

**STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
OFFICE OF CONSERVATION AND COASTAL LANDS
HONOLULU, HAWAII
DECEMBER 14, 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 Action OA-13-07 for the Failure to Remove an Erosion Control Structure by 4615 Kahala Avenue Corporation, Located at Kahala Beach, Island of Oahu, Hawaii, Tax Map Key: (1) 3-5-005:015

BACKGROUND:

On September 24, 2012, the Department received a petition and check for the \$100.00 filing fee from Gregory Kugle of Damon Key Leong Kupchak Hastert, A Law Corporation contesting Enforcement Action OA-13-07, for the failure to remove an erosion control structure (**Exhibit 1**).

AUTHORITY FOR DESIGNATING HEARING OFFICERS:

Pursuant to Hawaii Administrative Rules (HAR), §13-1-32 (b) *The board may conduct the hearing or, the board in 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;* and

Hawaii Revised Statutes (HRS), §92-16 and §171-6 which 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.

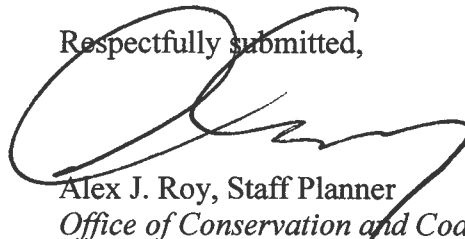
DISCUSSION:

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 OA-13-01, 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,



Alex J. Roy, Staff Planner
Office of Conservation and Coastal Lands

Approved for submittal:



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



STATE OF HAWAII
BOARD OF LAND AND NATURAL RESOURCES

RECEIVED
OFFICE OF CONSERVATION
LANDS

EXHIBIT /

PETITION FOR A CONTESTED CASE HEARING

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

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

- 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 4615 Kahala Avenue Corporation	2. Contact Person Gregory W. Kugle	
3. Address 4615 Kahala Avenue	4. City Honolulu	5. State and ZIP Hawaii 96816
6. Email See Below	7. Phone See Below	8. Fax See Below

B. ATTORNEY (if represented)		
9. Attorney Name Gregory Kugle	10. Firm Name Damon Key Leong Kupchak Hastert	
11. Address 1003 Bishop Street, Suite 1600	12. City Honolulu	13. State and ZIP Hawaii 96813
14. Email gwk@hawaiilawyer.com	15. Phone 808-531-8031	16. Fax 808-533-2242

C. SUBJECT MATTER

17. Board Action Being Contested

Case No. OA-13-7, consisting staff's recommendation to revoke Site Plan Approval OA-10-16, require the removal of shoreline erosion protection, impose fines, and seek a finding of a violation of HAR 13-5-6 and HRS 183C-7.

18. Board Action Date

September 14, 2012

19. Item No.

Agenda Item K-1

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

The staff report admits that removal of the shoreline erosion protection blankets will result in immediate erosion of Petitioner's real property, and will result in the loss of walls, fences and multiple mature coconut trees, all of which will have an immediate financial impact on Petitioner, as well as a physical taking of its real property interests. In addition, the potential of the imposition of fines will also directly impact Petitioner.

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

Petitioner strongly disagrees with the staff recommendation. Petitioner voluntarily removed naturally occurring mature trees and shrubs that were protecting its property from active erosion at DLNR's request, in exchange for the SPA. Petitioner relied in good faith and to its detriment and has expended significant sums on the governmental assurances, raising issues of vested rights and estoppel. In addition, the State has permitted the City and County of Honolulu to install and use the Hunakai Street drain line across state land, and the drain, particularly in its documented state of disrepair, has exacerbated the erosion occurring at Petitioner's property. Petitioner also disagrees that it has violated any statutes or regulations; the SPA did not have an expiration date and staff is seeking to retroactively create one. Petitioner further disagrees with the relief requested by staff, including removal of the protection without a commitment to alternative relief, and Petitioner further disagrees with staff's recommended fines, as they are inconsistent with the staff's own guidelines, which were not even duly enacted, and which are excessive. Petitioner further disagrees with the staff's conclusions and assumptions about the Hunakai street drain line and its effect on erosion.

22. Any Relief Petitioner Seeks or Deems Itself Entitled to

Petitioner is entitled to a rejection of the staff recommendation and a closure of the enforcement action. Petitioner should be allowed to retain the erosion protection measures while the beach is actively eroding and/or until a long term remedy can be implemented, including repair or removal of the Hunakai Street drain line, implementation of a beach nourishment program, or other alternatives. Moreover, because of Petitioner's real property interests and constitutional due process rights, Petitioner is entitled to a hearing and is entitled to judicial review of the Board's decision.

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

Petitioner's participation will insure that due process is afforded and that the Board's ultimate action is based on science, evidence and witness testimony, subject to rights and obligations afforded by a contested case procedure. Petitioner owns the property at issue, and Petitioner faces the fines that staff recommends, so Petitioner must be afforded an opportunity to present its case and to appeal an adverse decision.

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

HAR 13-1-31.1 provides that when a violation is alleged for which an administrative remedy is provided and for which the alleged violator is entitled to a contested case hearing, then a contested case hearing SHALL be held and the alleged violator SHALL be a party. Applying almost identical rules, the Hawaii Supreme Court held in *Kaleikini v. Theilen*, 124 Hawaii 1, 19-

20 (2010) that the Chairman of the Board of Land and Natural Resources erred by denying a contested case request that was procedurally proper. Because the DLNR has taken the position that there has been an alleged violation, 13-1-31.1 controls and requires a contested case hearing. In addition, due process requires that Petitioner be afforded a contested case hearing. In *Brown v. Thompson*, 91 Hawaii 1 (1999), the Hawaii Supreme Court held the Department of Land and Natural Resources failed to provide procedural due process when it failed to provide notice and an adequate hearing before depriving a boat owner of his property interests in the boat and the live aboard permit. Likewise, in *Price v. Zoning Board of Appeals*, 77 Hawaii 168 (1994), the Hawaii Supreme Court held that constitutional due process required an alleged violator to be provided with a hearing (a contested case hearing before the Zoning Board of Appeals) before the alleged violator could be subjected to fines.


Although Section 13-1-31.1 provides that Petitioner SHALL be a party and SHALL be afforded a contested case hearing, Petitioner also satisfies the more generalized provisions of HAR 13-1-31. "Without a hearing, an applicant or an alleged violator SHALL be a party." In this case, staff alleges a violation, therefore Petitioner shall be a party. In addition, because Petitioner has property interests in both its real property and the Site Plan Approval, Petitioner "shall be admitted" as a party because the mandatory parties include "all persons who have some interest in the land, who lawfully reside on the land ... or who otherwise demonstrate that they will be so directly and immediately affected by the requested action". HAR 13-1-31(b)(2). In the staff report, the DLNR concedes "it is true that removal of the Structure might result in an increase in property erosion". This is an admission that the Petitioner will be actually harmed, and its property interests damaged and taken, if the request is granted.

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.

Gregory W. Kugle

Petitioner or Representative (Print Name)


Signature

09/21/12

Date