

RECEIVED
DEPT. OF CONSERVATION
LANDS
BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII 2014 JUN 13 P 3 25

DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

In The Matter of a Contested Case to Appeal
The Board of Land and Natural Resources
Finding of Violation for Unauthorized Repair
And Reconstruction of a Boulder Revetment
At Mokule'ia, District of Waialua, O'ahu,
TMK: (1) 6-8-003:018

DLNR File No. OA-07-06

Findings of Fact, Conclusions of Law, &
Decision and Order

Table of Contents

	<u>Page</u>
I. FINDINGS OF FACT	1
A. Sequence of Events Regarding Violation Allegations	1
B. Construction and Location of the Rock Pile Revetment	8
C. Mauka Movement of the Shoreline	10
D. Reconstruction of the Rock Pile Revetment	11
E. The Shoreline Setback Variance	13
II. CONCLUSIONS OF LAW	14
A. Nonconforming Use and the Rock Pile Revetment	14
B. Reconstruction of the Rock Pile Revetment	18
C. OCCL/DLNR's Jurisdiction to Fine the Daileys and Require Removal of the Structure	18
D. Issues Presented by the Daileys	23
1. Does DLNR have jurisdiction over the revetment?	23
2. Is construction or repair of the revetment permitted by law?	23
3. Should DLNR have granted the Daileys' Emergency Permit?	23
4. Should the Board dismiss the enforcement action?	24
III. DECISION AND ORDER	25

**Findings of Fact, Conclusions of Law,
and Decision and Order**

The Board of Land and Natural Resources hereby adopts substantially the Hearings Officer's Proposed Findings of Fact ("FOF"), Conclusions of Law ("COL"), and Decision and Order ("D&O"). The FOF, COL, and D&O are based on the records maintained by the Department of Land and Natural Resources ("DLNR") on Conservation District Enforcement File No. OA-07-31, Regarding Alleged Unauthorized Repair/Reconstruction of a Boulder Retention Within the Conservation District at Mokule'ia, District of Waiialua, O'ahu, TMK no. (1) 6-8-003:018, and the witness testimonies and exhibits presented and accepted into evidence.

If any statement denominated a COL is more properly considered a FOF, then it should be treated as an FOF; and conversely, if any statement denominated as a FOF is more properly considered a COL, then it should be treated as a COL.

The FOF proposed by the parties, not incorporated by the Hearings Officer in this Decision and Order, have been excluded because they may be duplicative, not relevant, not material, taken out of context, contrary (in whole or in part) to the found facts, an opinion (in whole or in part), contradicted by other evidence, or contrary to law. The Parties' proposed FOF that have been incorporated may have minor modifications or corrections that do not substantially alter the meaning of the original findings.

I. FINDINGS OF FACT¹

A. Sequence of Events Regarding Violation Allegations

1. In December 2004, after receiving complaints regarding unstable rocks along the Mokule'ia (O'ahu) shoreline of Petitioners' (Michael Dailey and Elizabeth Dailey) property, posing a hazard and blocking pedestrian access, the Office of Conservation and Coastal Lands ("OCCL") conducted a site inspection and noted that large portions of a rock pile retention structure were scoured by wave energy, and the structural integrity of the retention was

¹ References to the record are enclosed in parentheses, followed by a party's proposed Finding of Fact ("FOF"), if accepted. "Exh." refers to exhibits accompanying written or oral testimony, followed by the exhibit number and page or table number, if necessary. Written testimony is referred to as follows: name of the witness, the type of written testimony, and the page number or paragraph of that testimony. "WDT" means written direct testimony or witness statement; and "WRT" means written responsive testimony or the written rebuttal testimony to the written responsive testimony. Oral testimony is referred to as follows: name of the witness, the date of the transcript ("Tr."), and the page number.

1 compromised. Rocks had dislodged from the revetment and rolled down onto the beach. (Exh. B-
2 7, p. 2.) [Daileys FOF 6; OCCL FOF 15-16.]

3 2. On February 7, 2005, the landowners, Michael Dailey and his mother, Elizabeth Dailey,
4 were sent and received a Notice and Order dated January 14, 2005, of the presence of an
5 unauthorized shoreline structure and recommendation of its removal; and a second Notice and
6 Order dated March 2, 2005 was issued on March 4, 2005, as the condition of the revetment had
7 worsened since the previous site inspection. (Exhs. B-1, B-2, B-7, p. 2.) [Daileys FOF 6; OCCL
8 FOF 17-19.]

9 3. On March 15, 2005, correspondence was received by OCCL from the Daileys' attorney
10 at the time, stating that the partial failure of the rock pile revetment appeared to be endangering
11 the home on the property and that no action had been taken because the homeowner was not sure
12 what action could be taken. The correspondence also stated that the Daileys would work as
13 quickly as possible to obtain the necessary permits for repairing the revetment. (Exh. B-7, p. 2.)

14 4. After meeting with the Daileys' attorney on March 17, 2005, OCCL requested a survey
15 of the property and evidence of when the rock pile revetment was constructed. (Exh. B-7, p. 2.)

16 5. On June 20, 2005, OCCL received a survey that illustrated the proposed location of the
17 current shoreline with respect to the revetment, a portion of which appeared to encroach on State
18 land. On June 27, 2005, correspondence to the Daileys' attorney encouraged them to take action
19 to reduce or eliminate the hazard of the loose rocks prior to the onset of the winter surf. (Exh. B-
20 7, p. 2.)

21 6. On August 22, 2005, an Emergency Conservation District Use Application ("CDUA")
22 was received by OCCL to repair the failed structure and to remove those portions that were
23 encroaching on state land. OCCL was unable to accommodate the application to repair the
24 structure, because OCCL had no evidence it was legal or nonconforming and also believed the
25 structure was not authorized by any government agency. OCCL staff also noted that the City and
26 County of Honolulu's ("C&C") Department of Planning and Permitting ("DPP") commented
27 (No. 2005/ELOG-2469) that it had no record of approvals for the revetment and that, in 1988,
28 C&C had determined that the boulder revetment was unauthorized (i.e., illegal) and, in 1992,
29 issued a citation (BV-92-06-004) for installing boulders within the shoreline setback area. The
30 1992 violation had been referred to C&C's Division of Land Utilization, but for unknown
31 reasons, it had never been pursued. (Exhs. A-15, p. 2; B-1, p. 1; B-7, pp. 2-3; C&C's DPP, "Re:

1 Emergency Authorization to Repair a Revetment (OA-05-38), 68-611 Farrington Highway—
2 Mokuleia, Tax Map Key 6-8-3 18,” p. 1.) [Daileys FOF 8; OCCL FOF 22-23.]

