No. _____

IN THE SUPREME COURT OF THE STATE OF HAWAI`I

KILAKILA ʻO HALEAKALĀ, Appellant - Appellant, vs. BOARD OF LAND AND NATURAL RESOURCES, DEPARTMENT OF LAND AND NATURAL RESOURCES, WILLIAM AILA, Jr., in his official capacity as Chairperson of the Board of Land and Natural Resources, and UNIVERSITY OF HAWAI`I, Appellees - Appellees.	Civil No. 12-1-3070-12 (RAN) (Agency Appeal) APPEAL FROM THE 1) FINAL JUDGMENT, filed herein on August 20, 2013 2) ORDER AFFIRMING THE BOARD OF LAND AND NATURAL RESOURCES' FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER IN DLNR File No. MA-11-04, filed on July 11, 2013 FIRST CIRCUIT COURT HONORABLE RHONDA A. NISHIMURA Judge

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

APPENDIX A

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

Twice now, this Court has thoughtfully granted writs of certiorari to review the decisions of the Intermediate Court of Appeals **(ICA)** in cases brought by Kilakila 'O Haleakalā regarding the summit of Haleakalā. Petitioner/Appellant-Appellant Kilakila 'O Haleakalā ("**Appellant**") begs this Court's indulgence for a third time and applies for a writ of certiorari pursuant to HRAP Rule 40.1 and HRS §§ 602-5(a)(1) and 602-59 because the ICA's decision once again involves grave errors and is inconsistent with many of this Court's decisions.

The summit of Haleakalā is a significant traditional cultural resource, a site of spectacular natural beauty and a popular visitor destination. JEFS # 115 RA:355, 380 Findings of Fact (**FOF**s) 25, 26, 27 149, 150. It lies within the conservation district, JEFS #51 RA:53, which this Court has observed tolerates the least degree of development. *Life of the Land v. Land Use Comm'n,* 63 Haw. 166, 170 n.3, 623 P.2d 421, 437 n.3 (1981). Nevertheless, the board of land and natural resources **(BLNR)** granted a conservation district use permit (**CDUP**) to the University of Hawai'i Institute for Astronomy **("applicant")** in November 2012 for the massive advanced technology solar telescope **(ATST)** project that includes a 142.7 foot tall building and a wastewater treatment plant on the summit. JEFS #115 RA: 363-4, 439.3.

I. QUESTIONS PRESENTED

In the broadest sense, the question presented is:

1. Did the ICA err in affirming the Circuit Court's affirmation of the BLNR's decision?

More specifically, the questions presented include:

2. Did the ICA err when it held that an agency can use decisionmaking criteria that are not identified in its own rules — despite this Court's rulings in *Aluli v. Lewin,* 73 Haw. 56, 61, 828 P.2d 802, 805 (1992), *Mahuiki v. Planning Comm'n,* 65 Haw. 506, 519- 520, 654 P.2d 874, 882-83 (1982), *Ainoa v. Unemployment Compensation Appeals Div.,* 62 Haw. 286, 614 P.2d 380 (1980) and *Aguiar v. Hawaii Hous. Auth.,* 55 Haw. 478, 522 P.2d 1255 (1974)?
3. In determining whether the ATST project is consistent with the purposes of the land use law and the conservation district, did the ICA err by (a) confusing an "as applied" challenge with a "facial" challenge; (b) failing to employ this Court's analysis in *Neighborhood Bd. No. 24 (Waianae Coast) v. State Land Use Comm'n,* 64 Haw. 265, 639 P.2d 1097 (1982); and (c) refusing to consider whether the proposed ATST

project itself "frustrates the state land use law's basic objectives," *Curtis v. Board of Appeals,* 90 Hawai'i 384, 396, 978 P.2d 822, 834 (1999)?

