. On December 1, 2010, the Board approved the University's application to construct the Telescope Project within the Observatory Site, issuing CDU Permit MA-3542 (**Board's 2010 Approval**). On December

13, 2010, Kilakila filed an administrative agency appeal to the circuit court challenging the Board's 2010 Approval. See ʻO Haleakalā v. Bd. of Land & Natural Res., 131 Hawaiʻi 193, 197, 317 P.3d 27, 31 (2013).[7] On February 11, 2011, while the agency appeal was pending, the Board approved Kilakila's request -- a request that was made before the Board's 2010 Approval -- for a contested case hearing on CDU permit MA-3542. See ʻO Haleakalā, 131 Hawaiʻi at 198, 317 P.3d at 32. As a result, the circuit court dismissed the agency appeal as moot. See id.

ʻO Haleakalā held that the circuit court had jurisdiction to review Kilkila's challenge under HRS § 91-14 (2012 Repl.) because the Board effectively denied Kilakila's request for a contested case hearing when it approved CDU Permit MA-3542 without rendering a decision on Kilakila's request. See id., 131 Hawaiʻi at 203, 317 P.3d at 37. On December 13, 2013, the Hawaiʻi Supreme Court remanded the case to the circuit court to decide Kilakila's request for a stay or reversal of the Board's 2010 Approval. See ʻO Haleakalā, 131 Hawaiʻi at 206, 317 P.3d at 40.

Meanwhile, on November 9, 2012, following the contested case hearing for CDU Permit MA-3542, the Board again approved the University's permit application, issuing CDU Permit MA-11-04 (**Board's 2012 Approval**). Kilakila's challenge of the Board's 2012 Approval is before this court in pending case No. CAAP-13-0003065.

II. STANDARDS OF REVIEW

A. Summary Judgment

We review summary judgments de novo. See Kamaka v. Goodsill Anderson Quinn & Stifel, 117 Hawaiʻi 92, 104, 176 P.3d 91, 103 (2008). Under HRCP Rule 56(c), the circuit court must grant a motion for summary judgment when the moving party: (1) has shown that there is no genuine issue regarding any material fact, and (2) is entitled to judgment as a matter of law. Id. "A fact is material if proof of that fact would have the effect

[7] We take judicial notice of this fact as an easily verifiable matter of public record. See Williams v. Aona, 121 Hawaiʻi 1, 11 n.6, 210 P.3d 501, 511 n.6 (2009).

of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties." Id.

If the moving party meets its burden of production, the non-moving party must present admissible evidence showing specific facts about essential elements of each claim to avoid summary judgment. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). We view the evidence in the light most favorable to the non-moving party; factual inferences are made in favor of the non-moving party. See Kamaka, at 117 Hawai'i at 104, 176 P.3d at 103.

In cases of public importance, summary judgments should be granted sparingly, and never on limited and indefinite factual foundations. Molokai Homesteaders Coop Ass'n v. Cobb, 63 Haw. 453, 458, 629 P.2d 1134, 1139 (1981). But where there is no genuine issue as to any material fact and defendants clearly demonstrate they should prevail as a matter of law, the disposition of a case by summary judgment is proper. Id.

B. Discovery Order

We disturb a trial court's discovery order only if there is a clear abuse of discretion that results in substantial prejudice to a party. See Hac v. University of Hawai'i, 102 Hawai'i 92, 101, 73 P.3d 46, 55 (2003). An abuse of discretion occurs when the trial court has clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant. See id.

III. DISCUSSION

A. HRS Chapter 343

Each person in the State 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." Haw. Const. art. XI, § 9. Accordingly, the State's environmental policy is to:

> (1) Conserve the natural resources, so that land, water, mineral, visual, air and other natural resources are protected by controlling pollution, by preserving or augmenting natural resources, and by safeguarding the State's unique natural environmental characteristics in a manner which will foster and promote the general welfare, create and maintain conditions under which

> humanity and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of the people of [Hawai'i].
>
> (2) Enhance the quality of life by:
>
> (A) Setting population limits so that the interaction between the natural and artificial environments and the population is mutually beneficial;
>
> (B) Creating opportunities for the residents of [Hawai'i] to improve their quality of life through diverse economic activities which are stable and in balance with the physical and social environments;
>
> (C) Establishing communities which provide a sense of identity, wise use of land, efficient transportation, and aesthetic and social satisfaction in harmony with the natural environment which is uniquely Hawaiian; and
>
> (D) Establishing a commitment on the part of each person to protect and enhance [Hawai'i's] environment and reduce the drain on nonrenewable resources.