3 7. On December 21, 2005, OCCL informed the applicant that: 1) it could not support the
4 granting of an after-the-fact permit, because the revetment clearly has had and will continue to
5 have a negative impact on the shoreline through the loss of beach area and accelerated erosion
6 fronting the structure; 2) there was no clearly demonstrated “emergency” present for the land
7 owner, because the erosion rate did not pose a significant immediate erosion threat to the
8 dwelling; 3) the unstable nature of the structure was perceived by OCCL to be a significant
9 safety issue to the general public traversing the area and could be considered “emergency” in
10 nature; and 4) the loss of land through erosion was a secondary concern to DLNR, which has a
11 primary function of protecting and preserving the public beach area for future generations. (Exh.
12 B-7: exh. 7.) [Daileys FOF 9.]

13 8. OCCL further determined that: 1) it could not process the emergency request, because the
14 legality of the structure had to be resolved before any requests for land use were processed by
15 DLNR; 2) the pending Conservation District violation case was being withdrawn and would be
16 closed upon removal of the portions of the structure that were encroaching onto state lands as
17 mapped in the May 2005 survey map included in the Daileys’ August 2005 CDUA submittal; and
18 3) once the encroaching portions of the revetment were removed from the Conservation District,
19 it should be replaced with a new engineered revetment located as far mauka as possible and
20 designed to enhance public access along the structure with a public easement along a clear
21 walkway, conducted in conjunction with relocating the dwelling landward to allow for more
22 accommodation space for the beach. (Exh. B-7: exh. 7.) [Daileys FOF 9.]

23 9. The case was eventually closed. Although OCCL believed that the structure was
24 unauthorized, it could not determine exactly when or where the structure had been built in
25 relation to the shoreline. Based on aerial photographs, it was believed that it had been built
26 between 1967 and 1986. (Exh. B-7, p. 3.) [Daileys FOF 3g, 28; OCCL FOF 24, 27.]

27 10. In December 2006, the violation case was re-opened after numerous complaints were
28 received that construction on the shoreline structure was continuing, and on December 23, 2006
29 a Notice and Order was delivered to Michael Dailey by a Conservation Enforcement Officer.
30 The Notice and Order states in part, “[y]ou are hereby ordered to cease any further activity on the
31 subject premises. Should you fail to cease such illegal activity immediately, you will be subject

1 to fines up to \$2,000 per day pursuant to Chapter 13-5, HAR, in addition to administrative costs
2 incurred by the Department.” (Exhs. B-5; B-7, p. 3.) [OCCL FOF 31, 33.]

3 11. Site inspections by a Conservation Enforcement Officer on December 28, 2006 and
4 OCCL staff on December 29, 2006, noted active work was still being conducted on the shoreline
5 structure. (Exh. B-7, p. 3.) [OCCL FOF 32, 35.]

6 12. On February 16, 2007, Department of Accounting and General Services (“DAGS”)
7 Survey Staff conducted a site inspection to investigate improvements relative to what was
8 previously submitted to OCCL by the landowner’s surveyor. Measurements indicated that
9 improvements fell along or slightly seaward of what was mapped as the former shoreline, and it
10 was noted that unauthorized sand bags littered the beach, sunken areas were developing within
11 the fill materials mauka of the unauthorized structure, and large sections of the newly built wall
12 were failing due to scouring and wave overtopping. (Exh. B-7, pp. 3-4.)

13 13. On February 21, 2007, a site inspection by a Conservation Enforcement Officer noted
14 work being conducted to stabilize palms along the wall and the retrieval of boulders that had
15 rolled off the wall toward the sea. (Exh. B-7, p.4.) [OCCL FOF 34.]

16 14. At the Board of Land and Natural Resources (“Board”) meeting on May 25, 2007, OCCL
17 stated that: 1) the Board had jurisdiction over land lying makai of the shoreline [i.e., the
18 conservation district] pursuant to HRS § 205A-1; 2) there was sufficient cause to bring the
19 matter to the Board since it was evident that portions of the structure were within the
20 conservation district pursuant to HAR § 15-15-20 (Standards for determining “C” conservation
21 district boundaries); 3) the Board may undertake enforcement actions on unauthorized artificial
22 shoreline structures even without benefit of a shoreline delineation in order to uphold the
23 directives of HRS Chapter 205A, § 205A-43.6(a), which requires the landowner in violation to
24 either remove the structure or correct the problem; and 4) “(t)herefore the Board, under [§ 205A-
25 43.6] (c), may assert its authority to compel the removal of the structure or correct the problem in
26 order to protect the coastal resources and uphold the directives of Chapter 205A, HRS.” (Exh. B-
27 7, pp. 4, 7.) [OCCL FOF 43.]

28 15. The February 16, 2007 site inspection showed that the highest wash of the waves was
29 mauka of the structure. (Exh. B-7, p. 6.)

1 16. Because DLNR has a “no tolerance” policy in regards to shoreline structures constructed
2 after 1999, the action to substantially repair and rebuild the structure without authorization fell
3 under this policy. (Exh. B-7, p. 6.)

4 17. OCCL therefore recommended that the Daileys: 1) be found to have violated HRS
5 Chapter 183C and HAR Chapter 13-5 and to have allowed the unauthorized repair/reconstruction
6 of a revetment/seawall and failing to cease and desist after written notification on at least three
7 occasions; 2) be fined \$10,000 (\$8,000 for each of four Conservation District violations and an
8 additional \$2,000 for administrative costs); and 3) remove the unauthorized improvements within
9 sixty days of the Board’s action. (Exh. B-7, p. 8.) [OCCL FOF 44-45.]

10 18. On May 29, 2007, OCCL notified the Daileys that the Board had approved OCCL’s
11 recommendation and that the Daileys’ oral request for a contested case was noted. (Exh. B-8.)
12 [Daileys FOF 27; OCCL FOF 48.]

13 19. On June 4, 2007, the Board received the Daileys’ written Petition for a Contested Case.
14 (Exh. B-9.) [Daileys FOF 27.]

15 20. On July 25, 2007, Lawrence Miike was appointed hearings officer. (Minute Order #1.)

16 21. On October 11, 2007, a hearing on standing and a scheduling meeting were held. In
17 addition to the Daileys and OCCL, Mokule‘ia Beach Colony (“Colony”) had also applied to be a
18 party “as an immediately adjacent property owner and as otherwise permitted by law.” (Minute
19 Order #2.)

20 22. At the October 11, 2007 hearing on standing, the Daileys and OCCL were granted
21 standing and the Colony withdrew its application. (Minute Order #3.)

22 23. At the October 11, 2007 hearing on standing, the Daileys and OCCL had agreed to have
23 further discussions before the contested case proceedings were scheduled. And after the standing
24 hearing, the Colony had re-applied to be a party. Scheduling of the hearing on standing and
25 contested case proceedings were deferred until they were announced through a Minute Order.
26 (Minute Order #4.)

27 24. The hearing on standing and meeting to schedule the contested case proceedings were
28 held on November 28, 2007, but at the request of the Daileys and agreement of OCCL, both the
29 contested case proceedings and hearing on standing were stayed until further notice. (Minute
30 Order #6.)

