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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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PILA'A 400, LLC,
Petitioner/Appellant-Appellant,

vs.

BOARD OF LAND AND NATURAL RESOURCES and
DEPARTMENT OF LAND AND NATURAL RESOURCES, STATE OF HAWAI'I,
Respondents/Appellees-Appellees.

SCWC-28358

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(ICA NO. 28358; CIV. NO. 05-1-0103)

FEBRUARY 14, 2014

CONCURRING AND DISSENTING OPINION BY NAKAYAMA, ACTING C.J.

I concur with the majority's holding that the BLNR had jurisdiction to institute the enforcement action and that the BLNR was not required to engage in rule-making before imposing financial penalties against Pila'a 400. However, I respectfully dissent from the majority's holding that Pila'a 400 received

reasonable notice before the contested case hearing.

Prior to the catastrophic events at issue in this case, Pila'a Bay was characterized as a beautiful area, an excellent site for swimming, snorkeling, fishing, and gathering edible seaweed, and an important habitat for marine life, with coral cover reaching almost 14 percent. Pilaa's inner reef was one of few extensive shallow reefs on the northeast coast of Kaua'i protected from ocean swell by an outer reef and "one of the few remaining high value coral reef flats in the state that had largely escaped encroachment from development and stress from improper land practices."

It is undisputed that on the night of November 26, 2001, during a heavy rainfall, a large portion of recently graded and filled hillside on property owned by Pila'a 400 (the Property) eroded into and engulfed Pila'a Beach and Bay. The earlier unpermitted grading and filling work on the Property, and the failure to implement adequate sediment and water pollution event controls for this unpermitted work, led to the massive pollution that occurred at Pila'a. The State seeks to recover damages for the remedial, restoration, and monitoring costs it expended in response to this avoidable environmental disaster.

The purpose of the contested case hearing was to determine whether the excessive sedimentation at Pila'a was caused

by Pila'a 400's violation of land use regulations and, if so, to calculate the cost of the resultant damages. Prior to and throughout the contested case hearing, the only land use violations alleged were unpermitted road construction, grading, filling of gulches, and storm drain construction occurring on the Property prior to Pila'a 400's ownership. It was not until Pila'a 400 filed its purposed findings of fact contending that it was not liable for the land use violations occurring prior to its ownership of the Property that the Department of Land and Natural Resources (DLNR) first suggested that the deposit of sediments onto Pila'a Beach and Bay constituted a violation of Hawai'i Administrative Rules (HAR) § 13-5-24 (1994) (governing land use in the resource subzone). Pila'a 400 immediately objected that it had never received notice that it was being prosecuted for this violation. Despite Pila'a 400's objections, the Board of Land and Natural Resources (BLNR) ultimately determined that Pila'a 400 was liable for the damage to Pila'a Beach and Bay due to its violation of HAR §§ 13-5-24 and 13-5-30(b) (1994) (prohibiting land use within the conservation district, including the resource subzone, without permit, variance, or other approval) through the unauthorized placement of solid material on conservation district land.

Because the contested case hearing notice failed to

alert Pila'a 400 to the particular sections of the statutes and rules involved in the hearing, and because it failed to provide Pila'a 400 with notice of the violation for which it was eventually found liable, the contested case hearing notice violated the Hawai'i Administrative Procedures Act's (HAPA) requirements mandated by HRS § 91-9(b) and Pila'a 400's due process rights. We must not allow the State's eagerness to recoup damages for the significant harm that occurred on conservation district land to run roughshod over the HAPA and the basic tenants of due process. Due process is "intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.'" Bishop v. Mahiko, 35 Haw. 608, 638 (1940) (quoting Bank of Columbia v. Okely, 17 U.S. 235, 244 (1819)). To enforce a judgment of more than 4 million dollars against a party who was not informed of the nature of the alleged violation prior to the judgment is an arbitrary exercise of government powers of the kind the due process clause was meant to guard against.