4. Should the courts take a close look at the record in cases affecting the environment?
5. Did the ICA err in concluding that the ATST project would not have substantial impacts when (a) the applicant repeatedly admitted that the impacts would be substantial; (b) the BLNR and the ICA failed to point to any evidence that the impacts to cultural resources would not be substantial, as required by *In re Kauai Elec. Div.,* 60 Haw. 166, 184, 590 P.2d 524, 537 (1978); (c) there was no evidence that the mitigation measures would reduce the intensity of the impacts to less than substantial; and (d) the BLNR relied on the final environmental impact statement (**FEIS**) to reach certain conclusions, but without any explanation ignored other portions of the FEIS?
6. Did the ICA err by relying on grounds not "invoked by the agency," *In re Water Use Permit Applications,* 94 Hawai'i 97, 163, 9 P.3d 409, 475 (2000) ("*Waiāhole*")?
7. Did the ICA err in interpreting HAR §13-5-30(c)(6) in a manner that excludes consideration of natural beauty and open space characteristics?
8. Did the ICA err in assuming that the lease of a portion of land does not subdivide it despite the plethora of law to the contrary?
9. Did the ICA err in holding that the ATST project is consistent with a valid management plan?
10. Did the BLNR prejudge the issue by granting the CDUP before the contested case was held and then authorizing some construction activities to proceed pursuant to that permit prior to completion of the *post hoc* contested case hearing?
11. Did the ICA err in relying on HRS § 171-6(20) to justify the BLNR's conduct pursuant to HRS chapter 183C when chapter 183C is not part of HRS chapter 171?
12. Was the BLNR's *post hoc* contested case hearing tainted by political pressure, *ex parte* communication, the refusal to fully and timely disclose the extent of *ex parte* communication, the dual role of the deputy attorney general as adversary and advisor to the tribunal, and the arbitrary deletion of key findings by the hearing officer?
13. Did the ICA err in holding that the applicant was authorized to apply for the permit?

II. PRIOR PROCEEDINGS

In December 2010, the BLNR voted to grant a CDUP for the ATST project without first

holding a required contested case hearing,[1] which Appellant had requested. *See Kilakila 'O Haleakalā v. Bd. of Land & Natural Res.*, 131 Hawai'i 193, 317 P.3d 27 (2013).[2] The BLNR then held *a post hoc* contested case hearing. JEFS #23 RA:12 ¶ 25. Appellant suggested a means by which the BLNR could attempt to cure the taint of prejudgment — by voiding its initial decision. JEFS #71 RA:141-42, JEFS #113 RA:110-11, 116. But the BLNR refused to do so.

During the course of the contested case hearing, the Governor's office and U.S. Senator Inouye's office[3] exerted political pressure on the BLNR Chair to approve the ATST project. JEFS #115 RA:298-9. On March 21, 2012, officials met with BLNR Chair Aila "to discuss the telescope, hearings officer and funding issue." JEFS #113 RA:259.

Soon thereafter – and while the contested case hearing was still on-going – the BLNR allowed some construction activities authorized by the December 2010 CDUP to commence. JEFS #113 RA:215-17. (Although authorized to proceed, the applicant did not do so.)

In November 2012, BLNR once again granted a CDUP for the ATST project. JEFS #115 RA: 439. Appellant timely appealed the BLNR's decision to the First Circuit Court. JEFS#23 RA:360. The Circuit Court affirmed the BLNR's November 2012 decision. JEFS#23 RA:349-355. Appellant timely appealed. JEFS #1. Appellant filed unsuccessful motions for injunctive relief pending appeal. JEFS #224-226 and 300. On October 17, 2014, the ICA affirmed the Circuit Court's judgment and order. JEFS #312.

