

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Office of Conservation and Coastal Lands
Honolulu, Hawai'i

September 12, 2014

Board of Land and Natural Resources
Department of Land and Natural Resources
State of Hawai'i
Honolulu, Hawai'i

Contested Case: OA 15-01

REGARDING: Appointment and Selection of a Hearing Officer to Conduct All Hearings for One (1) Contested Case Hearing

PETITION: **Docket No. OA 15-01**
Petition requesting the Board of Land and Natural Resources for a Contested Case Hearing Regarding Enforcement Action OA 14-66.

BACKGROUND

On July 11, 2014, the Board of Land and Natural Resources found the landowner, Sutton Family Partners, in violation of the following:

1. That the landowner did in fact, authorize, cause or allow the construction of a shoreline erosion control structure to occur; and
2. That the unauthorized land uses occurred within the State Land Use Conservation District, Resource Subzone.

On the same date, an oral request for a contested case hearing on the violation was made. Subsequently on August 1, 2014, OCCL received a petition for a Contested Case from Mr. Gregory Kugle of Damon Key Leong Kupchak Hastert, representing the Sutton Family Partners (**Exhibit 1**).

AUTHORITY FOR DESIGNATING HEARING OFFICERS

HAR §13-1-32 (d) provides that the BLNR may conduct the Contested Case Hearing, or at its discretion, may appoint a hearing officer to conduct the hearing.

Additionally, HRS §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 HEARING 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.

Staff therefore recommends,

RECOMMENDATION:

- 1) That the Board authorize the appointment of a Hearing Officer for CC OA 15-01, and let the Hearing Officer conduct all the hearings relevant to the subject petition for a Contested case Hearing, and
- 2) That the Board delegate the authority for selection of the Hearing Officer to the Chairperson.

Respectfully submitted,



Lauren Yasaka, 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
DEPT. OF CONSERVATION
COASTAL LANDS

PETITION FOR A CONTESTED CASE HEARING

2014 AUG - 1 3 59

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
- 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.
- All materials, including this form, shall be submitted in **three (3)** photocopies.

A. PETITIONER		
(If there are multiple petitioners, use one form for each.)		
1. Name Sutton Family Partners	2. Contact Person Richard C. Sutton, Jr.	
3. Address 201 Merchant Street, Suite 2307	4. City Honolulu	5. State and ZIP HI 96813
6. Email dsutton@lava.net	7. Phone 808-792-3888	8. Fax 808-521-5262

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

C. SUBJECT MATTER

17. Board Action Being Contested Conservation District Enforcement OA 14-66 Regarding the Unauthorized Placement of Shoreline Erosion Control Structure by Sutton Family Partners Located at Waiialua, Oahu, Tax Map Keys: (1) 6-8-010:014 & 015	
18. Board Action Date July 25, 2014	19. Item No. K-2
20. Nature and Extent of Petitioner's Interest That May Be Affected by the Board Action Fee simple land owner of Tax Map Keys: (1) 6-8-010: 014 & 015	
21. Any Disagreement Petitioner May Have with an Application before the Board <ol style="list-style-type: none">1. Petitioner has been granted right to use and easement2. Emergency required action to stop erosion and protect property3. Petitioner entitled to expanded easement4. Erosion control is engineering solution to erosion5. Inverse condemnation6. State ratified erosion control7. Equal protection8. Use Meets P-15 criteria9. Mediation should be ordered10. The no tolerance policy was not properly promulgated11. Petitioner reserves the right to supplement and amend	
22. Any Relief Petitioner Seeks or Deems Itself Entitled to <ol style="list-style-type: none">1. No fine2. No removal of erosion control3. Expanded easement	
23. How Petitioner's Participation in the Proceeding Would Serve the Public Interest Petitioner is the property owner subject to the NOV and is therefore entitled to a contested case hearing pursuant to HAR Section 13-1-31.1. In addition, retention of the erosion control will protect these and nearby parcels, which will also preserve and protect the coastal environment.	
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 <i>Kaleikini v. Theilen</i> , 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 <i>Brown v. Thompson</i> , 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 easement and SSV, 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 directly and immediately affected by the requested action". HAR 13-1-31(b)(2).

- 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

08/01/2014

Date