I. Pila'a 400 did not receive notice of the alleged violation prior to the contested case hearing

The heavy rainfall on November 26, 2001 caused a large portion of the recently graded and filled hillside on the Property to erode and resulted in a mudflow into the conservation

district -- covering the beach in several feet of mud and pouring into the bay. This tragic disaster severely degraded the condition of Pila'a Bay. During a scientific assessment conducted by the DLNR in June of 2002, the shallow areas of the bay suffered from chronic turbid conditions and corals were bleached, dead, dying, and becoming overgrown by algae. The assessment concluded that approximately 2,943 square meters of live coral was destroyed by the November 26, 2001 mudflow and subsequent sedimentation. Although much of the sediment has been cleansed from the beach by natural wave action, sediment and its negative impacts remain at Pila'a. It is unknown if the area will ever return to its pre-mudflow conditions.

In cases of such egregious damage, the desire to hold responsible parties liable is understandable, but it must not overshadow the importance of affording all parties due process of law. Subsequent to the catastrophic mudslide of November 26, 2001, the DLNR initiated an investigation into the illegal work conducted within the conservation district at Pila'a. On January 28, 2002, the DLNR provided a notice to Pflueger Properties and James Pflueger, Trustee (the former owners of the Property), that they were "in violation of [HAR] title 13, Chapter 5, entitled 'Conservation District' providing for land use within the Conservation District, enacted pursuant to Chapter 183C." The

notice stated that "[t]he following uses were conducted on the subject premises: grading, grubbing, cutting, and culvert construction" and that "[t]hese uses were not authorized by the [DLNR]." (Emphasis added).

The DLNR's subsequent report, entitled "Unauthorized Grading, Grubbing, Filling, Road Construction, Landscaping, Drainage Improvements, and Damages to State Land and Natural Resources due to Excessive Sedimentation at Pila'a" clarified that the DLNR based its jurisdiction over the damages at Pila'a Bay, on these alleged violations occurring on land, and not on the illegal dumping of sediments in Pila'a Bay. The report summarized the unauthorized land uses as follows:

The first part of this report documents the unauthorized land uses within the Conservation District. The unauthorized uses include [1] an unauthorized dirt road through gulch 2, and along the shoreline, [2] an unauthorized vertical cut in the coastal bluff, [3] unauthorized fill¹ and grading at the seaward extent of gulch 2 and [4] unauthorized storm drain construction adjacent to the beach. In addition, there are unauthorized improvements on the west side of the property consisting of a dirt road and graded/grassed picnic area that abuts the shore.

These unauthorized improvements resulted in extensive damages to shoreline and marine resources at Pila'a Bay, which was the focus of this report.

(Emphasis added). The land uses summarized in the report involved unauthorized construction activities, or "improvements,"

¹ This explanation of the unauthorized land uses demonstrated that the use of the word "filling" in the title of the report referred to the unauthorized fill of gulch 2, and not to any filling of the submerged land of Pila'a Bay.

occurring on land outside of the resource subzone. The report also incorrectly named "Pflueger Properties" as the landowner, instead of "Pila'a 400." While Pflueger Properties was the landowner at the time of the illegal activities discussed in the report, these activities had concluded before January 23, 2001, when Pila'a 400 assumed ownership of the property.

James Pflueger, Pflueger Properties, and Pila'a 400 (collectively, the Pflueger Parties) filed a written request for a contested case hearing with the BLNR, indicating that the Pflueger Parties contested not only the DLNR's calculation of damages, but also the Pflueger Parties' liability for these damages. On September 2, 2003, the BLNR determined that "[t]he landowner (James Pflueger)" had committed the first four land use violations detailed in the DLNR report -- described as: "failing to obtain the appropriate approvals for road construction, grading, filling, and storm drain construction" -- and assessed a fine. These violations were not assessed against Pila'a 400, and the violations did not include the dumping of sediment onto submerged land.

By notice of October 3, 2003, the BLNR indicated that it would "conduct a contested case hearing . . . regarding an enforcement action involving the alleged damages to State land(s) and natural resources due to excessive sedimentation at Pila'a."