HRS § 344-3 (2010 Repl.).

To implement these broad objectives, HRS Chapter 343 creates a process of review, aiming to "alert decision makers to significant environmental effects which may result from the implementation of certain actions" and "ensure that environmental concerns are given appropriate consideration in decision making along with economic and technical considerations." HRS § 343-1 (2010 Repl.). The heart of this review process is the EIS. See generally Molokai Homesteaders, 63 Haw. at 464, 629 P.2d at 1142 (arguing the EIS is the heart of HRS Chapter 343's federal counterpart, the National Environmental Policy Act). The EIS is "meaningless without the conscientious application of the EIS process as a whole, and shall not be merely a self-serving recitation of benefits and a rationalization of the proposed action." HAR § 11-200-14 (effective 1996).

The review process begins by defining the proposed action. An "action" is "any program or project to be initiated by any agency or applicant." HRS § 343-2. The subject of an EA may be variously described as an action, a project, or a program. Sierra Club v. Dep't of Transp., 115 Hawai'i 299, 306, n.6, 167 P.3d 292, 299, n.6, (2007). An EA is required for actions that propose (1) the use of state or county lands or funds" or (2) any

use within land classified as a conservation district. See HRS §§ 343-5(a)(1) and (2) (2010 Repl.). The Management Plan's EA cites these as its statutory triggers.[8] For agency actions, as here, the agency proposing the action must (1) review the EA, (2) consider the "significance criteria" provided by HAR §11-200-12, and (3) determine whether the proposed action will likely have a significant effect on the environment. See HRS § 343-5, HAR §§ 11-200-9(a), -11.2 (effective 1996), and -12 (effective 1996).

If the proposing agency determines the proposed action is likely to have a significant effect on the environment, then an EIS is required. See Kepo'o, 106 Hawai'i at 289, 103 P.3d at 958. A "significant effect" or "significant impact" is

> the sum of effects on the quality of the environment, including actions that irrevocably commit a natural resource, curtail the range of beneficial uses of the environment, are contrary to the state's environmental policies or long-term environmental goals and guidelines as established by law, or adversely affect the economic or social welfare, or are otherwise set forth in section 11-200-12 of this chapter.

HAR § 11-200-2 (effective 1996). The proposing agency must consider "every phase of a proposed action, the expected consequences, both primary and secondary, and the cumulative as well as the short-term and long-term effects of the action." HAR § 11-200-12. "In most instances," an action has a significant effect on the environment if it:

> (1) Involves an irrevocable commitment to loss or destruction of any natural or cultural resource;
>
> (2) Curtails the range of beneficial uses of the environment;
>
> (3) Conflicts with the [S]tate's long-term environmental policies or goals and guidelines as expressed in [HRS

---

[8] The parties dispute whether the Management Plan was exempted from the EA requirement as a planning document under HRS § 343-5(b). The [DLNR] contends the Management Plan is a planning document because it is not a land use. The University contends the circuit court made a factual finding that the Management Plan was a planning document and Kilakila's failure to contest the finding on appeal makes it binding on this court. Kilakila characterizes this contention as a meritless post-hoc argument because the University cited three § 343-5(a) triggers requiring an EA in the Management Plan's EA. Kilakila also contends the circuit court wrongly resolved a disputed fact on summary judgment. Regardless of whether an EA was required for the Management Plan, the University completed an EA, and HRS Chapter 343 requires an EIS if an EA concludes a significant environmental impact is likely. See HAR § 11-200-9(A)(4).

> Chapter 344], and any revisions thereof and amendments thereto, court decisions, or executive orders;
>
> (4) Substantially affects the economic welfare, social welfare, and cultural practices of the community or State;
>
> (5) Substantially affects public health;
>
> (6) Involves substantial secondary impacts, such as population changes or effects on public facilities;
>
> (7) Involves a substantial degradation of environmental quality;
>
> (8) Is individually limited but cumulatively has considerable effect upon the environment or involves a commitment for larger actions;
>
> (9) Substantially affects a rare, threatened, or endangered species, or its habitat;
>
> (10) Detrimentally affects air or water quality or ambient noise levels;
>
> (11) Affects or is likely to suffer damage by being located in an environmentally sensitive area such as a flood plain, tsunami zone, beach, erosion-prone area, geologically hazardous land, estuary, fresh water, or coastal waters;
>
> (12) Substantially affects scenic vistas and viewplanes identified in county or state plans or studies; or,
>
> (13) Requires substantial energy consumption.

