

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
OFFICE OF CONSERVATION AND COASTAL LANDS
Honolulu, Hawaii

October 26, 2012

**Board of Land and
Natural Resources
State of Hawaii
Honolulu, Hawaii**

Regarding: Appointment and Selection of a Hearing Officer to Conduct All Hearings for a Contested Case Regarding Enforcement File KA 13-10 Unauthorized Use of a Single Family Residence For Transient Rental Purposes by David Kuraoka Located at Hā`ena, Hanalei, Kaua`i, Tax Map Key: (4) 5-9-002:059¹

Background

On September 25, 2012, the Department received a petition and check for the \$100.00 filing fee from Roy A. Vitousek, III of Cades Schutte LLP representing Mr. David R. Kuraoka contesting Enforcement Action KA 13-10, findings of violation of Conservation District Use Permit (CDUP) KA-3379 for the unauthorized use of a single family residence for transient rental purposes. **(Exhibit 1)**

Authority for Designating Hearing Officers

HAR, §13-1-32 (b) provides that the Board may conduct the contested case hearing, or at its discretion, may delegate the conduct of the contested case hearing to a hearing officer, in which case the chairperson shall select such hearing officer.

Additionally, Hawaii Revised Statutes, §92-16 and §171-6 also provide that the Board may delegate to the Chairperson the authority to select the hearing officer to conduct a Contested Case Hearing.

Basis for Designating Hearings Officers

Conducting a Contested Case Hearing may involve: giving notice of hearings, administering oaths, compelling attendance of witnesses and the production of documentary evidence, examining witnesses, certifying acts, issuing subpoenas, making rules, receiving evidence, holding conferences and hearings, fixing filing deadlines, and disposing of other matters that may arise during the orderly and just conduct of a hearing. History suggests that designating a Hearing Officer to perform these actions may provide a more expeditious resolution of the case than having the full Board conduct the hearing.

¹ Enforcement file KA 13-10 recommendation to the Board contained a typographical error for the tax map key parcel. Nevertheless, Mr. Kuraoka is the owner of TMK: (4) 5-9-002:059 that was the subject of Enforcement File KA 13-10.

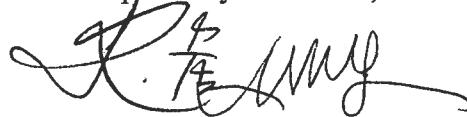
Discussion:

Staff notes that, by designating a Hearing Officer to conduct the hearing, the Board does not relinquish its authority to ultimately decide on the matters being contested. At the conclusion of the contested case, the Board would act with its own discretion on the Hearing Officer's Finding of Fact, Conclusion of Law, and Decision and Order.

Recommendation:

- 1) That the Board authorize the appointment of a Hearing Officer for Contested Case KA 13-02, and let the Hearing Officer conduct all the hearings relevant to the subject petition for a contested case hearing, and
- 2) That the Board delegates the authority for selection of the Hearing Officer to the Chairperson.

Respectfully submitted,



K. Tiger Mills, Staff Planner
Office of Conservation and Coastal Lands

Approved for submittal:



William J. Aila, Jr., Chairperson
Board of Land & Natural Resources

KA 13-DZ



STATE OF HAWAII
BOARD OF LAND AND NATURAL RESOURCES

PETITION FOR A CONTESTED CASE HEARING

RECEIVED

72 SEP 24 P3:47

OFFICIAL USE ONLY	
Case No.	Date Received
Board Action Date / Item No.	Division/Office

DEPT. OF LAND & NATURAL RESOURCES
STATE OF HAWAII

INSTRUCTIONS:

- File (deliver, mail or fax) this form within ten (10) days of the Board action date to:

Department of Land and Natural Resources
 Administrative Proceedings Office
 1151 Punchbowl Street, Room 130
 Honolulu, Hawaii 96813
 Phone: (808) 587-1496, Fax: (808) 587-0390

RECEIVED
 SEP 24 11 50 AM '11
 DEPT. OF LAND & NATURAL RESOURCES
 STATE OF HAWAII

- DLNR's contested case hearing rules are listed under Chapter 13-1, HAR, and can be obtained from the DLNR Administrative Proceedings Office or at its website (<http://hawaii.gov/dlnr/rules/Ch13-1-Official-Rules.pdf>). Please review these rules before filing a petition.
- If you use the electronic version of this form, note that the boxes are expandable to fit in your statements. If you use the hardcopy form and need more space, you may attach additional sheets.
- Pursuant to §13-1-30, HAR, a petition that involves a Conservation District Use Permit must be accompanied with a \$100.00 non-refundable filing fee (payable to "DLNR") or a request for waiver of this fee. A waiver may be granted by the Chairperson based on a petitioner's financial hardship.