While the notice indicates that the alleged damages were "due to excessive sedimentation at Pilaa," this is not evidence that Pila'a 400 was on notice that the alleged violation was "excessive sedimentation." Rather, all previous communications from the DLNR had characterized the "excessive sedimentation" as a result of alleged land use violations.² The notice also stated: "The hearing will be held pursuant to Chapters 91 and 183C, [HRS], and Chapters 13-1 and 13-5, [HAR]."

Prior to the commencement of the BLNR contested case hearing, the parties submitted conflicting statements of the issues. The DLNR stated: "The only issue in this contested case proceeding is the determination of the amount of damages to be assessed against the Pflueger Parties for damages to the beach, reef, and marine environment . . . which were largely the result of excessive sediment input dating from November 2001 and thereafter." The Pflueger Parties stated that they requested a

² The majority states that "[i]f Pila'a 400 was aware that damages would be assessed based on excessive sedimentation, then Pila'a 400 would also be aware that the alleged violation, on which damages are assessed, was the excessive sedimentation." Majority at 62-63 (emphasis in original). The majority reasons that "[t]here is no substantive distinction between being aware of the alleged basis for damages and the alleged violation, where damages can only be imposed based on a violation." Majority at 63. These statements are directly contradicted by the facts of this case. Here, the DLNR repeatedly represented that the alleged violations were unauthorized construction activities occurring outside of the resource subzone that caused the flow of sediments into Pila'a Bay and the resultant damages from excessive sedimentation. Therefore, not only are the basis of damages and the basis of a violation generally distinguishable, but here, Pila'a 400 premised its defense on its understanding that the deposit of sediments onto submerged land was not the alleged violation.

contested case hearing regarding recommendations made by the DLNR to the BLNR including that: "The landowner (James Pflueger) violated the provisions of Chapter 183C, Hawai'i Revised Statutes, and Chapter 13-5, [HAR], by damaging state land and natural resources stemming from unauthorized land uses, for a penalty of \$5,830,000."

The DLNR raised a number of objections to the Pflueger Parties' statement of the issues. The DLNR argued that as the BLNR had "already found that the landowner violated the conservation district laws 'by failing to obtain the appropriate approvals for road construction, grading, filling, and storm drain construction' . . . [t]hese issues and facts necessary to support the [BLNR]'s adoption of that finding and conclusion, therefore, are not issues in this contested case proceeding."

(Emphasis added). This indicates that, at that time, the DLNR sought to base Pila'a 400's liability on the violations that the BLNR concluded James Pflueger had committed, and not on any as of yet unalleged dumping of sediment onto submerged land by Pila'a 400.

On March 12, 2004, the Pflueger Parties submitted a motion for judicial notice of Pila'a 400 as the landowner and to dismiss Pflueger Properties and James Pflueger. The DLNR acknowledged that its report to the BLNR had "identifi[ed] the

landowner as the target of this enforcement action" and "concede[d] that Pflueger Properties and James H. Pflueger, not being the landowners, should therefore be dismissed from this action."

In its opening brief to the hearing officer, Pila'a 400 stated that "[i]n order to prevail on a claim for damage to State land, the DLNR must establish that 1) State land was in fact damaged by Pila'a 400 [sic] violation of land use regulations within the Conservation District; [and] 2) the measure of damage is reasonably certain and not founded upon speculation, conjecture, or guess." (Emphasis added).

In its November 10, 2004 proposed findings of fact, Pila'a 400 raised the defense that it could not be held liable for the damages to Pila'a Bay because it was not the property owner at the time of the road construction, grading, and gulch filling within the conservation district -- the unlawful activities charged in the violations. This attestation by Pila'a 400 appears to have alerted the DLNR to a grave weakness in its case. By allowing the dismissal of Pflueger Properties and James Pflueger, the DLNR had allowed the dismissal of the only parties responsible for the alleged violations of road construction, grading, and filling. At this late date, the DLNR was forced to craft a new theory under which Pila'a 400 could be held liable for

the damages to Pila'a Beach and Bay; a theory of which Pila'a 400 had no prior notice.