HAR § 11-200-12(b).

The University determined the Management Plan would not have a significant impact on the environment and published the Negative Declaration. Kilakila contends the Final EA for the Management Plan was deficient, and an EIS was required, because the Final EA failed to consider secondary and cumulative visual, noise, and cultural impacts.

HRS Chapter 343 provides for judicial review at various stages of the process: (1) when no EA is prepared, (2) when an agency determines that an EIS will or will not be required, as here, and (3) when an EIS is accepted. See HRS § 343-7 (2010 Repl.). The reviewing court must determine whether the agency complied with HRS Chapter 343 and HAR 11-200 as a matter of law. See Sierra Club, 115 Hawai'i at 317-18, 167 P.3d 292, 310-11. HRS § 343-5(c) affords agencies discretion to determine if a significant impact is likely, and HAR § 11-200-12 requires the agency to consider certain effects and criteria when making that

determination. See § 343-5(c) and HAR § 11-200-12. Consequently, we review the Negative Declaration to determine whether the University followed the proper procedures and considered HAR § 11-200-12[9] when it made the Negative Declaration.

B. The merits of Kilakila's challenge

Kilakila contends the circuit court erred in concluding that on summary judgment the University's Negative Declaration complied with HRS Chapter 343. Kilakila's argument is composed of two subparts: (1) the University failed to consider HAR 11-200-12, specifically regarding secondary and cumulative effects of the Management Plan, and (2) the circuit court erred by limiting discovery.

1. The circuit court did not err by concluding the Management Plan's EA complied with HRS Chapter 343 and that an EIS was not required as a matter of law.

Kilakila contends the University's Negative Declaration did not consider the appropriate environmental factors because: (1) the Telescope Project, the development of which is facilitated by the Management Plan, is a secondary impact of the Management Plan, (2) the Telescope Project's EIS concluded that visual and noise impacts of the Telescope Project would likely affect cultural resources adversely,[10] and as a result, (3) the University's determination that the Management Plan would not have a significant impact on the environment indicates the University failed to consider HAR § 11-200-12. Analogous challenges have been addressed by the Hawai'i Supreme Court in Molokai Homesteaders, Kepo'o, and Sierra Club.

In Molokai Homesteaders, a private developer sought to lease space in a county water distribution system. See Molokai Homesteaders, 63 Haw. at 456-57, 629 P.2d at 1138. The Board in

---

[9] The University contends Kilakila "did not dispute below that the proper significance criteria was applied." However, Kilakila's first amended complaint alleges the University failed to consider impacts mandated by HAR 11-200-12 ("signifigance criteria").

[10] Kilakila's argument on this point conflates the Telescope Project's EIS findings of "major" with "significant," and mischaracterizes the Management Plan's EA discussion of public comments as environmental impact conclusions that contradict the Negative Declaration.

Molokai Homesteaders determined the proposed action would not have a significant effect on the environment, issued a negative declaration, and approved the action. Id. This approval predated the enactment of HRS Chapter 343. The Board issued the Negative Declaration under the Executive Order of August 23, 1971 § 1(b), which mandated environmental impact statements for all "major State actions or projects utilizing State funds and/or State lands, that significantly affect the quality of the human and natural environment . . . ." Molokai Homesteaders, 63 Haw. at 457, n.6, 629 P.2d at 1138, n.6. In dicta, the Hawai'i Supreme Court explained that under HRS Chapter 343, had it applied, the proposed action was one where a significant effect was indeed likely because it facilitated the development of a large resort complex and likely involved the irrevocable commitment of natural resources:

> We entertain no doubt that the pertinent statutory provisions would mandate the preparation of an EIS if [the developer's] application for "rental of space" in the System's facilities were presented to the Board now. A proposal whose approval would facilitate the development of a large resort complex in a previously unpopulated area through the use of the Molokai Irrigation System's pipeline, allow water to be transported from its source to another area, and cause a rise in the salinity of the system's irrigation water would be within the purview of activities covered by [HRS] Chapter 343. The use of a government pipeline, the implicit commitment of prime natural resources to a particular purpose, perhaps irrevocably, and the substantial social and economic consequences of the governmental approval of the proposal would dictate the preparation of an EIS.