III. STATEMENT OF THE CASE

A. The Haleakalā Summit is Culturally Significant and Rich in Natural Beauty.

The summit area of Haleakalā is considered a significant traditional cultural site. JEFS #115 RA: 355, 380 (FOFs 26, 149, 150); JEFS #203 SR:214-15, 692; JEFS #105 RA:11-18, 24; JEFS #209 SR:504. This summit area, which includes the Haleakalā High Altitude Observatory Site **(HO),** JEFS #51 RA:52, is listed on the National Register of Historic Places. JEFS #203

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[1] At that same meeting, the BLNR approved a management plan for the area, which is the subject of a separate, but related case scheduled for oral argument before this Court on December 18, 2014. *See Kilakila 'O Haleakalā v. Univ. of Haw.*, 2014 Haw. LEXIS 274 (Sept. 12, 2014).

[2] Although it is not in the record in this case, that CDUP was voided in February 2014. The stipulation voiding that permit is in the appellate record in CAAP-13-0000182 at dkt #243.

[3] Senator Inouye's Chief of Staff, Jennifer Sabas, acted as the applicant's agent. Because he was worried about the loss of funding, the applicant's Mike Maberry specifically asked Sabas to talk to the hearing officer's boss' boss, Loretta Fuddy, the director of the department of health. JEFS #115 RA:299. Sabas admitted that she could "carry the uh message" in meetings regarding the ATST because she was told that "UH can't meet with DLNR." *Id.* at 297.

SR:210-11; JEFS #205 SR:1271. Not only is the Haleakalā summit area itself a cultural site, but there are also a number of cultural sites within the HO. JEFS #203 SR:215, 743-46, 1026-28, 1164; JEFS #93 RA:115-121. "The large number of remnant archaeological sites indicates that the area was used and therefore held significance during traditional times." JEFS #203 SR:1157. A number of traditional cultural practices are conducted in the Haleakalā summit area, including within the HO. JEFS #203 SR:63, 1156-64; JEFS #105 RA:12-17.

The summit of Haleakala is also a site of spectacular natural beauty. JEFS #115 RA:355 FOF 25, 26; JEFS #105 RA:20-21, 24, 31; JEFS #205 SR:1270-71. The HO sits within two hundred yards of the Haleakalā National Park, a popular visitor attraction. JEFS #115 RA: 355 FOF 24-27; JEFS #203 SR:207, 248. The purpose of Haleakalā National Park includes preserving the area's scenic character and cultural resource values. JEFS #105 RA:21, 25.

B. The Applicant Sought BLNR Approval to Construct at the Summit.

The applicant proposed to build the ATST project within the HO at the summit of Haleakalā. JEFS #51 RA:52; JEFS #203 SR:46. The ATST project includes: the telescope; a support and operations building adjacent to the observatory; a utilities building; a parking lot; a wastewater treatment plant; a new electrical transformer; three ice storage tanks; and a diesel generator. JEFS #203 SR:175-78. The solar telescope would be encased within a facility that would stand 142.7 feet tall and stretch 84 feet in diameter. *Id.* at 177; JEFS #75 RA:39. The ATST telescope building would exceed the height of existing facilities in the area by about fifty feet. JEFS #117 RA:288- 89. The 76.3 foot high support and operations building next to the ATST would contain: a large docking bay, a 20-ton crane, equipment storage, laboratories, a large-scale platform lift, a helium compressor, a vacuum pump and liquid nitrogen tanks. JEFS #75 RA:39; JEFS #203 SR: 175-78. The support and operations building itself would be bigger than some other structures in the area. JEFS #117 RA:289-90. The utility building for the ATST project would contain a 300 KVA generator, an 80-ton chiller, a 15-ton chiller, a 10-ton heat pump condenser unit, two ventilation fans, an air compressor, a vacuum pump and three uninterruptible power supply units. JEFS #203 SR:177. The entire ATST project would occupy a footprint of .74 acres. *Id.* at 176. The ATST project would also require the handling and storage of hazardous materials including: hydrochloric acid, potassium hydroxide, nitric acid, stripping/ cleaning effluent, aluminum, silver, silicon nitride, nickel chromium, propylene glycol Dynalene HC heat-transfer fluid, compressed helium and nitrogen, and diesel fuel. *Id.* at 193-95.