In the DLNR's November 10, 2004 proposed findings of fact, it suggested for the first time that the "mudflow and subsequent sedimentation events constitute[d] placement of solid material on land and grading of land and . . . marine construction within the meaning of HAR § 13-5-24." Despite Pila'a 400's vehement objections that it had received no notice of this alleged violation, the Hearing Officer recommended that "[t]he November 26, 2001, mudflow and subsequent sedimentation events constitute marine construction within the meaning of HAR § 13-5-24. . . . Pila'a 400 did not have a [DLNR] or [BLNR] permit authorizing marine construction (including filling of submerged land). Nor could a permit be obtained for the filling of submerged land where protected marine resources are destroyed."

The BLNR concluded that Pila'a 400's violation was "placement of any solid material on land in the form of dumping or allowing to be put on conservation land (including submerged land) of a large unknown amount of dirt and sediment . . . without a permit as required by HAR §§ 13-5-24 and 13-5-30(b)."

The majority is correct that the contested case hearing focused primarily on the damages to Pila'a Beach and Bay. The

majority also cites to the numerous instances in which Pila'a 400 was notified that this case concerned "damages to state land and natural resources" and Pila'a 400's general awareness that the damage to the submerged land of Pila'a Bay was at issue in this case. Majority at 51-53. The majority concludes the Pila'a 400 was "unequivocal[ly] . . . informed that the core issue to be determined at the contested case hearing was the damage to the reef caused by sedimentation." Majority at 53.

Clearly, Pila'a 400 was aware that this case concerned its potential liability for the damages to Pila'a Beach and Pila'a Bay (including submerged land) caused by excessive sedimentation from the mudflow of November 26, 2001. However, the pertinent question is whether Pila'a 400 had notice of which sections of HAR chapter 13-5 it was accused of violating or what actions the DLNR alleged constituted a land use violation. At the time of Pila'a 400's alleged violation, HRS § 183C-7(b) authorized the collection of a penalty for damages to State land as a result of "violating [HRS chapter 183C] or any rule adopted in accordance with this chapter." HRS § 183C-7(b). Therefore, in order to prove that Pila'a 400 was liable for damages to State land under HRS § 183-7(b), the DLNR was required to first prove that Pila'a 400 violated a section, or sections, of HRS chapter 183C or HAR chapter 13-5 and that this violation caused the damages to State

land.

II. Pila'a 400 did not waive its argument that it received insufficient notice of the alleged violations

Pila'a 400's appeal is a secondary appeal of an administrative agency's decision and we "'apply the same standard of review as that applied upon primary review by the circuit court.'" AlohaCare v. Ito, 126 Hawai'i 326, 341, 271 P.3d 621, 636 (2012) (quoting Kaiser Found. Health Plan, Inc. v. Dep't of Labor & Indus. Relations, 70 Haw. 72, 80, 762 P.2d 796, 800-01 (1988)). Therefore, any "findings of fact" entered by the circuit court are not binding on this court. Furthermore, because both the circuit court and the ICA reviewed this case on appeal, neither court could properly enter "findings of fact."

It is a patent misrepresentation of the proceedings in this case to state that "Pila'a 400 has conceded that it was 'aware of the general issues' to be determined at the contested case hearing and it was 'sufficiently apprised of the nature of the proceeding' such that the BLNR sought damages based on placement of solid material on submerged land." Majority at 49. Although Pila'a 400 was of course "aware of the general issues" -- that the contested case proceeding concerned the mudslide of November 26, 2001 -- it was not, and it has not conceded, that it was sufficiently apprised of the nature of its violation. At

every opportunity, Pila'a 400 objected to the lack of notice it received that the alleged violation was the placement of solid material on submerged land in violation of HAR §§ 13-5-24 and 13-5-30(b). Specifically, Pila'a 400 raised this objection before the hearing officer, before the BLNR, before the circuit court, before the ICA, and before this court. In its application for writ of certiorari, Pila'a 400 stated that despite "[t]he ICA's reference to Pila'a [400]'s awareness of the 'general issues' and the 'nature of the proceeding' . . . in order to assure procedural due process during an administrative hearing, a party 'must have been apprised of the particulars of the specific claims against him prior to the hearing.'" (quoting Silver v. Castle Mem'l Hosp., 53 Haw. 475, 486, 497 P.2d 564, 572 (1972)). Pila'a 400 never conceded that it received notice that the alleged violation was placement of solid material on submerged land and it properly raised the issue of notice before this court.