1 25. On April 23, 2010, C&C's DPP approved a shoreline setback variance (SSV) to allow a
2 "seawall to replace an existing unauthorized seawall and boulder structure (revetment) which
3 were built within the 40-foot shoreline setback area without the necessary approvals," subject to
4 conditions that included the following:

5 a. Prior to the issuance of a building permit, the applicant shall submit a current
6 certified shoreline survey;

7 b. The necessary building permit(s) had to be obtained within one year, or the
8 variance would lapse;

9 c. The new shoreline protection structure shall be constructed landward of the
10 regulatory shoreline, as verified by the current certified shoreline survey;

11 d. No part of the shoreline protection structure shall be constructed on land in the
12 State Conservation District. (Exh. A-15, pp. 2, 11.) [OCCL FOF 61-63.]

13 26. On September 15, 2011, the shoreline was certified by the Chairperson as being mauka of
14 the rock revetment. (Exh. B-10.) [OCCL FOF 53.]

15 27. On April 1, 2013, a status conference was held, at which time the Daileys were requested
16 to provide a status report. (Minute Order #7.)

17 28. On May 3, 2013, the Daileys, through their current attorney, submitted a status report
18 identifying a meeting to be held on May 8, 2013, between attorneys for the Daileys and the
19 adjoining Colony with the following objectives: 1) to reach an agreement on the interface
20 between the Daileys' SSV revetment and the Colony's seawall, in which case a revised building
21 plan would be submitted to C&C's DPP within 30 days of the agreement; or 2) if no agreement
22 could be reached, the Daileys would request a meeting with OCCL to discuss an acceptable
23 alternative that would allow implementation of the SSV to the extent practicable. (Status Report
24 to the Hearings Officer, from Gregory W. Kugle, Damon Key Leong Kupchak Hastert, attorney
25 for the Daileys, May 3, 2013.)

26 29. A status and prehearing conference was held on June 24, 2013, at which time it was
27 reported that no agreement could be reached between the Daileys and the adjoining Colony, and
28 it was agreed that the contested case hearing would proceed. The date for the evidentiary hearing
29 was established as September 25 and 26, 2013. (Minute Orders #8 and #9.)

30 30. In the Notice of Hearing, OCCL alleged that the landowner has not removed the
31 unauthorized structure or obtained a permit to repair it in violation of HAR Chapter 13-5, HRS

1 Chapter 183C, HRS Chapter 205A, Coastal Zone Management, and more specifically, HRS
2 §205A-43.6. (Minute Order #11.)

3 31. In their Petition for Contested Case Hearing, the Daileys raised the following issues: 1)
4 whether DLNR has jurisdiction over the subject matter of the alleged violation; 2) whether the
5 construction/repair of the shore protection structure constitutes an unauthorized land use; 3)
6 whether the Board erred in denying the Daileys' request to dismiss the alleged violations; and 4)
7 whether the Board erred in denying the Daileys' request for a temporary variance or emergency
8 permit. (Minute Order #11.)

9 32. On August 19, 2013, a hearing was held on OCCL's motion to quash a Subpoena Duces
10 Tecum and to strike the Notice of Taking Deposition Upon Written Questions that was served on
11 the custodian of records for OCCL by the Daileys. The Motion to quash and to strike the notice
12 were granted by the Hearings Officer, who concluded that records maintained at OCCL are
13 public and reviewable by the Daileys and that subpoenas can be requested for witnesses to
14 appear at the evidentiary hearing. ("Hearing on Respondent Department of Land and Natural
15 Resources, Office of Conservation and Coastal Lands' Motion to Quash Subpoena Duces Tecum
16 and to Strike Notice of Taking Deposition Upon Written Questions," August 23, 2013.)

17 33. At the August 19, 2013 hearing, a revised schedule was established for the contested
18 case's evidentiary hearing, setting October 15 and 16, 2013 as the dates. (Minute Order #12.)

19 34. On August 22, 2013, a site visit was conducted at the Daileys' property. (Minute Order
20 #10.)

21 35. On September 16, 2013, the shoreline certification (*supra*, FOF 26) expired.² (Bolander,
22 Tr., 10/15/13, pp. 115-116.)

23 36. On October 8, 2013, a hearing on three motions was held:

- 24 a. Daileys' motion to dismiss for lack of enforcement jurisdiction;
- 25 b. OCCL's motion in limine (for an order precluding the Daileys from presenting
26 any evidence or argument pertaining to the CDUA that they submitted to OCCL
27 in 2005); and

² A certified shoreline survey is valid for 12 months. Where an application for a government permit or approval has been submitted with a valid certified shoreline survey, the director of DLNR may allow the certified shoreline survey to be used for purposes of processing the application for a period not to exceed two years from the date of certification. HAR § 13-222-11 .

1 c. OCCL's motion to add witnesses, or, in the alternative, to extend the deadline for
2 filing witness statements.

3 Daileys' motion to dismiss was denied without prejudice; OCCL's motion in limine was denied;
4 and OCCL's motion to add witnesses or to extend the deadline was denied but not summarily
5 prohibited during the evidentiary hearing. ("Order Regarding Hearing on Motions," Minute
6 Order #14.)

7 37. The evidentiary hearing before Hearings Officer Lawrence Miike began and concluded
8 on October 15, 2013. The Daileys were represented by counsel Gregory Kugle, and OCCL was
9 represented by Deputy Attorney General Robyn Chun.

10 38. On December 6, 2013, the parties submitted their proposed FOF, COL, and D&O to the
11 hearings officer. (Minute Order #15.)

12 39. On December 18, 2013, the Hearings Officer submitted his proposed FOF, COL, and
13 D&O to the Board. (Minute Order #16.)

14 **B. Construction and Location of the Rock Pile Revetment**

15 40. The Colony's and Daileys' properties are on a reef "headland" that protrudes seaward
16 from shore, with embayments situated eastward and westward. The beach is narrowest fronting
17 the Colony's and Daileys' properties because of their location at the tip of the headland. (Exh. A-
18 11, p. 2.)

19 41. The house located on the Daileys' property was constructed in 1965 by Michael Dailey's
20 parents, Fred and Elizabeth Dailey, approximately 40 feet from the shoreline at that time.
21 Currently, the house is about 28 feet from the shoreline. (Michael Dailey, WDT, p. 2;³ Elizabeth
22 Dailey, WDT, ¶¶ 2-3; Exh. A-15, p. 8.) [Daileys FOF 2.]

23 42. The beach was also much wider than currently. At that time, none of the neighboring
24 properties to the west, including the adjacent Colony property, had rock seawalls or revetments,
25 although the Colony had a small wooden seawall a few years before a big storm in 1969.
26 (Michael Dailey, WDT, pp. 2-3; Elizabeth Dailey, WDT, ¶ 4; Exh. A-2.)

27 43. On December 1-4, 1969, an extreme storm/high surf event damaged the Daileys' and
28 Colony's properties, flooding the Daileys' house and the front row of the Colony units and

³ While Michael Dailey's WDT is numbered by paragraphs, there are several instances of duplicated paragraph numbers. Thus, for his testimony statements are referenced by page numbers.