The ATST project would take place within an area the applicant and others call "Science City." JEFS #203 SR:126 n.1, 211, 707, 767, 802; JEFS #93 RA:182,227, 228. The area is filled with observatory and associated facilities. JEFS #203 SR:127-28, 148, 208-9. It is forty percent developed with roads, buildings, parking areas and walkways. JEFS #115 RA:356 FOF 30.

C. The Applicant and Its Partner Repeatedly Admitted that the ATST Project Would Have Substantial Impacts Which Cannot Be Mitigated.

In its conservation district use application, the applicant admitted that construction of the ATST project would have a substantial adverse impact on cultural resources and viewplanes. It admitted that the

> ATST Project would have **a substantial (major) adverse impact on cultural resources.** Specifically, the proposed ATST Project would be seen as culturally insensitive and disturb traditional cultural practices conducted within the Region of Influence (ROI), which includes parts of HALE. Noise and associated construction-related disturbances would also have a major, adverse impact on cultural practices within the ROI. **No mitigation would eliminate these impacts,** but numerous mitigation measures would be employed to reduce such impacts as much as possible.

JEFS #51 RA:56. It concluded that "the impact on visual resources at the Pu`u `Ula`ula (Red Hill) Overlook from the construction and operation of the proposed ATST Project is **substantial** because of its prominence in relatively close-up views." *Id.* at 79. The ATST "will cause a **substantial** visual impact on visitors to the summit area of [the National Park]." *Id.* at 78.

A chart in the FEIS for the ATST project summarizing the cumulative impacts from the addition of the proposed ATST project identified major, adverse and long-term impacts to: cultural, historic, archaeological resources; visual resources and view planes; and visitor use and experience. JEFS #203 SR:504. The FEIS unequivocally concluded that the construction and operation of the ATST project "would result in major, adverse, short-and long-term direct impacts on the traditional cultural resources" in the summit area. *Id.* at 81. "Overall, there is a belief that to go forward with the proposed ATST Project would result in the desecration of a sacred site, with some equating the effects to building an observatory next to the Wailing Wall in Jerusalem or within the city of Mecca." *Id.* at 287. A report in the FEIS concluded: "Based on the information gathered during the course of this study and presented in this report, the overwhelming evidence, from a cultural and traditional standpoint, points toward a significant adverse impact on Native Hawaiian traditional cultural practices and beliefs." *Id.* at 1168. The FEIS stated: "Changes in the **viewshed** during the operations phase would result in **major,**

adverse and long-term impacts on the visitor use and experience from locations where the **ATST project would be prominently seen."** *Id.* at 390; *see also id.* at 102 and 504. Noise from construction of the proposed ATST project is "anticipated to be a major, adverse, short-term, direct impact," *Id.* at 88; *see also* JEFS #117 RA:135-138, 140, 143-45, and could affect "Native Hawaiian cultural practitioners and those engaged in recreational activities, even when such levels comply with regulatory requirements." JEFS #203 SR:88.

The applicant's partner, the National Science Foundation, which is funding the ATST, concluded that:

> At the Preferred Mees site, there will also be a major, adverse long-term impact on visual resources for [Haleakala National Park] visitor use and experience once the ATST facility is erected. The fully executed facility will be visible from Pu'u Ula'ula Overlook, the western edge of the Haleakala Visitor's Center, the summits of Pa Ka'oao and Magnetic Peak, and along the Park road corridor nearing [Haleakala High Altitude Observatory Site]. These impacts will last for the life of the ATST, will continue to affect visitor expectations of the summit natural vistas, and no mitigation will adequately reduce the intensity of this impact.