Id., 63 Haw. at 466-67, 629 P.2d at 1144 (footnote omitted.)

Kepo'o also addressed the question of whether a proposed action was likely to have a significant impact and require an EIS. Kepo'o, 106 Hawai'i at 289-90, 103 P.3d at 958-59. Kepo'o concluded that because the proposed action involved an irrevocable commitment of natural resources, an EIS was required:

> The EA in the present case indicates that the proposed power plant would essentially commit 86,000 gallons of fuel to plant operations per day, withdraw 10.4 million gallons of groundwater per day, and discharge hundreds of tons of air pollutants into the atmosphere each year, exceeding significance levels under the Prevention of Significant Deterioration program. Although [the Plaintiffs] maintain that numerous "undisputed facts" show that the power plant "may have a significant effect on the environment," the

> aforementioned facts meet the definition of "significant effect." As defined in HRS § 343-2, "significant effect" includes irrevocable commitment of natural resources. The burning of thousands of gallons of fuel and the withdrawal of millions of gallons of groundwater on a daily basis will "likely" cause such irrevocable commitment. Therefore, the preparation of an EIS was required pursuant to both the common meaning of "may" and the statutory definition of "significant effect."
>
> The power plant also involves effects that are similar to the effects of the proposed project in Molokai Homesteaders. In addition to the substantial fuel consumption and withdrawal of groundwater, the proposed plant would increase the salinity of the groundwater (because of the re-injection of water with higher salinity levels into the injections wells), bring oil by sea to Kawaihae Harbor, and pump the oil through pipes running under the State highway to the plant. These aspects of the power plant mirror the effects posed by the use of the transmission facilities of the Molokai Irrigation System, a project that would have necessitated an EIS.
>
> Finally, as the court observed, an EIS was mandated by the pre-1996 rule for "significance criteria." Even though the "substantial energy consumption" category did not exist when Chairperson Drake issued the negative declaration in 1993, the proposed project triggered at least one other category that was in existence in 1993, namely that it "[i]nvolves an irrevocable commitment to loss or destruction of any natural or cultural resource." HAR § 11-200-12(b). As previously discussed, the withdrawal of 10.4 million gallons of groundwater and the burning of 86,000 gallons of fuel on a daily basis "[i]nvolves an irrevocable commitment to loss or destruction of" natural resources. Thus, an EIS was required pursuant to HRS § 343-5(c) and under both the pre- and post-1996 versions of the significance criteria enumerated in HAR § 11-200-12(b).

Id. (citation omitted).

Molokai Homesteaders and Kepo'o essentially reasoned that the agency determining that a significant impact was not likely could not have considered the appropriate factors since the proposed actions involved irrevocable commitments of natural resources. The proposed action in both cases, the withdrawal and consumption of large amounts of water, itself involved a commitment of natural resources. Whether the Management Plan in this case involves a similar commitment is less clear.[11] At its

[11] The Telescope Project, on the other hand, clearly involves a commitment of natural resources, to wit, the portion of unimpeded view-plane lost by constructing a multi-story building. The Management Plan concluded: "While a separate analysis of land use resources for the proposed [Telescope Project] describes specific impacts, it can be stated that this proposed project would be an incremental addition of approximately 4 percent to the use of Conservation District lands within HO and only a fraction of a percent of the total resource subzone." An EIS was completed for the Telescope Project.

heart, the Management Plan exists to conserve resources rather than commit them to a specific purpose. However, the Management Plan's EA appears to suggest the routine management of the Observatory Site involves some commitment of cultural resources:

> There is no way to fully quantify the cumulative effects of past and ongoing action on traditional cultural practices and spiritual values. In consideration of these past and present actions, foreseeable future actions would result in readily detectable, localized effects, with additional consequences to traditional cultural practitioners within greater Hawai'i. The practices and procedures in the [Management Plan] for cultural preservation are intended to be helpful and to reduce adverse impacts from routine management of the site. However, the cumulative impact of the [Management Plan], along with past and ongoing actions would still be adverse, but less than significant.

