



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT
P.O. BOX 621
HONOLULU, HAWAII 96809

STAFF SUBMITTAL

COMMISSION ON WATER RESOURCE MANAGEMENT

November 20, 2013
Honolulu, Hawaii

Carolee and Blake Kolona's Request for a Contested Case Hearing
on Pacific Links Hawaii, LLC's Application for a Stream Channel Alteration Permit
(SCAP.3645.3), Makaha West Golf Course Improvements, Makaha and West Makaha Streams,
Makaha, Oahu, TMKs: (1) 8-4-002:053, 055, and 067

PETITIONER:

Carolee and Blake Kolona, Trustees
Kolona Land Trust
84-1042 Maunaolu Street
Waianae, HI 96792

SUMMARY:

On May 22, 2013, Carolee and Blake Kolona ("Kolona") submitted a timely request for a contested case hearing on Pacific Links Hawaii, LLC's Application for a Stream Channel Alteration Permit ("SCAP") (SCAP.3645.3), Makaha West Golf Course Improvements, Makaha and West Makaha Streams, Makaha, Oahu (TMKs: (1) 8-4-002:053, 055, and 067) ("Makaha West"), which was scheduled for decision making at the May 22, 2013 meeting. Both the Kolona request and the Makaha West SCAP were deferred.

This matter was presented but deferred again at the August 21, 2013 Commission meeting (Item E-1). The Commission August 21, 2013 submittal is incorporated here by reference.

The Kolona's land is *upstream and mauka* of the Makaha West land and all activities proposed in the stream channel alteration permit. The work under the SCAP Application and project will not impact lands *mauka or inland* of the golf course, including the mauka Kolona property. The Kolonas may present information to the Commission at the meeting scheduled to consider the matter, but they do not have a right to a contested case hearing.

LOCATION: See Exhibit 1.

BACKGROUND:

On October 23, 2012, the Commission received a complete SCAP application from Pacific Links Hawaii, LLC, through its agent Wilson Okamoto Corporation.

On May 22, 2013, prior to the start of the Commission meeting at which the SCAP was to be decided, Carolee and Blake Kolona timely submitted a written petition requesting a contested case hearing. HAR §13-167-52. The Commission heard the staff presentation on Pacific Links Hawaii, LLC SCAP application, but deferred decision-making until the request for a contested case hearing was resolved.

On August 21, 2013, the Kolona's request for a contested case hearing was heard by the Commission. The petitioner was present, but the Commission deferred decision-making to provide more notice.

Applicant Pacific Links Hawaii, LLC, proposes to construct five tee boxes adjacent to the subject streams, including the grubbing of existing vegetation, installation of fill for new golf holes, finish grading, stream bank protection with soil gripper bag walls, and stream bank revegetation with native plants and trees.

No construction work will be done within the stream bed or the ordinary high water mark of the Makaha and West Makaha Streams, located in Makaha, Oahu.

The Kolona's land is *upstream and mauka* of the Makaha West land and activities proposed in the stream channel alteration permit. The stream does not actually flow through the Kolona property. Thus, there is no potential impact of this Application on the upstream Kolona property.

DISCUSSION:

A contested case hearing is one where the "legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing." Haw. Rev. Stat. §91-1(5).¹ A contested case is "required by law" if a person has a property or liberty interest that must be afforded due process.²

To establish a due process right to a contested case hearing, the claimant must first show that "the particular interest which claimant seeks to protect by a hearing [is] 'property' within the meaning of the due process clauses of the federal and state constitutions[.]" Sandy Beach Def. Fund v. City Council of Honolulu, 70 Haw. 361, 376, 773 P.2d 250, 260 (1089). "Property interests, of course, are not created by the Constitution. Rather they are created and their

¹ HAR §13-167-51 provides in relevant part that: "When required by law, the commission shall hold a contested case hearing upon its own motion or on the written petition of any government agency or any interested person who is properly admitted as a party pursuant to section 13-167-54."

² The Fourteenth Amendment to the U.S. Constitution provides, in part, "nor shall any state deprive any person of life, liberty, or property, without due process of law." Article I, section 4 of the Hawaii Constitution provides, in part, "[n]o person shall be deprived of life, liberty or property without due process of law."

dimensions are defined by existing rules or understanding that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.” Int’l Broth. of Painters and Allied Trades v. Befitel, 104 Haw. 275, 283, 88 P.3d 647 655 (2004) (quoting Bd. of Regents v. Roth, 408 U.S. 564 (1972)). This property interest must be one for which the claimant has “a legitimate claim of entitlement” and must be “more than an abstract need or desire” or “a unilateral expectation.” Bush v. Hawaiian Homes Comm’n, 76 Haw. 128, 136, 870 P.2d 1272, 1280.