1 washing away the Colony's wooden seawall. (Michael Dailey, WDT, ¶ 5; Elizabeth Dailey,
2 WDT, ¶ 5.)

3 44. The Daileys had previously stated in August 2005 in their emergency CDUA that the
4 rock pile revetment was built about the same time as Elizabeth Dailey's home, around 1965. In
5 his testimony, Michael Dailey said that he was away at military school when the 1969 storm hit,
6 and when he came home from school, the rock pile revetment was in the front of the property
7 fronting the beach. So he would say, based on conversations with his father, Fred Dailey, that it
8 was in early 1970 when the rock pile revetment was built on their property, well above the
9 shoreline as it existed then, with the help of William Paty, who was then head of Wailua Sugar
10 Company and later was Chairman of the Department of Land and Natural Resources ("DLNR")
11 from 1984 to 1992. Significant beach remained in front of the revetment, and the upper reach of
12 the waves was significantly makai of the rock revetment. (Exh. A-5, p. 4; Lemmo, Tr., 10/15/13,
13 pp. 83-84; Michael Dailey, WDT, pp. 3-4; Elizabeth Dailey, WDT, ¶ 7; Rohrbach, WDT, ¶ 3;
14 Paty, WDT, ¶¶ 2-3.)

15 45. William Paty stated that the position of DLNR at that time was that DLNR did not
16 regulate rocks or structures that were placed on private property above the shoreline, and that
17 was a County matter. (Paty, WDT, ¶ 4; Exh. A-3.)

18 46. Michael Dailey does not know whether any county or state agency issued permits for the
19 rock revetment, although it is his understanding that the C&C for many years, and during this
20 time period, did not require or issue building permits for rock revetments of the type his father
21 installed. (Michael Dailey, WDT, p. 4.)

22 47. Prior to the enactment of the shoreline setback in 1970 that established the variance
23 process, there may be other types of building records, such as a record of authorization for
24 construction. (Eversole, Tr., 10/15/13, pp. 99-100.)

25 48. Michael Dailey was unable to locate any correspondence, permits, or applications with
26 regards to the structure, nor any information as to when the rock pile structure was built, a
27 process made especially difficult because Fred Dailey was deceased. (Exh. A-5, p. 4.)

28 49. In 1987, the Colony received approval from the C&C for a shoreline protection structure
29 within the shoreline setback area. DLNR certified the shoreline on June 28, 1989, with the
30 proposed structure being above the debris lines as of April 22, 1985 and June 13, 1989. The
31 Colony then built its current seawall in 1989. (Exh. A-16; Fraser, WDT, ¶ 8.)

1 50. In 1989, the rock pile revetment placed by the Daileys was on the eastern side of the
2 Colony's seawall. It was only loose rocks piled along the shoreline of the Daileys' property, with
3 a gap of five to six feet between the pile of rocks and the Colony's seawall, where the Colony
4 placed boulders in anticipation of the Daileys building their seawall to join the Colony's. (Fraser,
5 WDT, ¶¶ 8, 11-16, exhibits 3-6; Fraser, Tr. 10/15/13, pp. 148, 151-154, 167-168.)

6 51. The Colony's permit called for a 15-foot return at both ends, but after conversations with
7 Fred Dailey, the Colony understood that it was his intention to connect the end of his seawall on
8 the Colony's side of his property with the Colony's seawall. Therefore, the Colony did not build
9 the return on that end of its seawall. (Exh. A-16; Fraser, WDT, ¶¶ 9-10.)

10 C. Mauka Movement of the Shoreline

11 52. Over the decades since the rock pile revetment was built, the beach in front of the
12 Daileys' house eroded such that the shoreline and the ocean moved gradually inland toward the
13 existing rock revetment, with the erosion apparently increasing after the Colony installed its
14 vertical seawall in 1989. (Elizabeth Dailey, WDT, ¶ 8; Michael Dailey, WDT, pp. 4-5.)

15 53. Michael Dailey stated that an aerial photograph from 1967 shows the vegetation line to
16 be approximately 30-40 feet from the rear of the house and that currently, the rock revetment is
17 approximately 20 feet from the rear of the house, confirming, in his opinion, that the rocks were
18 placed mauka of the 1967 vegetation line. Based on Land Court maps for 1965 and as amended
19 in 1975, the 1975 shoreline was significantly mauka/inland of the 1965 boundary, leading
20 Michael Dailey to observe that considerable erosion occurred between the date of the enactment
21 of the conservation district provisions in 1964, and 1975; and if the rock revetment had been
22 placed on or near the shoreline as it existed in 1965— i.e., on or near the conservation district—
23 then these maps would not show such significant erosion by 1975. (Michael Dailey, WDT, pp. 4-
24 5.)

25 54. The shoreline certification issued by the Board on September 15, 2011 (*supra*, FOF 26),
26 identifies the shoreline as of May 18, 1964 as being makai of the rock revetment, with the
27 estimated erosion to the certified shoreline on September 15, 2011, as comprising 0.064 acres or
28 2,780 square feet. (Exh. A-14.)

29 55. A 2005 survey illustrated the proposed location of the current shoreline with respect to
30 the revetment, a portion of which appeared to encroach on State land; and a 2007 site inspection
31 concluded that there was a partial encroachment into the conservation district, disagreeing with

1 the Daileys' surveyor that the revetment was just mauka of the shoreline (*supra*, FOF 5, 12).
2 (Exhs. B-7, p. 2-4; A-12.)

3 56. On September 15, 2011, the shoreline was certified by the Board as being mauka of the
4 rock revetment (*supra*, FOF 26). (Exh. A-14.)

5 57. OCCL, in a September 19, 2008, comment to C&C's DPP on the draft environmental
6 assessment for the Daileys' application for a shoreline setback variance to replace the rock
7 revetment, stated that "there is no evidence that the revetment was built 'entirely' behind the
8 shoreline as neither survey (the 2005 and 2007 surveys, *supra*, FOF 5, 12) was certified. (Exh.
9 A-18, p. 1.)

10 58. However, in a Land Division recommendation to the Board, dated May 24, 2013, the
11 division did not require certified surveys in order to determine where a seawall on another
12 property was located in 1965 versus 2013, concluding that in 2013, the shoreline had moved
13 mauka of the recorded boundary and seawall and that therefore, that portions of the seawall and
14 rockpile were now considered to be encroaching on state lands. (Exh. A-24, p. 3.)

15 59. OCCL also "believes that the Board may also undertake enforcement actions on
16 unauthorized artificial shoreline structures even without the benefit of a shoreline delineation in
17 order to uphold the directives of Chapter 205A, HRS. § 205A-43.6(a) requires the landowner in
18 violation of this part to either remove the structure or correct the problem." (Exh. B-7, p. 7.)

19 **D. Reconstruction of the Rock Pile Revetment**

20 60. OCCL's files on the 2004 complaint of unstable rocks from the Daileys' revetment and
21 the denial of the Daileys' 2005 emergency CDUA were closed. Even though OCCL believed that
22 the structure was unauthorized, it could not determine exactly when or where the structure had
23 been built in relation to the shoreline (*supra*, FOF 1-9).

