



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

Joycelyn Self and Clyde Phillips' 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:

Joycelyn Self and Clyde Phillips
84-481 Nukea Street
Waianae, HI 96792

SUMMARY:

On August 19, 2013, Joycelyn Self and Clyde Phillips ("Petitioners") submitted a 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) ("Makaha West"). The Makaha West application was first scheduled for decision making on May 22, 2013.

LOCATION: Petitioners Self-Phillips own a residential parcel of land located downstream and makai of the Makaha West Golf Course land and of activities proposed in the SCAP. The Self-Phillips parcel is not adjacent to the West Makaha Golf Course. See Exhibits 1-4.

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. Hawaii Admin. Rules ("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 could be addressed.

At the August 21, 2013, CWRM meeting (Agenda Item E-1) the staff recommended that the Kolona petition for a CCH be denied. The CWRM voted to defer decision-making on the Kolona contested case hearing request (Item E-1) for further information and to ensure greater notice.

At the same August 21, 2013, CWRM meeting, a second set of Petitioners, Self-Phillips, filed a petition requesting a contested case hearing on the Makaha West Golf Course SCAP.3645.3 (originally scheduled at the May 22, 2013 Commission Meeting (Agenda Item D-3)).

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.

DISCUSSION:

An oral or written request for a contested case hearing must be made by the close of the public hearing or at the Commission meeting at which the matter is scheduled for disposition. A person requesting the contested case hearing must subsequently file a written petition with the Commission within ten days of the close of the meeting. HAR §13-167-52(a).

The Makaha West Golf Course SCAP.3645.3 was presented to the Commission at its May 22, 2013 meeting. Petitioners Self-Phillips made no oral or written request for a contested case hearing at the May 22 2013 meeting, nor did they follow up with a written request within 10 days. Instead, Petitioners Self-Phillips did not file a request until August 19, 2013.

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 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

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.”

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.

Petitioners Self-Phillips seek 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” (Exhibit 2). Land Court Order No. 10157 applies to both the Petitioner’s and the Makaha West Golf Course properties. Both were registered 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.

First, the Petitioners Self-Phillips claim an easement, which provides them a protected property interest. However, the easement they point to is, in fact, *an encumbrance on their property*. An encumbrance does not represent a property interest belonging to the landowner, but a right that a third party has to require petitioner to accept water in the natural stream bed. 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 Petitioner’s Warranty Deed, certificate of title 299405 (dated October 12, 1999) 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

Over the last 80 years, grading and agricultural activities and the addition of an upstream earthen berm have diverted the historic stream bed more than 130 feet north of its previous alignment. The Makaha Stream does not pass through the Self-Phillips property. During significant rain events, low lying properties along the historical course are subject to flooding. However, under the proposed SCAP, there is no basis for concluding that the severity and frequency of flood events in the makai plain will increase as a result of the upstream activities proposed here.

Thus, the Petitioners Self-Phillips have not alleged a property interest that would entitle them to a contested case hearing on this SCAP.

Second, the Petitioners Self-Phillips have not alleged or shown with particularity how activities associated with the SCAP upstream of their land would directly affect their land, nor have they alleged any downstream use of the Makaha Stream.⁴ See Response to Petition Question 13. In fact, they did not claim to engage in any stream related activities other than removal of debris. See Response to Petition Question 12.

Exhibits 1, 3 and 4 show the location of the West Makaha Golf Course and the Self Phillips parcel.

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 Petitioner’s property, nor is it located adjacent to their property.

Exhibits 3 and 4 show that in 2013, the Makaha Stream continues to channelize and fan out into a floodplain as it flows towards the beach.

The aerial photo indicates the Petitioner's property and subdivision were developed near the natural stream bed and/or floodplain of the Makaha Stream.

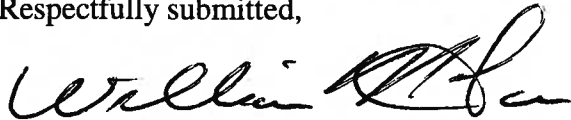
For purposes of the Makaha West SCAP application the Petitioners:

- 1) failed to allege a property interest that would entitle them to a contested case hearing;
and
- 2) failed to show a nexus between the proposed activities and their parcel.

RECOMMENDATION:

That the Commission DENY Petitioners Joycelyn Self and Clyde Phillips' request for a contested case hearing on the West Makaha SCAP.

Respectfully submitted,

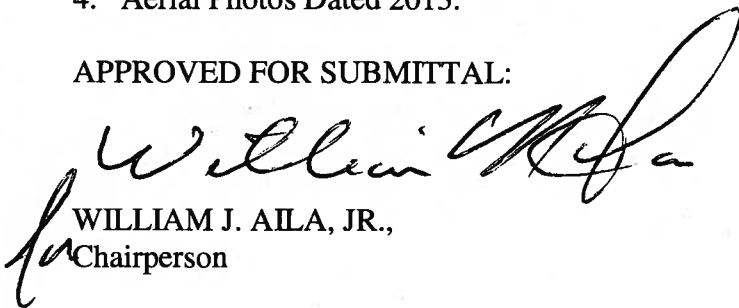


WILLIAM M. TAM
Deputy Director

Exhibits:

1. Location Map Dated 2012.
2. Petition for a Contested Case Hearing before the Commission on Water Resource management, filed by Joycelyn Self and Clyde Phillips.
3. Aerial Photos Dated 2006.
4. Aerial Photos Dated 2013.

