

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
OFFICE OF CONSERVATION AND COASTAL LANDS
HONOLULU, HAWAII
MAY 10, 2013

**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 the Denial of the Conservation District Use Application (CDUA) HA-3626 for a Single Family Residence (SFR) and Related Improvements Located at Maku`u, Puna District, Island of Hawaii, Tax Map Key: (3) 1-5-010:032.

BACKGROUND:

On *November 16, 2012*, the Department received a petition from Sidney M. Fuke on behalf of John and Maureen Gapp, contesting the denial of Conservation District Use Application (CDUA) HA-3626 for a Single Family Residence (SFR) and related improvements (**Exhibit 1**). Please note that during the Board of Land and Natural Resources (Board) *November 9, 2012* meeting, the Board indicated that the filing fee for this contested case would be waived.

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 provides 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 Hearings Officer (HO) to perform these actions may provide a more expeditious resolution of the case than having the full Board conduct the hearing. Pursuant to HAR §13-1-31 Parties (a) *without a hearing, an applicant or an alleged violator shall be a party*. Therefore it has been determined that John and Maureen Gapp have basis to petition for a contested case.

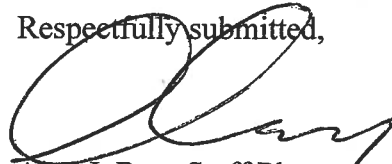
DISCUSSION:

Staff notes that, by designating a HO 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 Hearings Officer's Finding of Fact, Conclusion of Law, and Decision and Order.

RECOMMENDATION:

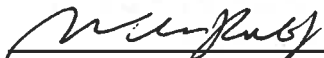
- 1) That the Board grant a petition and authorize a Contested Case to John and Maureen Gapp;
- 2) That the Board authorize the appointment of a Hearings Officer to conduct hearings relevant to the petition as provided by law; and
- 3) That the Board delegate the authority for selection of the Hearings 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

Attachment: Exhibit 1 – Petition for Contested Case Hearing

EXHIBIT I HA-13-04



STATE OF HAWAII
BOARD OF LAND AND NATURAL RESOURCES

PETITION FOR A CONTESTED CASE HEARING

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

INSTRUCTIONS:

1. 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

2. 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.
3. 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.
4. 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 John and Maureen Gapp	2. Contact Person Sidney Fuke	
3. Address c/o 100Pauahi Street, Suite 212	4. City Hilo	5. State and ZIP HI 96720
6. Email sidfuke@hawaiiantel.net	7. Phone (808) 969-1522	8. Fax

B. ATTORNEY (if represented)		
9. Attorney Name	10. Firm Name	
11. Address	12. City	13. State and ZIP
14. Email	15. Phone	16. Fax

C. SUBJECT MATTER

17. Board Action Being Contested
Denial of CDUA - HA-3626

18. Board Action Date
November 9, 2012

19. Item No.
OCCL K-1 CDUA HA 3426

20. Nature and Extent of Petitioner's Interest That May Be Affected by the Board Action
Petitioners own a property for which they were denied the opportunity to construct a dwelling on it in a culturally and archaeologically sensitive manner.

21. Any Disagreement Petitioner May Have with an Application before the Board
The Board denied the Petitioner's request, as it reasoned that the Petitioner's property was a result of a subdivision that was not authorized by the Board. Petitioners maintain that they are the unsuspecting victims of action taken by and between the former landowner and the County Planning Department. If there was sufficient coordination between the State and County governments, this would have been avoided. However, there was none or very little. The Petitioner should not be held accountable or culpable for this situation, but the Board's denial unfortunately has the effect of making the Petitioner culpable.

22. Any Relief Petitioner Seeks or Deems Itself Entitled to
Petitioner seeks to have the Board approve the applicant's request or, in the alternative, work out and execute the appropriate regulatory measures needed to rectify this situation with the County of Hawaii. The alternative measures would, in the end, result in the Petitioner being able to construct their dwelling as proposed in their application.

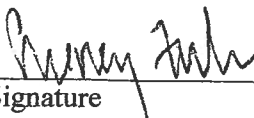
23. How Petitioner's Participation in the Proceeding Would Serve the Public Interest
The Petitioner is where they are today because of a direct action taken by the County of Hawaii Planning Department, and the indirect or no-action action - by virtue of its non-participation in the decision-making process - taken by the State DLNR. These direct and indirect actions have caused considerable harm and stress to the Petitioner. This proceeding would thus help the respective agencies develop a more coordinated and rational approach so as to avoid future occurrences.

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
The Petitioner is the aggrieved party and should qualify under this proceeding.

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.

SIDNEY FUKU (Planning Consultant)
Petitioner or Representative (Print Name)


Signature

Nov. 12, 2012
Date