24 61. In December 2006, the violation case was re-opened after numerous complaints were
25 received that construction on the shoreline structure was continuing (*supra*, FOF 10).

26 62. Site inspections by a Conservation Enforcement Officer on December 28, 2006 and by
27 OCCL staff on December 29, 2006, noted active work was still being conducted on the shoreline
28 structure (*supra*, FOF 11). Work was observed being conducted on the top of the previously
29 existing shoreline structure on both days, despite the Notice and Order to cease construction
30 issued on December 23, 2006. Sandbags and soil was being used for backfill, and cement was

1 being poured over boulders and rocks for what appeared to be a seawall on top of the loose rock
2 revetment. (Exh. B-7, p. 3, exhibits 12-13.)

3 63. In February 2007 work was observed being conducted to stabilize palms along the wall
4 and the retrieval of boulders that had rolled off the wall toward the sea (*supra*, FOF 13). (Exh. B-
5 7, p. 4, exhibits 14-16.)

6 64. Improvements included cleaning up some of the loose rocks, restacking them, and then
7 building a new vertical stem wall on top of the restacked rocks. (Eversole, Tr., 10/15/13, p. 90.)
8 [OCCL FOF 38.]

9 65. OCCL characterizes it as construction of a replacement, a new feature, a hybrid seawall,
10 or a new seawall. (Lemmo, Tr. 10/15/13, pp. 54-56; Eversole, Tr. 10/15/13, p. 90.) [OCCL FOF
11 39.]

12 66. Michael Dailey described this construction as having “consisted of retrieving and
13 stacking of the rocks back to the original location/footprint of the revetment, and in some areas
14 pulling the rocks further landward than their original footprint by more vertical stacking, and
15 capping the structure with grout to insure its structural integrity,” and costing about \$50,000.
16 Completely removing and reconstructing the revetment/seawall was estimated as well in excess
17 of \$300,000. (Michael Dailey, WDT, pp. 7-8; Exhs. A-7, A-8; Hida, WDT, p. 2.) [Daileys FOF
18 20.]

19 67. The reconstructed structure has a different footprint and a different vertical dimension to
20 it. It is an un-engineered revetment, of which most or 147 feet, has been reconstructed into a
21 grouted seawall ranging in height from two to six feet above the beach, with a two- to three-foot
22 wide concrete cap. The lower portions of the structure are not grouted and as a result, waves
23 wash through the wall, causing the upper wash of the waves to be mauka of the boulder
24 revetment, with soil liquefaction mauka of the revetment. A 45-foot section of the revetment,
25 adjacent to the Mokule‘ia Beach Colony (to the west), was not reconstructed. (Exh. A-15, p. 2;
26 Bohlander, WDT, ¶¶ 10, 12; Eversole, Tr., 10/15/2013, p. 107.)

27 68. Construction on the shoreline structure (*supra*, FOF 61-66) led to the May 25, 2007, staff
28 submittal (*supra*, FOF 14) alleging the unauthorized repair/reconstruction of the boulder
29 revetment/seawall in four instances and failing to cease and desist after written notification on at
30 least three occasions. (Exh. B-7.)

1 69. The Daileys introduced exhibits on three cases in Mokule'ia that OCCL declined to
2 pursue for violations, two of which were issued easements by the Board.

3 a. The first was a recommendation to close a violation case, because all the recent
4 work was done mauka of the existing walls and well within the property
5 boundaries. In addition, C&C's DPP was handling the case and would be
6 enforcing Special Management Area ("SMA") and setback variance violations.
7 (Exhs. A-19, A-20; Lemmo, Tr., 10/15/13, p. 72.)

8 b. The second involved a Request to Resolve State Land Encroachment, in which
9 OCCL determined that the subject seawall was an authorized land use based on
10 the C&C's approval letter for a Shoreline Setback Variance (No. 2009/SV-10) for
11 the subject seawall. (Exhs. A-21, A-23; Lemmo, Tr., 10/15/13, pp. 65-69.)

12 c. The third also involved a Request to Resolve State Land Encroachment, in which
13 OCCL was notified that C&C had determined in a letter regarding Emergency
14 Repair Work and Shoreline Setback Variances (Nos. 2009/SV-12 and 2009/SV-
15 13) at the subject property that the existing seawalls were authorized after-the-fact
16 by the variances. (Exhs. A-22, A-24; Lemmo, Tr., 10/15/13, pp. 69-71.) [OCCL
17 FOF 56-60.]

18 **E. The Shoreline Setback Variance**

19 70. In August 2005, the Daileys had submitted an Emergency Conservation District Use
20 Application to repair the failed structure and remove those portions that were encroaching on
21 state land, but OCCL had concluded that it could not approve the application because: 1) there
22 was no evidence that the structure was legal or nonconforming; and 2) the structure had not been
23 authorized by any government agency because C&C had no record of approvals for the rock
24 revetment and that, in 1992, the owner of the property had been cited by C&C's DPP for the
25 unauthorized placement of boulders in the shoreline setback area (*supra*, FOF 6-8) (Exh. A-15,
26 p. 2.)

27 71. On April 23, 2010, C&C's DPP: 1) denied the request to allow a two-tiered seawall along
28 the makai boundary of the site; but 2) approved a Shoreline Setback Variance to allow a seawall
29 and/or revetment (as redesigned to feature a varied slope, steeper in proximity to the dwelling
30 and less steep in other open areas) to encroach into the shoreline setback area further mauka of
31 the proposed site, subject to conditions that included the following: a) a current certified

1 shoreline survey (*supra*, FOF 26); b) revised plans as described above; c) the seawall and/or
2 revetment shall be constructed landward of the regulatory shoreline, as verified by the certified
3 shoreline survey; and d) no part of the structure shall be constructed on land in the conservation
4 district—i.e., makai of the certified shoreline. (*supra*, FOF 25). (Exh. A-15, p. 11.)

5 72. Michael Dailey stated that the structure contemplated in the application for a Shoreline
6 Setback Variance was designed with the understanding that the 2007 shoreline surveys (*supra*,
7 FOF 55) accurately depicted the existing shoreline to be seaward of the existing structure and
8 that the eventual shoreline certification would establish the shoreline at the same location, which
9 would allow repurposing of the materials in their current locations and which would then match
10 up with the adjoining seawall of the Colony. (Michael Dailey, WDT, pp. 9-10.)

11 73. Michael Dailey also stated that to construct the C&C-permitted structure mauka of the
12 2011 shoreline (*supra*, FOF 71) would require removal of all existing rocks, as well as
13 significant amounts of the current yard, in particular the very narrow area directly in front of the
14 existing dwelling. (Michael Dailey, WDT, p.10.)