JEFS #97 RA:515-16; *see also id.* at 463. It also concluded: "Construction and operation of the ATST project . . . would result in major, adverse, short- and long-term, and direct impacts on the traditional cultural resources" in the summit area. *Id.* at 473. "Mitigation measures would be implemented, and while helpful, they would not, however, reduce the impact intensity to moderate: impacts would remain major, adverse, long-term and direct." *Id.*

D. Other Evidence Showed that the ATST's Impacts Would Be Substantial.

The applicant's conclusion that the impact of the ATST project would be substantial was buttressed by the National Park Service, a former planning director, a professor of Hawaiian studies and the two previous superintendents of Haleakalā National Park. JEFS #207 SR:390-409; JEFS #105 RA:19-32; JEFS #209 SR:504. The National Park Service "believes that both during construction (short-term) and operation (long-term) the ATST will have a major adverse impact to the viewshed." JEFS #207 SR:399; *see also id* at 392. The BLNR itself concluded: "The cumulative effects on traditional cultural resources of past actions combined with the ATST Project would be major, adverse, long-term and direct." JEFS # 115 RA:384 FOF 170.

IV. ARGUMENT

Appellant does not have sufficient space to present all of its arguments, but summarizes here some of the more important ones that are explained in greater detail in its briefs.

A. The ICA Improperly Approved the Use of Unwritten Criteria in Decisionmaking.

The ICA held that the BLNR could grant a permit based on criteria that were not in its rules. On page 32-33 of the PDF version of its decision, the court wrote, "Kilakila contends the Board's decision-making authority is 'naturally constrained' by HAR Chapter 13-5 but provides no authority for the proposition that the Board is limited to considering the HAR § 13- 5-30(c) criteria when deciding whether to grant conservation district use permits." On page 34, it wrote, "Kilakila cites to no authority that the criteria set forth in § 13-5-30(c) is exhaustive or that the Board was limited to considering only §13-5-30(c)'s criteria, and we find none."

The ICA ignored cases cited by Appellant: *Aluli*, 73 Haw. at 61, 828 P.2d at 805 ("Without established written standards by rules, no one can know whether permit applications will be reviewed fairly and consistently and whether consideration to grant or deny a permit will serve the purpose of the statute or are unlawful"); *Mahuiki*, 65 Haw. at 519-520, 654 P.2d at 882-83 (holding that the decisionmaking criteria in HRS chapter 205A must be followed and that consideration of prior zoning decision was improper); and *Topliss v. Planning Comm'n,* 9 Haw. App. 377, 842 P.2d 648 (1993)(holding that traffic congestion that has no impact on the coastal environment is irrelevant for the purposes of decisionmaking pursuant to HRS § 205A-26). These cases stand for the proposition that an agency cannot rely on unwritten criteria to justify its decision.

The ICA also ignored decades of black letter law. Forty years ago, this Court held in *Aguiar* that the Hawaii Housing Authority could not use criteria for determining rental amounts that were not in rules enacted pursuant to the Hawai'i Administrative Procedure Act (HAPA). This Court held that it would "not interpret provisions of the Hawaii Administrative Procedure Act so as to give government even 'an appearance of being arbitrary or capricious.'" *Aguiar*, 55 Haw. at 489, 522 P.2d at 1264. This Court cited that same principle in *Ainoa,* in which it held that referees could not rely on decisionmaking criteria that had not been enacted by rule. Relying on criteria that were not enacted pursuant to HAPA "appears to be contrary to the intent and purposes of HAPA." *Ainoa*, 62 Haw. at 292, 614 P.2d at 384. *See also id.* at n. 12. This principle is well established in the law. *See e.g., Honsby v. Allen*, 326 F.2d 605 (5th Cir. 1964) (agency decision reversed here applicant "not afforded an opportunity to know, through reasonable regulations promulgated by the board, of the objective standards which had to be met to obtain a license."); *Holmes v. New York City Housing Authority,* 398 F.2d 262 (2d Cir.

1968)("due process requires that selections among applicants be made in accordance with 'ascertainable standards'").