The Kolonas request a contested case hearing on the basis of an easement for the “free flowage of water through the natural stream beds, as set forth by Land Court Orders Nos. 10157, filed March 7, 1951, and 10510, filed July 31, 1951.” Land Court Order No. 10157 applies to both the Kolona and the Makaha West Golf Course properties. Both were registered together in Land Court Application 1052. Land Court Order No. 10157 identifies “an easement for the free flowage of water through the natural stream beds” as an encumbrance on the registered property.

What the Kolonas claim as their easement right is, in fact, *an encumbrance on both properties*. An encumbrance is not a beneficial property interest belonging to the landowner. Rather it is a right that a third party has to require that the Kolonas accept the free flow of water across their land. See S. Utsunomiya Enterprises, Inc. v. Moomuku Country Club, 75 Haw. 480, 502, 866 P.2d 951, 963 (1994) (“An ‘encumbrance’ is any right or interest existing in a third person that diminishes the value of the estate to the grantee, but which is consistent with the passage of the estate to the grantee.”). The Kolonas’ Warranty Deed, Certificate of Title 1040309 (dated March 29, 2012) also states that their property is subject to the “free flowage of water through the natural stream beds, as set forth by Land Court Orders Nos. 10157.”³

The Kolona property is located next to and mauka of the Makaha West Golf Course. The Kolonas have not shown with any particularity how activities associated with the stream channel alteration permit *downstream of their land* will adversely impact their property mauka of the activities.⁴ See Response to Petition Question 13. They did not claim to engage in any stream related activities. See Response to Petition Question 12.

There is no specific allegation how SCAP activities above the ordinary high water mark and outside the flow of water could potentially impact the Kolona property located upstream. The activities covered under the SCAP occur *downstream* of the Kolona property and could not harm their mauka land. For purposes of this SCAP, the Kolonas have alleged no specific nexus between the site of the proposed activities and their land.

The Kolonas do not have a property interest that would entitle them to a contested case hearing.

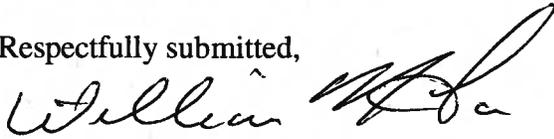
³ The Limited Warranty Deed for Makaha West Golf Course similarly states that the property is subject to the “free flowage of water through the natural stream beds, as set forth by Land Court Orders Nos. 10157, filed March 7, 1951, and 10510, filed July 31, 1951.”

⁴ Makaha West Stream does not flow through the Kolona property, nor is it located adjacent to the Kolona property.

RECOMMENDATION:

That the Commission deny the petition for a contested case hearing filed by Carolee and Blake Kolona.

Respectfully submitted,

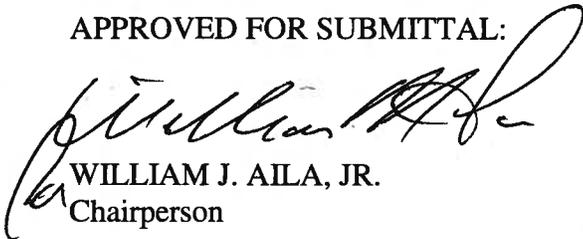


WILLIAM M. TAM
Deputy Director

Exhibits:

1. Location Map.
2. Petition for a Contested Case Hearing before the Commission on Water Resource Management, filed by Carolee and Blake Kolona.

APPROVED FOR SUBMITTAL:



WILLIAM J. AILA, JR.
Chairperson



The Kolona property is TMK 8-4-029-142 shown in the upper right hand corner.

**PETITION REQUESTING A CONTESTED CASE HEARING BEFORE THE
COMMISSION ON WATER RESOURCE MANAGEMENT**

**NOTE: THIS PETITION IS TO BE FILED IN PERSON OR MAILED AND
POSTMARKED WITHIN 10 DAYS OF THE PUBLIC HEARING OR
COMMISSION MEETING AT WHICH THE REQUEST FOR A CONTESTED
CASE HEARING WAS MADE.**

(Please submit an original and 3 copies, pursuant to HAR 13-167-25(c)).