APPROVED FOR SUBMITTAL:



WILLIAM J. AILA, JR.,
Chairperson

Location Map Dated 2012.



ORIGINAL

**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 AUG 19 PM 2:15

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)

1. **NAME:** Joycelyn Self and Clyde Phillips, Property owners
(If you are representing an organization, please attach the resolution, meeting minutes, or other evidence that provides your authority.)

2. **ADDRESS:** 84-481 Nukea Street
Waianae, HI 96792
PHONE: (808) 348-3264 **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:** August 21, 2013

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):**

SCAP. 3645.3
FILE ID: OTHER 3645.3
DOC ID: 1161

8. **ARE YOU HAWAIIAN?** Yes

ORIGIN

**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) 8-4-027-012
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) 8-4-027-012
12. **WHAT, IF ANY, ACTIVITIES HAVE YOU ENGAGED IN ON THE PROPERTY CONSIDERED IN THIS ISSUE?**
Including but not limited to the removal of debris from the stream.
13. **WHAT IS NATURE AND EXTENT OF YOUR INTEREST THAT MAY BE AFFECTED?**
The nature and extent of our interest that may be affected is the "free flowage of water through the natural stream bed" as set forth by Land Court Oder No. 10157, filed March 7, 1951 and 10510, filed July 31, 1951. Any alterations to the stream channel may directly and/or indirectly affect and/or alter the natural free flowage of water through the stream bed. We have property interest and are asserting our property interest in this matter, as the stream does in fact flow through our property.

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

We oppose any and all alterations by Pacific Links Hawaii, LLC, as indicated on SCAP application .3645.3, which would directly and/or indirectly affect and/or alter "the free flowage of water through the natural stream bed". We do not agree that the Water Commission has any jurisdiction to hear or adjudicate on SCAP applications involving Land Court Orders. "The Land Court has exclusive original jurisdiction over all applications for the registration of title to land easements or rights in land held and possessed in fee simple with the State, with power to hear and determine all questions arising upon the applications" (as stated by Land Court).

Futhermore, as indicated on #13 of this application, we oppose any and all alternations that would directly and/or indirectly affect and/or alter the "free flowage of water through the natural stream bed" as set forth by Land Court Order No. 10157, filed March 7, 1951 and 10510, filed July 31, 1951.

We have property interest and are asserting our property interest in this matter, as the stream does in fact flow through our property.

15. WHAT ARE THE BASIC FACTS AND ISSUES?

Pacific Links Hawaii, LLC wants to alter the natural free flowage of the Makaha Stream and West Makaha Streams, via SCAP application .3645.3. I am invoking and asserting my rights under Land Court Order 10157 and 10150 to oppose any and all alterations that will directly and/or indirectly affect and/or alter the "free flowage of water through the natural stream bed", by the applicant or anyone else, now and in the future. As stated previously, we have property interest in the matter.

Some of the property in question falls within the Makaha Valley AEF Flood Way. These designated flood way areas are included in the Land Court Order as those designated areas are part of the natural free flowage of water, which would make them part of the stream bed when heavy rains and flooding occur. Such endeavors to artificially alter any part of the stream, which include the stream bank, can undermine the property of others. The applicates want to grub vegetation, fill for new golf holes, finish grading, protect the stream with soil gripper bad walls, and revegetated the stream bank with native plants and trees. To say no construction will be done within the stream channel, bed or within the ordinary high water mark is absurd. The application itself is called a Stream Channel Alteration Permit (SCAP). This activities in and of themselves affect and/of alter the "free flowage of water through the natural stream bed". I do believe, grubbing, filling, and grading, constitutes construction. "Filling obstructs flood flows, backing up floodwaters onto upstream and adjacent properties. It also reduces the floodplain's ability to store excess water, sending more water downstream and causing floods to rise to higher levels. This also increases floodwater velocity" (FEMA). Even though our property is located upstream from the golf course, any and all alternations to the stream channel, whether downstream or upstream, can and may have potential impact on the flowage of water through the stream, which would impact us as landowners. The fact that the stream flows through our property and our property is located right along the stream shows enough of a nexus between the site of proposed activities and our land. To even suggest or entertain the thought that because we live upstream we may as well live in an entirely different ahupua'a shows complete disregard to the Hawaiian Culture and would require that person to further educate themselves. An ahupua'a begins at the top of the mountain, continues to the ocean, and includes everything in-between. Altering any part of the ahupua'a can dramatically affect the ahupua'a ability to function properly.

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**16. WHAT IS THE RELIEF THAT YOU SEEK OR THAT YOU DEEM YOURSELF
ENTITLED?**

The application by Pacific Links Hawaii, LLC to be denied as this is a Land Court issue. Not only do we have rights afforded to us by Land Court Orders 10157 and 10510, but we also have property interest in this matter. The Water Commission must recognize this.

**17. IDENTIFY ANY AND ALL OTHER PERSONS WHO MAY OR WILL BE AFFECTED
BY THE RELIEF WHICH YOU SEEK:**

All landowners in Makaha Valley, especially those who live right along the Makaha Stream and West Makaha Stream.

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

Joycelyn Self
Name (Print)
Clyde Phillips

Joycelyn Self
Signature
Clyde Phillips

Aug 19, 2013
Date

Aerial Photo Dated 2006.



EXHIBIT 3

Aerial Photo Dated 2013.