15 74. Michael Dailey also believes that the existing rock structure satisfies the legal
16 requirements as “nonconforming” under the applicable statutes and regulations, and that
17 therefore it should not be required to be removed. (Michael Dailey, WDT, p. 10).
18

19 **II. CONCLUSIONS OF LAW**

20 **A. Nonconforming Use and the Rock Pile Revetment**

21 1. The rock pile revetment was originally placed in the shoreline setback area, but with
22 movement of the shoreline mauka, the revetment is currently entirely in the conservation district
23 and therefore within the jurisdiction of the Department of Land and Natural Resources pursuant
24 to HRS chapter 183C. FOF 44, 52-56; HRS § 205-5(a).

25 2. Under *Hawaii County v. Sotomura*, “registered ocean front property is subject to the
26 same burdens and incidents as unregistered land, including erosion.”⁴ 55 Haw. 176, 180, 516
27 P.2d 57, 61 (1973). By common law, “[t]he loss of lands by the permanent encroachment of the
28 waters is one of the hazards incident to littoral or riparian ownership ... (W)hen the sea, lake or
29 navigable stream gradually and imperceptibly encroaches upon the land, the loss falls upon the

⁴ “Erosion” is defined in a footnote to *Sotomura* as “the gradual and imperceptible wearing away of land by the natural action of the elements.” (citation omitted) 55 Haw. at 179, 516 P.2d at 60, (FN3).

1 owner, and the land thus lost by erosion returns to the ownership of the state.” *Id.*, 55 Haw. at
2 183, 516 P.2d at 62-63. The seaward boundary lies along the upper reaches of the wash of
3 waves.” *Id.*, 55 Haw. at 182, 516 P.2d at 62; *see also* HRS § 205A-1 (definition of “shoreline”).

4 3. The Daileys argue that the revetment should be considered a nonconforming use under
5 *Waikiki Marketplace Inv. Co. v. Chair of Zoning Bd. of Appeals* (86 Haw. 343, 949 P.2d 183
6 (1997)) if a previously lawful use under the zoning code in existence when the structure was
7 built [Daileys Proposed COL 31, 32], i.e., a lawful use in the shoreline area.

8 4. Structures in the shoreline area do not need a variance if they were completed prior to
9 June 22, 1970, or received either a building permit, board approval, or shoreline setback variance
10 prior to June 16, 1989. HRS § 205A-44(b)(1) and (2).⁵

11 5. Michael Dailey’s testimony (FOF 44) regarding his recollections of the date of
12 construction of the revetment with his deceased father, past practices of the C&C regarding
13 building permits (FOF 46), and his inability to locate any correspondence, permits, or
14 applications with regards to the structure (FOF 48); without more, are insufficient to establish the
15 revetment as a lawful structure.

16 6. As the C&C’s DPP: a) had no records of approvals for the revetment (FOF 6); and b)
17 cited the owner for the unauthorized placement of boulders in the shoreline setback area in 1992,
18 although the alleged violation had been referred to C&C’s Division of Land Utilization but for
19 unknown reasons was never pursued (FOF 6); and c) on April 23, 2010, approved a shoreline
20 setback variance (SSV) to allow a “seawall to replace an existing unauthorized seawall and

⁵ HRS § 205A-44: **Prohibitions.** (b) Except as provided in this section, structures are prohibited in the shoreline area without a variance pursuant to this part. Structures in the shoreline area shall not need a variance if:

- (1) They were completed prior to June 22, 1970;
- (2) They received either a building permit, board approval, or shoreline setback variance prior to June 16, 1989;
- (3) They are outside the shoreline area when they receive either a building permit or board approval;
- (4) They are necessary for or ancillary to continuation of existing agriculture or aquaculture in the shoreline area on June 16, 1989;
- (5) They are minor structures permitted under rules adopted by the department which do not affect beach processes or artificially fix the shoreline and do not interfere with public access or public views to and along the shoreline; or
- (6) Work being done consists of maintenance, repair, reconstruction, and minor additions or alterations of legal boating, maritime, or watersports recreational facilities, which are publicly owned, and which result in little or no interference with natural shoreline processes; provided that permitted structures may be repaired, but shall not be enlarged within the shoreline area without a variance.

1 boulder structure (revetment) which were built within the 40-foot shoreline setback area without
2 the necessary approvals” (FOF 25); a further inference can be drawn that the revetment was not
3 considered a lawful structure by the C&C’s DPP.

4 7. In the conservation district, ““(n)onconforming use’ means the lawful use of any building,
5 premises, or land for any trade, industry, residence, or other purposes which is the same as and
6 no greater than that established prior to October 1, 1964, or prior to the inclusion of the building,
7 premises, or land in the conservation district.” (HAR § 13-5-2.) (*emphasis added*).

8 8. In the conservation district, the burden of proof to establish that the land use or structure
9 is legally nonconforming is on the applicant. HAR § 13-5-7(f).⁶ Applicant Daileys could have
10 met the burden of proving that their use of the rock pile revetment in the shoreline setback area
11 was lawful prior to its inclusion in the conservation district in two ways: 1) it was in lawful use
12 in the shoreline setback area prior to its inclusion in the conservation district (*supra*, COL 7); or
13 2) it had been completed prior to June 22, 1970, or had received either a building permit, board
14 approval, or shoreline setback variance prior to June 16, 1989 (*supra*, COL 4).

15 9. The Daileys have not met their burden of proof in either case:

16 a. They have not met the burden of proving that the revetment was in lawful use in
17 the shoreline setback area prior to its inclusion in the conservation district. They
18 had been cited for the unauthorized placement of boulders in the shoreline setback
19 area in 1992, and the approval of an SSV from C&C’s DPP was for a “seawall to
20 replace an existing unauthorized seawall and boulder structure (revetment) which
21 were built within the 40-foot shoreline setback area without the necessary
22 approvals (*supra*, COL 6).” FOF 6, 25.

⁶ HAR § 13-5-7: **Nonconforming uses and structures.** (a) This chapter shall not prohibit the continuance, or repair and maintenance, of nonconforming land uses and structures as defined in this chapter. (b) Any land identified as a kuleana may be put to those uses which were historically, customarily, and actually found on the particular lot including, if applicable, a single family residence. (c) The repair of structures shall be subject to development standards set forth in this chapter, and other requirements as applicable, including but not limited to a county building permit, shoreline setback, and shoreline certification. (d) If a nonconforming structure is damaged or destroyed by any means (including voluntary demolition) to an extent of more than fifty percent of its replacement cost at the time of its destruction, it shall not be reconstructed except in conformity with the provisions of this chapter, except as provided under section 13-5-22 (P-8). (e) Repairs or maintenance of a nonconforming structure shall not exceed the size, height, or density of the structure which existed on October 1, 1964 or at the time of its inclusion into the conservation district. (f) The burden of proof to establish that the land use or structure is legally nonconforming shall be on the applicant.