III. The contested case hearing notice did not meet the requirements of HRS § 91-9(b)(3)

HRS § 91-9 requires that an agency's notice for a contested case "shall include . . . the particular sections of the statutes and rules involved" in order to ensure "an opportunity for hearing after reasonable notice." (Emphasis added). It is undisputed that the BLNR's Notice cited only to

the HRS and HAR chapters and not to the particular sections of the relevant statutes and rules. Pila'a 400's awareness of the nature of the proceedings and the general issues involved does not satisfy the specificity required by this statutory provision.

“‘[W]here the statutory language is plain and unambiguous, our sole duty is to give effect to its plain and obvious meaning.’” State v. Kalama, 94 Hawai'i 60, 64, 8 P.3d 1224, 1228 (2000) (quoting Citizens for Prot. of N. Kohala Coastline v. Cnty. of Haw., 91 Hawai'i 94, 107, 979 P.2d 1120, 1133 (1999)). There is no ambiguity in the language of HRS § 91-9(b)(3). Notice that fails to cite to “the particular sections of the statutes and rules involved,” does not meet the statutory requirements of HRS § 91-9(b)(3).

The majority states that because HRS § 91-9(b)(3) requires citation to all of the statutes and rules involved, the BLNR's notice stating that the hearing would be held pursuant to HRS chapter 183C and HAR chapter 13-5 was sufficient. Majority at 54-56. The majority's conclusion is based upon its reasoning that “‘involved’ has a broad and inclusive definition” and that the list of the particular HAR chapter 13-5 sections “involved” was too lengthy to enumerate. Majority at 54-55. However, the majority's reading strips the statute of its fundamental requirement that the notice be “reasonable.” See HRS § 91-9.

The BLNR's notice stated that the action would be held pursuant to all of the chapters and rules regarding conservation district lands. The breadth and vagueness of the BLNR's notice failed to alert Pila'a 400 to the issues to be resolved at the contested case hearing and prevented Pila'a 400 from preparing an adequate defense. Such a notice is inherently unreasonable.³

Hawaii's courts have never interpreted this provision, however courts in other jurisdictions have consistently read identical notice provisions in their administrative procedure acts strictly, requiring agencies to provide notice of "the particular sections of the statutes and rules involved." These courts have unanimously concluded that, where the defendant was not informed of the specifics of the alleged violation prior to the contested case hearing, the notice was insufficient. See, e.g., Liberty Mut. Ins. Co. v. Tenn. Dep't of Labor & Workforce Dev., 2012 WL 11739, at *6-7 (Tenn. Ct. App. Jan. 3, 2012) (holding the notice insufficient because it failed to "includ[e] reference to the particular sections of the statutes and rules involved"); Henricks v. Ariz. Dep't of Econ. Sec., 270 P.3d 874,

³ The notice requirements contained in HRS § 91-9 must, at a minimum, be interpreted as requiring reasonable notice to meet constitutional due process requirements. Therefore, the notice must provide sufficient reference to the statutes and rules involved to give the party "'notice of the case against him and opportunity to meet it.'" Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 171-172 (1951) (Frankfurter, J., concurring)); see also infra Part IV (discussing due process notice requirements).