(Emphasis added.)

Molokai Homesteaders and Kepo'o found the agency failed to take a hard look at the appropriate environmental considerations where the proposed action created a new, or additional, commitment of natural resources. Rather than making additional commitments of natural resources, the Management Plan would mitigate existing commitments.

Much of Kilakila's challenge of the Management Plan's Final EA is founded not on the contention the Management Plan will likely have a significant impact on the environment, but is instead founded on the contention the Telescope Project, as a secondary effect of the Management Plan, has a significant impact on the environment. To this end, Kilakila relies heavily on Sierra Club. Sierra Club differs from Molokai Homesteaders and Kepo'o because the petitioner in Sierra Club challenged an agency's determination that a proposed action was exempt from the EA requirement, and not a determination that an EIS was not required. See Sierra Club. However, an agency making an exemption determination "must look beyond an action's facial compliance with an exemption class, and also determine that the activity will probably not have a significant effect." Id., 115 Hawai'i at 340, 167 P.3d at 333 (emphasis added).

In Sierra Club, the Department of Transportation (**DOT**) proposed harbor improvements and the petitioner contended the agency failed to consider secondary impacts resulting from activity facilitated by the harbor improvements:

> The exemption letter does not consider whether Superferry operation independent of the harbor will have any significant effect on the environment. Rather, DOT appears to studiously restrict its consideration of environmental impact to the physical harbor improvements themselves. Although DOT does say that "[t]he installation and result of the minor improvements noted will not produce or create any adverse air quality, noise or water quality impact," which could imply a reference to the Superferry itself, as the "result" of the harbor improvements, this statement is oblique and does not indicate that secondary impacts were considered.

Id., 115 Hawai'i at 341-342, 167 P.3d at 334-335 (citation and emphasis omitted). Consequently, Sierra Club held:

> Stated simply, the record in this case shows that DOT did not consider whether its facilitation of the [Hawai'i] Superferry Project will probably have minimal or no significant impacts, both primary and secondary, on the environment. Therefore, based on this record, we can only conclude that DOT's determination that the improvements to Kahului Harbor are exempt from the requirements of [Hawai'i Environmental Policy Act] was erroneous as a matter of law. The exemption being invalid, the EA requirement of HRS § 343-5 is applicable.

Id., 115 Hawai'i at 342, 167 P.3d at 335.

Unlike Sierra Club, the action facilitated by the Management Plan, the Telescope Project, had both a final EIS and supplemental cultural impact statement. Additionally, any future developments facilitated by the Management Plan would trigger an EA under § 343-5 (a)(2) (use of land in conservation district). And, the Management Plan's EA repeatedly considered the Telescope Project:

> The two reasonably known future projects at [the Observatory Site] are the construction of the minor SLR 2000 facility located behind the southwest side of the Mees facility and the proposed [Telescope Project]. SLR 2000 would be located on a small site less than 900 square feet and would not alter land use or existing activities. The construction of the proposed [Telescope Project] would increase the level of existing telescope activities. While a separate analysis of land use resources for the proposed [Telescope Project] describes specific impacts, it can be stated that this proposed project would be an incremental addition of approximately 4 percent to the use of Conservation District lands within [the Observatory Site] and only a fraction of a percent of the total resource subzone. In consideration of these factors, if construction is approved, the proposed [Telescope Project] is anticipated to result in less than significant cumulative impacts on land use.
>
> . . . .
>
> There is no way to fully quantify the cumulative effects of past and ongoing action on traditional cultural practices and spiritual values. In consideration of these past and present actions, foreseeable future actions would result in

readily detectable, localized effects, with additional consequences to traditional cultural practitioners within greater Hawai'i. The practices and procedures in the [Management Plan] for cultural preservation are intended to be helpful and to reduce adverse impacts from routine management of the site. However, the cumulative impact of the [Management Plan], along with past and ongoing actions would still be adverse, but less than significant.

Individual projects that may have the potential for significant impacts on cultural resources would need to be analyzed to quantify those impacts, and to avoid, minimize, and mitigate those impacts where possible. For projects proposed or funded by Federal agencies, such as the proposed [Telescope Project], the Section 106 process discussed in Section 3.2.2-Factors Considered for Impacts Analysis is required.

. . . .