1 b. The Daileys base their claim that the rock pile revetment was built prior to June
2 22, 1970, solely on Michael Dailey’s personal recollection from conversations
3 with his deceased father, but he could provide no supporting/collaborative
4 evidence of his recollection (*supra*, COL 5). FOF 44, 46, 48. Furthermore, the
5 Daileys provided no evidence either to rebut C&C’s DPP’s documentation that
6 they had been found in violation for the unauthorized placement of boulders
7 without the necessary approvals in 1992 (*supra*, COL 6), FOF 6, 25, or to
8 reconcile this violation with their claim that the structure had been built prior to
9 June 22, 1970.

10 c. Unlike the *Waikiki Marketplace Investment* case, the Daileys did not offer
11 testimony regarding the zoning laws applicable to the revetment at the time it was
12 built. Contrary to the facts of that case, the parties in this proceeding did not
13 stipulate that the structure was a permissible use at the time of its construction.
14 *See* 86 Haw. at 347, 949 P.2d at 187.

15 10. Thus, the Daileys’ rock pile revetment is not a nonconforming use in the conservation
16 district that would qualify for continued use under HRS § 183C-5.⁷

17 11. Selective enforcement has not been argued by the Daileys aside from assertions that
18 OCCL has declined to pursue violations for similar structures in the conservation district in
19 Mokule’ia, these other structures were either within the jurisdiction of C&C’s DPP (in the
20 shoreline setback area and not in the conservation district), or had been granted variances by
21 C&C’s DPP and were therefore authorized land uses. FOF 69. A party making such a claim of
22 selective enforcement has the burden to demonstrate that enforcement had a discriminatory effect
23 and the enforcers were motivated by a discriminatory purpose. *Rosenbaum v. City and County of*
24 *San Francisco*, 484 F.3d 1142, 1152-1153 (9th Cir. 2007). “To establish discriminatory effect,
25 ..., the claimant must show that similarly situated individuals ... were not prosecuted.” (citation
26 omitted). To show discriminatory purpose, a plaintiff must establish that “the decision-maker ...

⁷ HRS § 183C-5: **Nonconforming uses.** (a) Neither this chapter nor any rules adopted hereunder shall prohibit the continuance of the lawful use of any building, premises, or land for any trade, industrial, residential, or other purpose for which the building, premises, or land was used on October 1, 1964, or at the time any rule adopted under authority of this part takes effect. All such existing uses shall be nonconforming uses. Any land identified as a kuleana may be put to those uses which were historically, customarily, and actually found on the particular lot including, if applicable, the construction of a single family residence. Any structures may be subject to conditions to ensure they are consistent with the surrounding environment.

1 selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in
2 spite of,’ its adverse effects upon an identifiable group.” (internal citation omitted) *Id.* No such
3 burden has been met.

4 **B. The Rock Pile Revetment became a Hybrid Seawall**

5 12. The “reconstructed” seawall is a new structure and not a repair/reconstruction of the
6 original rock pile revetment. FOF 50, 64-67.

7 13. The original structure consisted of a loosely stacked pile of rocks (*supra*, FOF 50) while
8 the 2007 structure does not duplicate the original but is instead a grouted vertical stem wall
9 ranging in height from two to six feet above the beach, with a two- to three-foot wide concrete
10 cap, FOF 64-67, and would not meet the requirements of HAR § 13-5-7(e).⁸

11 14. The Daileys’ 2007 construction of the hybrid seawall was an unauthorized and
12 unpermitted land use within the conservation district.

13 15. Even if it did qualify as a repair/reconstruction of the original rock pile structure, the
14 original structure does not qualify as a nonconforming use (*supra*, COL 10) and thus, neither
15 would its repair/reconstruction qualify it for a continuation of such use.

16 **C. OCCL/DLNR’s Jurisdiction to Fine the Daileys and Require Removal of the**
17 **Structure**

18
19 16. In asserting its jurisdiction, OCCL’s May 2007 staff submittal concluded that the Board,
20 under its jurisdiction pursuant to HRS § 205A-1, could undertake enforcement actions in order to
21 uphold the directives of HRS Chapter 205A, § 205A-43.6(a), which requires the landowner in
22 violation to either remove the structure or correct the problem; and “(t)herefore the Board, under
23 part (c), may assert its authority to compel the removal of the structure or correct the problem in
24 order to protect the coastal resources and uphold the directives of Chapter 205A, HRS.” FOF 14.

25 17. The staff submittal then recommended that the Daileys be found to have violated HRS
26 Chapter 183C and HAR Chapter 13-5. FOF 17.

27 18. HRS Chapter 183C and HAR Chapter 13-5 are the statute and administrative rules
28 governing conservation districts, the subject of this contested case.

29 19. HRS Chapter 205A is the statute governing the coastal zone management area, of which
30 there are four parts:

⁸ HAR § 13-5-7(e) states: “Repairs or maintenance of a nonconforming structure shall not exceed the size, height, or density of the structure which existed...at the time of its inclusion into the conservation district.”

- 1 a. Part I. (“Coastal Zone Management”): “Coastal zone management area” means all
2 lands of the State and the area extending seaward from the shoreline to the limit
3 of the State’s police power and management authority, including the United States
4 territorial sea. (HRS § 205A-1: Definitions.)
- 5 b. Part II. (“Special Management Areas”): “Special management area” means the
6 land extending inland from the shoreline as delineated on the maps filed with the
7 authority as of June 8, 1977, or as amended pursuant to section 205A-23.
8 (HRS § 205A-22: Definitions.)
- 9 c. Under Part III. (“Shoreline Setbacks”): “Shoreline area” shall include all of the
10 land area between the shoreline and shoreline setback line⁹ and may include the
11 area between mean sea level and the shoreline; provided that if the highest annual
12 wash of the waves is fixed or significantly affected by a structure that has not
13 received all permits and approvals required by law or if any part of any structure
14 in violation of this part extends seaward of the shoreline, then the term “shoreline
15 area” shall include the entire structure. (HRS § 205A-41: Definitions.)
- 16 d. Part IV. (“Marine and Coastal Affairs”): “Exclusive economic zone” or “EEZ”
17 means that area set forth in the Presidential Proclamation 5030 issued on March
18 10, 1983, whereby the United States proclaimed jurisdiction from the seaward
19 boundary of the State out to two hundred nautical miles from the baseline from
20 which the breadth of the territorial sea is measured. (HRS § 205A-61:
21 Definitions.)

22 20. In sum, the 2007 staff submittal claimed jurisdiction through HRS § 205A-1, which is in
23 Part I; asserted authority through HRS § 205A-43.6(c) in order to uphold the directives of HRS
24 § 205A-43.6(a), both of which are in Part III (Shoreline Setbacks), then found the Daileys in
25 violation of HRS Chapter 183C and HAR Chapter 13-5, which govern the conservation district
26 (*supra*, COL 16, 17, 19).

27 21. OCCL asserts that Part I of HRS Chapter 205A includes definitions of words as they are
28 used in the chapter; that each of the other Parts includes definitions of words used only in that
29 Part; and that the definition of “department” that Petitioners rely on is the definition of that word
30 as it is used in Part II, not as it is used in Part III. (Respondent Department of Land and Natural

⁹ In this case C&C has established the shoreline setback line at forty feet mauka of the shoreline. FOF 25.