Finally, the plain language of the rules and their history demonstrate that the BLNR is not allowed to consider other criteria. Language allowing the BLNR to consider whether "public benefit outweighs the impact on the conservation district" was removed from its rules in 1994. HAR § 13-2-11(c)(8) (1991), found at the Supreme Court law library, was repealed by Act 283, 2000 Sess. Laws of Haw. Thus, the ICA and circuit court erred in allowing the BLNR to rely on criteria that are not found in its rules (or other legal authority).

B. The ICA Used the Wrong Test to Determine Whether the ATST Project is Consistent with the Purposes of the Land Use Law and Conservation District.

On page 13 of its opinion, the ICA concluded that because the BLNR's rules allow astronomy facilities in the resource subzone, the ATST project is *per se* consistent with the purposes of the conservation district. The ICA's analysis falls short.

First, the ICA confused an "as applied" challenge with a "facial" challenge, which are distinct issues. *Cf Jou v. Dal-Tokyo Royal State Ins. Co.,* 116 Hawai'i 159, 166, 172 P.3d 471, 478 (2007). Appellant is **not** arguing that astronomy facilities are *per se* inconsistent with the purposes of the conservation district and the land use law. Rather, this specific project, the ATST project (given its unprecedented height, mass, and scale; industrial appearance; use of hazardous materials, location in "Science City", location in an area that is already 40% developed, and substantial impacts), is inconsistent with these purposes. The ICA wrongly assumed that as long as the BLNR's rules generally allow astronomy facilities in the conservation district, it need not analyze whether this specific astronomy project is consistent with the purposes of the conservation district and land use law.

Second, the ICA compounded this error by failing to employ the analytical framework articulated by this Court in *Neighborhood Bd.* The ICA further ignored the legislative history of amendments to the conservation district law that reveal that conservation district is to be protected from urban encroachment.

Finally, the ICA did not even consider whether the proposed ATST project itself "frustrates the state land use law's basic objections," *Curtis*, 90 Hawai'i at 396, 978 P.2d at 834.

C. The ICA Erred in Rubberstamping the BLNR's Findings Regarding Impacts.

In repeatedly citing *Application of Hawaiian Elec. Co., Inc.* 81 Hawai`i 459, 465, 918

P.2d 561, 567 (1996), the ICA refused to actually look at the evidence and rubberstamped the BLNR's findings. Given the political overtones which seriously curtailed the operation of those processes ordinarily to be relied upon to protect Native Hawaiian rights and public trust natural resources, this Court should engage in a correspondingly more searching judicial inquiry. *Cf. United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4, 58 S.Ct. 778, 783 n.4, 82 L.Ed. 1234, 1241 n.4 (1938). In cases involving public trust natural resources and Native Hawaiian rights, this Court has routinely taken a close look at the evidence. *Waiāhole,* 94 Hawai'i at 144, 9 P.3d at 456;[4] *Kauai Springs, Inc. v. Planning Comm'n of Kaua`i*, 133 Hawai`i 141, 165, 324 P.3d 951, 975 (2014) ("we must take a 'close look' at agency decisions that involve the public trust"); *In re 'Īao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications & Petition*, 128 Hawai`i 228, 251, 287 P.3d 129, 152 (2012) (undertaking a "close review" of agency's decision); *Sierra Club v. DOT*, 115 Hawai`i 299, 342, 167 P.3d 292, 335 (2007) ("this court 'must ensure that the agency has taken a "hard look' at environmental factors.'"); *Diamond v. Dobbin,* 132 Hawai'i 9, 34, 319 P.3d 1017, 1042 (2014) ("many of the agency's findings of fact were clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record"); *Curtis*, 90 Hawai'i at 400, 978 P.2d at 838 ("remarkable disparity" in the evidence).

The need for close review is compounded in this case because the BLNR's decision here, like that in *Diamond*, "appears to be a post hoc justification of its earlier decision." *Diamond*, 132 Hawai`i at 30, 319 P.3d at 1038. Given the creation of environmental courts pursuant to Act 218, Sess. Laws of Haw. 2014, this Court should provide badly needed judicial guidance to the new environmental courts when reviewing agency decisions such as this one.