New impacts from projects Listed in Table 4-1 (in particular, any future excavation) could affect archeological resources at [the Observatory Site]. Possible future effects and measures to mitigate them would be considered in the environmental review documents completed for specific projects, such as SLR 2000 and the proposed [Telescope Project]. Combined impacts may affect known (but not located) traditional cultural properties or areas of tradition al importance. However, implementation of the [Management Plan] for [the Observatory Site] would not result in significant cumulative impacts on those resources.

Impacts on cultural resources resulting from implementation of the [Management Plan] are expected to be less than significant. Therefore it would not substantially contribute to the adverse impacts from past, present, and reasonably foreseeable future activities on cultural resources.

. . . .

The implementation of the [Management Plan] would result in a beneficial impact on visual resources. However, past and ongoing actions at [the Observatory Site] have had less than significant adverse impacts on visual resources and the existing visual character, or quality of the site and its surroundings and light or glare. The implementation of requirements in Section 3.5.4-Facility Design Criteria of the MP are intended to minimize such visual impacts, so that the impacts would continue to be less than significant on visual resources. The cumulative impact from past, present, and known foreseeable future actions in addition to implementation of the [Management Plan] would still be less than significant.

Future projects could involve impacts similar to or greater than current impacts of [the Observatory Site] on visual resources. The proposed [Telescope Project] is a project that would have adverse impacts on visual resources beyond those addressed in the [Management Plan], and those have been analyzed elsewhere ([Telescope Project Final EIS] 2009).

* * *

The current ambient noise level within [the Observatory Site] is low, but some users of Haleakalā may be particularly noise sensitive. In particular, cultural

> practitioners within the immediate vicinity of a noise source could be disturbed. Most disturbances are low level discrete events rather than a substantial increase in the overall ambient noise level. In general, current noise levels are compatible with existing activities.
>
> Reasonably foreseeable future actions within [the Observatory Site] would require analysis of noise impacts from construction and operations. Section 3.5.3.2-Construction Practices of the [Management Plan] provide requirements for avoiding, minimizing and mitigating noise from potential future construction activities. Future potential projects could result in construction noise that has an adverse impact on cultural resources and on visitors to the summit area, whose expectations of a natural soundscape may not be met. These projects would require noise analysis to evaluate the cumulative contribution to noise from past and present [Observatory Site] activities.
>
> The implementation of the [Management Plan] would have some beneficial impacts to baseline noise levels from implementation of noise reduction requirements for any construction activity. Therefore, overall, the cumulative impacts of past, present, and reasonably foreseeable future actions at [the Observatory Site], combined with the requirements of the [Management Plan] for noise management, would be less than significant.

This record does not show that the University failed to follow the proper procedures or failed to consider § 11-200-12 when it made the Negative Declaration for the Management Plan. As such, the circuit court did not err by granting summary judgment in favor of the University on Count 1.

2. The circuit court did not err by granting the University's Protective Order.

HRCP Rule 26(c) provides that the court may, for good cause shown, "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . that the . . . discovery not be had[.]" The University moved for a protective order barring discovery requests served by Kilakila under HRCP Rule 26(c), contending the University's compliance with HRS Chapter 343 was a question of law, not fact, and the circuit court's review was limited to the agency's administrative record. The circuit court, "having reviewed [the University's] Motion for Protective Order, [DLNR's] substantive joinder therein, the memoranda, declarations and reply in support thereof and opposition thereto, and the files and records herein, and for good cause shown," granted the motion.

Kilakila contends the circuit court's review is not limited to the administrative record since Kepo'o involved a challenge of a negative declaration. The Hawai'i Supreme Court's statement that "summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law," indicated the circuit court's review was not limited to the administrative record. Kepo'o, 106 Hawai'i at 287, 103 P.3d at 956 (internal quotation marks, citations omitted and emphasis added). Kepo'o merely cited the standard of review for summary judgment, quoting Heatherly v. Hilton Hawaiian Village Joint Venture, 78 Hawai'i 351, 353, 893 P.2d 779, 781 (1995), amended on reconsideration in part by 78 Hawai'i 474, 896 P.2d 930 (1995), a case where a protective order barring discovery was not at issue.