877 (Ariz. Ct. App. 2012) (concluding that because the notice did not reference the "particular sections of the statutes and rules involved" the defendant was "unprepared for her hearing and unable to effectively challenge or verify" the agency's allegations); Villanueva v. Bd. of Pshychologist Exam'rs, 27 P.3d 1100, 1105-06 (Or. Ct. App. 2001) (giving the words of the statute "their plain and natural meaning," notice was insufficient where it failed to reference "particular sections of the statutes and rules involved"); Ex parte Forest Manor, Inc., 739 So.2d 20, 22-23 (Ala. 1998) (holding that notice that failed to include "particular sections of the statutes and rules involved" was lacking because "notice must contain all of the information mandated by the statute"); Matter of Alvarado v. State, 488 N.Y.S.2d 177, 178-79 (N.Y. App. Div. 1985) (holding that notice that failed to reference the "particular sections of the statutes and rules involved" contained "no specific charges to which they could file an answer or prepare for hearing, and no statement of legal authorities").

Giving effect to the plain meaning of HRS § 91-9(b) (3), Respondents were required to provide Pila'a 400 with notice of the particular sections of the statutes and rules involved in its contested case hearing. The notice's reference to HRS chapter 183C and HAR chapter 13-5 failed to meet the specificity required

by HRS § 91-9(b) (3).

IV. The contested case hearing notice violated Pila'a 400's due process rights

The Fourteenth Amendment to the United States Constitution and article I, section 5 of the Hawai'i Constitution, guarantee that no person will be deprived of "life, liberty or property without due process of law." Korean Buddhist Dae Won Sa Temple of Haw. v. Sullivan, 87 Hawai'i 217, 242 nn.28-29, 953 P.2d 1315, 1340 nn.28-29 (1998). "The basic elements of procedural due process of law require notice and an opportunity to be heard at a meaningful time and in a meaningful manner before governmental deprivation of a significant property interest." Sandy Beach Def. Fund v. City Council of City & Cnty. of Honolulu, 70 Haw. 361, 378, 773 P.2d 250, 261 (1989). "'To satisfy the requirements of due process, an administrative agency must give the party charged a clear statement of the theory on which the agency will proceed with the case.'" Charles H. Koch et al., Administrative Law and Practice § 5:32 (3d ed. 2010) (quoting Yellow Freight Sys., Inc. v. Martin, 954 F.2d 353, 357 (6th Cir. 1992)); see also Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the

circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.").

We have frequently stressed that "[d]ue process is flexible and calls for such procedural protections as the particular situation demands.'" Sandy Beach Def. Fund, 70 Haw. at 378, 773 P.2d at 261 (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)). Therefore, the notice of an agency action must be sufficiently specific to alert the party to the purpose of the action and to allow the party to prepare a defense. See Mathews, 424 U.S. at 334 ("The essence of due process is the requirement that 'a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it.'" (quoting Joint Anti-Fascist Refugee Comm., 341 U.S. at 171-172 (Frankfurter, J., concurring))); Matter of Mangini v. Christopher, 736 N.Y.S.2d 180, 184 (N.Y. App. Div. 2002) ("It is axiomatic that due process precludes the deprivation of a person's substantial rights in an administrative proceeding because of uncharged misconduct and it necessarily follows, therefore, that a respondent in such a proceeding is entitled to fair notice of the charges against him or her so that he or she may prepare and present an adequate defense and thereby have an opportunity to be heard.'" (ellipses omitted) (quoting Matter of Block v. Ambach,

537 N.E.2d 181, 184 (N.Y. 1989)).

In Silver, this court considered whether a physician whose staff privileges were not renewed by a hospital board received adequate notice pursuant to the requirements of procedural due process. 53 Haw. at 476-77, 484, 497 P.2d at 566-67, 571. We reasoned that although the physician was provided with a hearing, it did not meet the requirements of due process:

[The physician] was never provided with specific written charges as to why his performance was not deemed acceptable. He was merely read an indictment of general allegations at the hearing. In order for appellant's right to a hearing to be effective he must have been apprised of the particulars of the specific claims against him prior to the hearing. In this case appellant had no opportunity to investigate the basis for his performance being questioned. As such his right to present a defense was rendered nugatory.