1. The impacts to cultural resources are substantial.

In affirming the BLNR's decision, the ICA (1) held, on page 21 of its opinion that the BLNR "is not bound by the conclusions of a conservation district use application"; and (2) failed (like the Circuit Court and the BLNR) to cite to any evidence in the record that the impacts to cultural resources would be less than substantial (or to any evidence that any mitigation measure would reduce the intensity of the impact).

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[4] Natural beauty is a public trust resource, and traditional practices are public trust purposes. *Waiāhole,* 94 Hawai'i at 136-137, 9 P.3d at 448-449. *See also Morgan v. Planning Dept., County of Kaua`i*, 104 Hawai`i 173, 181 and 184 n. 12, 86 P.3d 982, 990 and 993 n.12 (2004).

The ICA disregarded the applicant's admission in spite of the principle that admissions in any judicial pleading are binding. *Cf. Lee v. Puamana Cmty. Ass'n*, 109 Hawai'i 561, 573, 128 P.3d 874, 886 (2006). In a quasi-judicial proceeding, an applicant's admission (against its own interest) should **not** be disregarded – particularly if there is no evidence to the contrary. Nor should they be discounted here because Appellant relied on the applicant's admissions, JEFS #101 RA:10-13, 22-27 (Exhibit B-2); JEFS #103 RA:163-65, 176. Disregarding an applicant's damning admission is also arbitrary and capricious.

The courts are not being asked to weigh evidence here. There is **no** evidence in the record that the impacts to cultural resources would not be substantial. "A conclusion requires evidence to support it." *Kauai Elec.,* 60 Haw. at 184, 590 P.2d at 537. Furthermore, the BLNR concluded, "The cumulative effects on traditional cultural resources of past actions combined with the ATST Project would be major, adverse, long-term and direct." JEFS #115 RA: 384 FOF 170.

The decision in *Mālama Makua v. Rumsfeld*, 163 F. Supp. 2d 1202, 1218 (D. Haw. 2001), which concerned the National Environmental Policy Act, is clearly not binding here. Nevertheless, the ICA's discounting of the federal court's analysis is cavalier. It should be obvious that a perfunctory description or mere listing of mitigation measures, without supporting analytical data, is insufficient to support a finding of no substantial adverse impact.

The ICA, the Circuit Court and the BLNR erred given that (1) the applicant repeatedly admitted that the impacts to cultural resources would be substantial; (2) there is no evidence that the impacts to cultural resources would not be substantial; and (3) there was no evidence that the mitigation measures would reduce the intensity of the impacts to less than substantial.

2. The impacts to other natural resources are substantial.

In concluding that the ATST would not have a substantial impact on scenic vistas, the BLNR relied on a few sentences in the FEIS while disregarding other conclusions in the FEIS – as well as the conclusions of (a) the applicant in its own application, (b) the National Science Foundation, the applicant's partner (c) the National Park Service and (d) the hearing officer who visited the site. Because 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**." *Waiāhole,* 94 Hawai'i at 163-4, 9 P.3d at 475-6 (emphasis added). The BLNR failed to give any reason for discounting the rejected evidence. Furthermore, it is arbitrary and capricious for the BLNR to rely on the FEIS to reach certain

conclusions, but reject other portions the FEIS without explanation.

D. The ICA Erred in Interpreting and Applying HAR §13-5-30(c)(5).

The ICA justified the BLNR's compliance with HAR §13-5-30(c)(5) by noting on page 29 of its opinion that "the Board appears to have interpreted 'locality and surrounding areas' as immediate vicinity, i.e., the Observatory Site." In so doing, the ICA overstepped its bounds. A "reviewing court must judge the propriety of agency action solely by the grounds invoked by the agency." *Waiāhole*, 94 Hawai`i at 163, 9 P.3d at 475. The BLNR never said the "surrounding area" is just the HO and excludes the national park. In fact, the BLNR itself recognized that the national park was part of the surrounding area.