IF MAILED, SEND TO: Commission on Water Resource Management
P.O. Box 621
Honolulu, Hawaii 96809
Phone: (808) 587-0225 Fax: (808) 587-0219

IF DELIVERED: Commission on Water Resource Management
1151 Punchbowl St., Rm. 227, Kalanimoku Bldg.
Honolulu, HI 96813

2013 11 22 AM 9:24

Please provide the following information:

(If there is not sufficient space to fully answer any of the items noted below, please use additional sheets of paper)

CAROLEE KOLONA, TRUSTEE OF THE KOLONA LAND TRUST

1. **NAME:** Blake Kolona, Trustee of the Kolona Estate Land Trust
(If you are representing an organization, please attach the resolution, meeting minutes, or other evidence that provides your authority.)
2. **ADDRESS:** 84-1042 Mauna'olu Street, Waianae, HI 96792
PHONE: _____ **FAX:** _____
3. **ATTORNEY OR CONTACT PERSON:** _____
4. **ADDRESS:** _____
PHONE: _____ **FAX:** _____
5. **SUBJECT MATTER:** opposing SCAP.3645.3 approval and hearing
6. **DATE OF PUBLIC HEARING/COMMISSION MEETING:** _____
7. **WHAT IS THE LEGAL AUTHORITY UNDER WHICH THE PROCEEDING, HEARING OR ACTION IS TO BE HELD OR MADE (CITE APPLICABLE SECTION OF CONSTITUTION, STATUTES, OR ADMINISTRATIVE RULES):**

8. **ARE YOU HAWAIIAN?** _____

**PETITION REQUESTING A CONTESTED CASE HEARING BEFORE
THE COMMISSION ON WATER RESOURCE MANAGEMENT**

9. WHAT IS THE TAX MAP KEY OF THE PROPERTY ON WHICH YOU RESIDE?

(1) 8-4-029-142

10. WHAT IS THE TAX MAP KEY OF THE PROPERTY CONSIDERED IN THIS ISSUE?

(1) 8-4-002: 053, 055, and 067

**11. WHAT IS THE TAX MAP KEY OF THE PROPERTY OR PROPERTIES WHICH YOU
OWN IN THE VICINITY OF THE PROPERTY CONSIDERED IN THIS ISSUE?**

(1) - 8-4-029-142

**12. WHAT, IF ANY, ACTIVITIES HAVE YOU ENGAGED IN ON THE PROPERTY
CONSIDERED IN THIS ISSUE?**

13. WHAT IS NATURE AND EXTENT OF YOUR INTEREST THAT MAY BE AFFECTED?

**My easement rights in maintaining the "free flowage" of Makaha and West Makaha Streams
as set forth in Land Court Order No. 10157 of 1951.**

**PETITION REQUESTING A CONTESTED CASE HEARING BEFORE
THE COMMISSION ON WATER RESOURCE MANAGEMENT**

**14. WHAT IS THE DISAGREEMENT, DENIAL, OR GRIEVANCE WHICH YOU ARE
CONTESTING?**

I do not agree the Water Commission has jurisdiction over LCO easements (my easement rights) to hear or adjudicate this SCAP application. I also oppose any alteration of the free flowage of the Makaha Stream(s) by applicant, based upon my easement rights set forth in Land Court Order No. 10157 of 1951, which applicant has as an encumbrance on their deed(s).

15. WHAT ARE THE BASIC FACTS AND ISSUES?

Applicants want to alter the natural free flowages of the Makaha Stream and West Makaha Streams, via Stream Channel Alteration Permit application, and I am asserting my easement rights under LCO 10157 to oppose any such stream channel alterations by applicant or anyone else, now or in the future.

**PETITION REQUESTING A CONTESTED CASE HEARING BEFORE
THE COMMISSION ON WATER RESOURCE MANAGEMENT**

16. WHAT IS THE RELIEF THAT YOU SEEK OR THAT YOU DEEM YOURSELF ENTITLED? The Water Commission must recognize my easement right, and thus has no jurisdiction to hear this SCAP application. The application should be dismissed for lack of jurisdiction or denied forthwith based upon my easement right being clearly exercised to oppose any alteration of the free flowage pursuant to my rights under LCO 10157.

17. IDENTIFY ANY AND ALL OTHER PERSONS WHO MAY OR WILL BE AFFECTED BY THE RELIEF WHICH YOU SEEK:
Land owners in Makaha Valley.

The above-named person hereby requests and petitions the Commission on Water Resource Management for a Contested Case Hearing in the matter described above.

Blake Kolona
Name (Print)

Blake Kolona
Signature

5/10/13
Date

Carolee Kolona

*Carolee*⁴

CCHR FORM (05/21/1996)

5/18/2013