Kilakila also maintains that challenges to compliance with HRS Chapter 343 are not restricted to an administrative record since the circuit court and Hawai'i Supreme Court in Unite Here! Local 5 v. City & Cnty. of Honolulu, 123 Hawai'i 150, 231 P.3d 423 (2010) considered evidence outside the administrative record. Unite Here! is inapposite because it involved a dispute over whether a supplemental EIS was required. See Unite Here!, 123 Hawai'i at 154, 231 P.3d at 427. The question presented in Unite Here! involved examination of whether environmental impacts had changed in the time since the original EIS was prepared and was not limited to a question of law. See id.

Here, the circuit court did not abuse its discretion by granting the Protective Order. Whether the Management Plan's EA and its Negative Declaration complied with HRS Chapter 343 is a question of law that does not require factual determinations beyond the administrative record. See generally Wakabayashi v. Hertz Corp., 66 Haw. 265, 275, 660 P.2d 1309, 1315 (1983) (the trial court possesses considerable discretion in permitting discovery).

3. Counts 2, 3 and 4 are moot.

In Count 2, Kilakila contended the Board violated HAR § 13-1-28, et seq. and HRS § 91-9, et seq. by failing to conduct a contested case hearing before the Board's 2010 Approval. Count 3 contended the Board's 2010 Approval was invalid because construction of the Telescope Project was contrary to the purpose of the conservation district. Count 4 contended the Board's 2010 Approval violated HAR Chapter 13-5 because the UH Appellees failed to meet the criteria of HAR § 13-5-30(c) (1994). Counts 2, 3 and 4 are moot because relief had already been granted by 'O Haleakalā, which remanded the controversy surrounding the Board's 2010 Approval of the Telescope Project to the circuit court on December 13, 2013. See supra, I.C.; see also Wong v. Bd. of Regents, University of Hawai'i, 62 Haw. 391, 394-95, 616 P.2d 201, 203-04 (1980) (issue is moot if the two conditions for justiciability relevant on appeal -- adverse interest and effective remedy -- have been compromised). Consequently, the appeal from the circuit court's denial of Kilakila's motion to reconsider the dismissal of counts 2, 3 and 4 is also moot.

IV. CONCLUSION

Accordingly, the following Judgment and Orders entered in the Circuit Court of the First Circuit are affirmed:

1) the February 20, 2013 "Final Judgment," to the extent consistent with this opinion;

2) the March 14, 2011 "Order Granting Defendants University of Hawai'i and [Thomas M. Apple's] Motion for Protective Order [Filed January 18, 2011]"; and

3) the January 17, 2013 "Order (1) Granting Defendants University of Hawai'i and [Thomas M. Apple's] Motion for Summary Judgment as to Count 1 of Plaintiff's First Amended Complaint for Declaratory and Injunctive Relief; (2) Granting Defendants Board of Land and Natural Resources, Department of Land and Natural Resources, and William Aila's Motion for Summary Judgment as to Count 1 of Plaintiff's First Amended Complaint for Declaratory and Injunctive Relief [Filed December 13, 2010]; (3) Granting Defendants University of Hawai'i and [Thomas M. Apple's] Joinder in Defendants Board of Land and Natural Resources, Department of

Land and Natural Resources, and William Aila's Motion for Summary Judgment as to Count 1 of Plaintiff's First Amended Complaint for Declaratory and Injunctive Relief [Filed December 13, 2010]; and (4) Denying Plaintiff's Motion for Summary Judgment as to Count 1."

David Kimo Frankel
Sharla Ann Manley
(Camille K. Kalama with them on the briefs)
(Native Hawaiian Legal Corporation)
for Plaintiff/Appellant-Appellant Kilakila ʻO Haleakalā.

Lisa Woods Munger
Lisa A. Bail
Adam K. Robinson
Christine A. Terada
(Goodsill Anderson Quinn & Stifel)
and
Darolyn H. Lendio,
University General Counsel, and
Bruce Y. Matsui
(Office of the General Counsel)
with them on the brief for
Defendant/Appellee-Appellee University of Hawaiʻi, and Thomas M. Apple, in his official capacity as Chancellor of the University of Hawaiʻi at Manoa.

Julie H. China,
Deputy Attorney General,
(Donna H. Kalama, Deputy Attorney General, with her on the brief) for
Defendant/Appellee-Appellee Board of Land and Natural Resources, William Aila, in his capacity as the Interim Chairperson of the Board of Land and Natural Resources; and Department of Land and Natural Resources.