A. PETITIONER		
(If there are multiple petitioners, use one form for each.)		
1. Name David R. Kuraoka	2. Contact Person Roy A. Vitousek III	
3. Address 75-170 Hualalai Road, Ste. B-303	4. City Kailua-Kona	5. State and ZIP Hawaii 96740
6. Email rvitousek@cades.com	7. Phone (808) 329-5811	8. Fax (808) 326-1175

B. ATTORNEY (if represented)		
9. Attorney Name Roy A. Vitousek, III	10. Firm Name Cades Schutte LLP	
11. Address 75-170 Hualalai Road, Ste. B-303	12. City Kailua-Kona	13. State and ZIP Hawaii 96740
14. Email rvitousek@cades.com	15. Phone (808) 329-5811	16. Fax (808) 326-1175

C. SUBJECT MATTER

17. Board Action Being Contested

In Enforcement Action KA-13-10, finding of violation of CDUP KA-3379 for a single family residence on TMK (4) 5-2-002:059 that provides "that the single family dwelling not be used for rental or any other commercial purposes unless approved by the Board", and fine of \$15,000.00.

18. Board Action Date

September 14, 2012

19. Item No.

Agenda Item K.4

20. Nature and Extent of Petitioner's Interest That May Be Affected by the Board Action

See attached.

21. Any Disagreement Petitioner May Have with an Application before the Board

See attached.

22. Any Relief Petitioner Seeks or Deems Itself Entitled to

See attached.

23. How Petitioner's Participation in the Proceeding Would Serve the Public Interest

See attached.

24. Any Other Information That May Assist the Board in Determining Whether Petitioner Meets the Criteria to Be a Party under Section 13-1-31, HAR

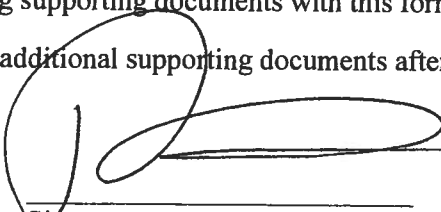
See attached

Check this box if Petitioner is submitting supporting documents with this form.

Check this box if Petitioner will submit additional supporting documents after filing this form.

Roy A. Vitousek III

Petitioner or Representative (Print Name)


Signature

September 24, 2012

Date

Petition for A Contested Case Hearing

Continuation of FORM APO-11

Petitioner David R. Kuraoka

Re: Board Meeting of September 14, 2012, Agenda Item No. K.4

Item 20. Nature and Extent of Petitioner's Interest That May Be Affected by the Board Action.

Petitioner does not own the real property identified by TMK (4) 5-2-002:059 located in Ha'ena, Hawai'i (the "Property"). Petitioner is an artist and lives on another Haena property eight months out of the year, but teaches on the mainland the other four months each year.

The DLNR alleges that the single family residence on the Property is subject to DLNR Conservation District Use Permit (CDUP) KA-3379 which contains a condition that "the single family dwelling not be used for rental or any other commercial purposes unless approved by the Board." The CDUP does not define "rental". "Rental" is also not defined in either Hawaii Revised Statutes chapter 183C nor Hawaii Administrative Rules § 13-5.¹

The CDUP is wholly lacking of any indicia of the nature, scope, or temporal limitations of the "rental" condition. Read literally, the condition is a blanket prohibition of any use of the single family residence by any person other than the owner, for any period of time, in exchange for anything having any value. Such a broad prohibition on the use of the single family residence is unreasonable, overbroad, beyond the statutory authority of the DLNR as provided in HRS ch. 183C, and is invalid. If the condition prohibiting rental is in fact less broad than a literal reading would indicate, the condition is impermissibly vague and invites *ad hoc* enforcement.