Id. at 486, 497 P.2d at 572. We stated that due process requires that one receive notice "sufficiently adequate to apprise him of the specific charges against him." Id. at 485, 497 P.2d at 571. While Silver is factually distinguishable from the present case, the basic due process notice requirements are equally applicable -- due process required that Pila'a 400 receive notice of the specific violation of which it was accused.

The majority cites to our decision in In re Hawai'i Electric Light Co., Inc., 67 Haw. 425, 690 P.2d 274 (1984) for the principle that an agency may "base[] its final conclusion on grounds that had neither been presented . . . by either side in a contested case hearing, nor stated in the [HRS] § 91-9(b)

notice." Majority at 59. In In re Hawai'i Electric, the petitioner alleged that the notice was insufficient because it failed to specify all of the issues that could be considered in determining whether the proposed tariffs, rates, and rate structure were reasonable; specifically the notice failed to identify a factor that the agency used to reach its final determination. 67 Haw. at 429, 690 P.2d at 277. We reasoned that "[t]he nature and complexity of rate-making proceedings make it impractical to adopt a particularistic standard of issue identification." Id.

In re Hawai'i Electric is easily distinguished from this case. Here Pila'a 400 is not requesting notice of an amorphous array of possible issues that an agency may consider in reaching its decision. Instead, Pila'a 400 alleges only that it did not receive notice of the nature of the alleged violation which became, belatedly, the basis of the entire proceeding. Mandating that the BLNR provide notice to alleged violators of the land use provisions they are accused of violating is a reasonable requirement, in addition to being a fundamental requirement of due process.

The majority cites to Chang v. Planning Comm'n of the Cnty. of Maui, 64 Haw. 431, 445, 643 P.2d 55, 58 (1982), for the principle that notice is not insufficient due to mere technical

violations. Majority at 57-58, 61. While this principle is sound, an examination of Chang demonstrates the wide disparity between excusable technical violations and the events here. In Chang, a published notice failed to comply with the requirement of HRS § 91-9(b)(5), that a party be informed of its right to be represented by counsel at a hearing. 64 Haw. at 447-48, 643 P.2d at 58-59. However, the petitioner in Chang received a separate notice which included information regarding his right to counsel and he was later orally advised of his right to retain counsel. Id. at 448, 643 P.2d at 59. This court held that "while the planning commission may have committed a technical statutory violation in its published notices, appellant cannot be heard to complain of harm or injustice caused thereby as he subsequently received ample notice of his right to representation." Id. at 454, 643 P.2d at 62.

The circumstances here are vastly different than the circumstances in Chang. Here, prior to the close of the hearing, Pila'a 400 was actually unaware that the violation from which its liability stemmed was unauthorized dumping on submerged land pursuant to HAR §§ 13-5-24 and 13-5-30(b). As discussed in Part I, a review of the record of communications reveals that not only did Pila'a 400 believe, but the DLNR itself alleged, that Pila'a 400's liability stemmed from the four land use violations the

BLNR found the "landowner (Mr. Pflueger)" committed in its September 2, 2003 determination. In its pre-hearing filings, and during the contested case hearing, Pila'a 400 repeatedly argued that it could not be held liable for these violations. Because Pila'a 400 was not provided with notice of a possible violation of HAR §§ 13-5-24 and 13-5-30(b) by the unauthorized dumping of sediments onto submerged land, it was not able to prepare or present a meaningful and adequate defense to this violation during the contested case hearing.

V. Conclusion

The BLNR ordered Pila'a 400 to pay more than 4 million dollars in damages as a result of the unauthorized deposit of sediments onto submerged land. However, prior to the close of the contested case hearing, Pila'a 400 received no notice that its liability for the damages to Pila'a Bay could or would stem from this violation. The notice Pila'a 400 received neither cited to the specific rules governing such a violation, nor allowed Pila'a 400 to prepare a defense to such a charge. This notice violated both HRS § 91-9(b)(3) and the due process clause. To permit an administrative agency to provide such woefully insufficient notice before depriving an individual of a protected interest sets a dangerous precedent for Hawaii's administrative law.

/s/ Paula A. Nakayama