> The parties and Hearing Officer Jacobson visited **the site of the proposed ATST and the surrounding area** on July 15,2011. They observed the views from the area, the proximity of the structures to each other, the ahu' in the HO site and views from them, the view from **Pu 'u 'Ula 'ula, the view from the Haleakala National Park** Visitor Center and the area around the Visitor Center, the view from the road driving up to the HO site, and the historic sites in the HO site.

JEFS #115 RA:353 FOF 16 (emphasis added). *See also id.* at 357 ("other surrounding uses"); *id.* at 354-5, 385-6 FOFs 21-27, 176-9. The ICA's interpretation also ignored the plural in the term "surrounding areas." Although the HO may be a surrounding area, the BLNR's rules call for compatibility with surrounding areas. There is no evidence in the record that the ATST project is compatible with Haleakala National Park, which is only two hundred yards away. JEFS #203 SR:102, 390, 504; JEFS #97 RA:515-16; JEFS #207 SR:395.

E. The ICA Erred in Interpreting and Applying HAR §13-5-30(c)(6).

The ICA err in interpreting HAR § 13-5-30(c)(6) in a manner that excludes consideration of natural beauty and open space characteristics. Because the applicant admitted that the ATST does not improve natural beauty or open space characteristics, JEFS #117 RA:294, and the BLNR failed to point to any evidence that the ATST preserves natural beauty and open space, HAR § 13-5-30(c)(6) is not met.

F. The ICA Erred in Assuming the Lease of a Portion of Land Does not Subdivide it.

In holding on page 31 that there is no subdivision of land related to this application, the ICA ignored all of the authority cited by Appellant that the term "subdivision" includes the leasing a portion of a parcel of land. *See, e.g., In re Taxes Bishop Estate*, 27 Haw. 190 (1923)(acknowledging that property is leased in subdivisions or lots to various tenants);

Brennan v. Stewarts' Pharmacies, 59 Haw. 207, 212, 579 P.2d 673, 676 (1978)(recognizing that space was subdivided through subleases); and BLACK'S LAW DICTIONARY 1002 (5th ed. 1979) (definitions of "parcels" "conveyance" and "subdivision"). As a matter of law, with approval of this project, the applicant is subdividing the property.

G. The ATST Project is Not Consistent with a Valid Management Plan.

The ICA erred in holding that the ATST project is consistent with the management plan. First, the ICA ignored Appellant's on-going challenge to the validity of the management plan. *See Kilakila 'O Haleakalā v. Univ. of Haw.*, 2014 Haw. LEXIS 274 (Sept. 12, 2014). Second, the ICA carved out an exception to the management plan that even the BLNR did not recognize. *Cf* JEFS #115 RA:418 FOF #320. Ignoring the unambiguous language of the management plan, JEFS #93 RA:68-69, the ICA on page 35 of its opinion held that because the applicant's partner unilaterally concluded that an exception would not undermine the purposes of the management plan, the BLNR must have intended an exception to the management plan's literal requirements. Yet, the BLNR never reached that conclusion.

H. The ICA Erred in Tolerating Procedural Errors.

Finally, the ICA turned a blind eye to the BLNR's procedural errors. The ICA cited HRS § 171-6(20) to justify the BLNR's conduct. But HRS chapter 183C is not part of HRS chapter 171. The ICA saw no prejudgment in allowing construction to proceed on a portion of the project being contested before decisionmaking. It saw no harm in ex parte political pressure placed on the BLNR chair, or in the role of the deputy attorney general.

V. CONCLUSION

The significant resources of the conservation district can only be protected if the BLNR acts: pursuant to its own written rules; consistently with the purposes of the land use law and the conservation district law; and based on the substantial evidence. When the BLNR acts with unfettered discretion, the legal protections afforded the state's most important natural and cultural resources are undermined. Based on the above and its briefs filed with the ICA, Appellant respectfully requests that this Court accept this application for a writ of certiorari.

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

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