Petitioner is aware of other single family residences in the Haena Conservation District that are subject to DLNR CDUPs which do not contain any restriction or condition prohibiting "rental." These owners are actively engaging in long and short term rentals of their single family residences. There is no rational or justifiable reason that Petitioner's CDUP has a condition prohibiting rental, and other owners' CDUP do not. Petitioner is also aware that the DLNR itself rents residential structures located in the Conservation District for less than 180 consecutive days. This presents an equal protection issue.

On August 28, 2012, the DLNR gave Petitioner notice that it would ask the Board at its meeting on September 14, 2012 to consider "**an alleged violation of the conservation district rules relating to the unauthorized use of a single family residence as a vacation rental in the conservation district on TMK (4) 5-2-002:059...**" (emphasis added).

Notably, there is no definition of "vacation rental" in the CDUP, HAR 13-5, or HRS ch. 183C. In addition, at the time that the Board issued the CDUP to Petitioner on December 6, 2006, there was no DLNR rule² defining "rental", "vacation rental" or requiring that all CDUPs include a

¹ In contrast, "commercial purpose" is defined in HAR § 13-5-42.

² Petitioners' CDUP was issued in 2006 prior to the Board's most recent amendments to HAR § 13-5-42(a)(5) in 2011, that required all CDUPs to include a prohibition of "transient rentals" which is defined as "the use of a single-family residence or structure for less than 180 consecutive days in exchange for compensation including but not limited to monetary payment, services or labor of employees." The 2011 amendments to HAR § 13-5-

provision prohibiting “rental” or “vacation rental.” Petitioner submits that, therefore, there are no “conservation district rules” prohibiting rental of the single family residence on conservation zoned lots. The only arguable prohibition of “rental” on the single family residence is the CDUP condition itself. The validity of this condition must be determined before the Board can decide if a violation of the condition has occurred.

On September 14, 2012, counsel for Petitioner requested a contested case hearing from the Board on the DLNR’s enforcement proceeding and to continue the matter to a date when Petitioner could be present and participate in a contested case hearing. Rather than continue the matter and without holding a contested case proceeding, the Board found Petitioner in violation of the condition prohibiting “rental” in the CDUP and imposed a fine of \$15,000.00 at the September 14, 2012 meeting. The Board’s decision is unsupported by evidence or the record before the Board. The OCCL provided absolutely no evidence that the residence had ever been rented to anyone.

Item 21. Any Disagreement Petitioner May Have With An Application Before the Board.

Petitioner disagrees with the DLNR’s enforcement action and requests that the DLNR rescind or reverse its finding that Petitioner is in violation of the CDUP conditions and rescind or reverse the imposition of a \$15,000.00 fine. The findings should be reversed because they are not supported by evidence or the record. Petitioner asserts that the finding of a CDUP violation, after a request for contested case hearing was held, without holding a contested case hearing, and without the Petitioner present, was a violation of due process.

Item 22. Any Relief Petitioner Seeks or Deems Itself Entitled To.

Petitioner requests that the Board (1) vacate its September 14, 2012 finding of a CDUP violation and imposition of a \$15,000.00 fine; (2) appoint a hearings officer and set the matter for contested case hearing; and (3) deny the DLNR’s request for a finding of a CDUP violation and request for a \$15,000.00 fine. The contested case should be conducted separately from any other contested case hearings relating to alleged CDUP violations by other owners in the Ha’ena Conservation District and should have a different hearings officer assigned from other contested case hearings.

If the Board declines to vacate its September 14, 2012 decision, Petitioner submits that the DLNR should be prohibited from presenting any new evidence in a contested case hearing because the Board has found that the Department has already presented evidence sufficient for the Board to find a violation has occurred. The DLNR is not entitled to a second bite at the apple and to present additional evidence against Petitioner to prove a violation of the CDUP condition prohibiting rental use.

41(a)(5) cannot retroactively amend CDUPs issued prior to the amendment to include a prohibition on “transient rentals”.

Item 23. How Petitioner's Participation in the Proceeding Would Serve the Public Interest.

Petitioner is in the best position to represent his personal interest, as well as the public's interest in ensuring that the CDUP condition is lawful and not in excess of the Board's statutory authority.

Item 24. Any Other Information That May Assist the Board in Determining Whether Petitioner Meets the Criteria to be a Party Under Section 13-1-31, HAR.

none