1 Resources, Office of Conservation and Coastal Lands' Memorandum in Opposition to Elizabeth
2 Dailey and Michael Dailey's Motion to Dismiss for Lack of Enforcement Jurisdiction, October
3 1, 2013, pp. 2-3.)

4 22. OCCL is in error:

- 5 a. Part II of HRS Chapter 205A assigns jurisdiction over the Special Management
6 Area, or the lands extending inland from the shoreline, to the counties;¹⁰ and Part
7 III is a subset of the Special Management Area, limited to lands mauka of the
8 shoreline to the shoreline setback, which in this case is forty feet (*supra*, COL 19,
9 footnote 9). Thus, while a certified shoreline is obtained via DLNR pursuant to
10 HAR Chapter 13-222 under the authority of HRS § 205A-42, it is the counties,
11 not the state, that have jurisdiction over Part III, regarding the shoreline setback
12 area;
- 13 b. OCCL claims jurisdiction through HRS § 205A-1(*supra*, COL 16), which does
14 not address jurisdiction but is instead the definitions section to Part I of HRS
15 Chapter 205A, which merely defines “coastal zone management area (*supra*, COL
16 19),” “agency,”¹¹ and “lead agency,”¹² among other terms;
- 17 c. HRS § 205A-43.6(c), through which OCCL asserts its authority (*supra*, COL 16),
18 merely states that the authority of the Board under HRS Chapter 183C is not
19 diminished by an artificial structure in violation of the shoreline setback statute
20 (*infra*, COL 23), but OCCL interprets the section to give it jurisdiction over both
21 HRS Chapter 183C and HRS § 205A-43.6;
- 22 d. the enforcement authority in Part III of HRS Chapter 205A is regarding shoreline
23 setbacks—in this case extending from the shoreline to forty feet inland of the

¹⁰ HRS § 205A-22 defines:

“Department” means the planning department in the counties of Kauai, Maui, and Hawaii, and the department of land utilization in the city and county of Honolulu, or other appropriate agency as designated by the county councils.

“Authority” as the county planning commission, except in counties where the county planning commission is advisory only, in which case “authority” means the county council or such body as the council may by ordinance designate. The authority may, as appropriate, delegate the responsibility for administering this part.

¹¹ “Agency” means any agency, board, commission, department, or officer of a county government or the state government, including the authority as defined in Part II.

¹² “Lead agency” means the office of planning.

1 private property of the Daileys and unequivocally within the jurisdiction of C&C,
2 not the state (*supra*, COL 19); and

3 e. the administrative rules accompanying HRS 205A, Parts II and III, are under the
4 purview of C&C. (See Department of Land Utilization, Part 2 Rules Relating to
5 Shoreline Setbacks and the Special Management Area at ROH Chapters 11-18.)

6 23. In its entirety, HRS § 205A-43.6 reads as follows:

7 §205A-43.6 Enforcement of shoreline setbacks. (a) The department or an agency
8 designated by department rules shall enforce this part and rules adopted pursuant to this part.
9 Any structure or activity prohibited by section 205A-44, that has not received a variance
10 pursuant to this part or complied with conditions on a variance, shall be removed or corrected.
11 No other state or county permit or approval shall be construed as a variance pursuant to this part.

12 (b) Where the shoreline is affected by an artificial structure that has not been authorized
13 with government agency permits required by law, if any part of the structure is on private
14 property, then for purposes of enforcement of this part, the structure shall be construed to be
15 entirely within the shoreline area.

16 (c) The authority of the board of land and natural resources to determine the shoreline
17 and enforce rules established under chapter 183C shall not be diminished by an artificial
18 structure in violation of this part.

19 24. While HRS § 205A-43.6 refers to enforcement of shoreline setbacks (*supra*, COL 23),
20 OCCL asserts that the section gives it authority to enforcement within the conservation district
21 and in fact used this section in its May 2007 staff recommendation to find that the Daileys
22 violated HRS Ch. 183C and HAR Ch. 13-5, the statute and regulations pertaining to the
23 conservation district (*supra*, COL 16, 17).

24 25. The Daileys state that: 1) the rock pile revetment is in the shoreline setback area and not
25 in the conservation district; 2) OCCL has applied the shoreline setback rules to actions outside
26 the conservation district; and 3) OCCL's authority is limited by its enabling statute, HRS §
27 183C-4(b), which expressly limits its rule-making authority and the applicability of those rules to
28 "use of land within the boundaries of the conservation district." (Elizabeth Dailey and Michael
29 Dailey's Motion to Dismiss for Lack of Enforcement Jurisdiction, September 24, 2013, p. 8.)

30 26. The Daileys are partially correct. OCCL has attempted to apply the shoreline setback
31 statute to activities—the rock pile revetment and the subsequent new seawall—inside the

1 conservation district. The statute unambiguously is limited to the shoreline setback area—in this
2 case, the forty feet mauka of the seashore and on the private property of the Daileys, over which
3 OCCL has no jurisdiction.

4 27. In its Bill of Particulars, OCCL identified specific sections that the Daileys were alleged
5 to have violated:

- 6 (1) no use except a nonconforming use in the conservation district: HRS § 183C-
7 4(b);¹³
- 8 (2) enforcement of shoreline setbacks: HRS § 205A-43.6(a), (b)¹⁴;
- 9 (3) prohibitions: HRS § 205A-44(b);¹⁵
- 10 (4) penalty: HAR §§ 13-5-6(c), (d);¹⁶
- 11 (5) nonconforming uses and structures: HAR § 13-5-7;¹⁷
- 12 (6) permits: HAR § 13-5-30(b);¹⁸ and
- 13 (7) emergency permits: HAR § 13-5-35(d).¹⁹

14 (OCCL’s “Bill of Particulars,” p. 2, September 6, 2013.)

15 Thus, OCCL continues to maintain that it can use both the conservation district’s statute and
16 rules and the shoreline setback’s statute to regulate activities in the conservation district.

¹³ HRS § 183C-4(b): **Zoning; amendments.** (b) The department shall adopt rules governing the use of land within the boundaries of the conservation district that are consistent with the conservation of necessary forest growth, the conservation and development of land and natural resources adequate for present and future needs, and the conservation and preservation of open space areas for public use and enjoyment. No use except a nonconforming use as defined in section 183C-5, shall be made within the conservation district unless the use is in accordance with a zoning rule.

¹⁴ See COL 23, *supra*.

¹⁵ See footnote 4, *supra*.

¹⁶ HAR §§ 13-5-6: **Penalty.** (c) No permit shall be processed by the department or board until any violations pending against the subject parcel are resolved. (d) No land use(s) shall be conducted in the conservation district unless a permit or approval is first obtained from the department or board.

¹⁷ See footnote 5, *supra*.

¹⁸ HAR § 13-5-30: **Permits, generally.** (b) Unless provided in this chapter, land uses shall not be undertaken in the conservation district. The department shall regulate land uses in the conservation district by issuing one or more of the following approvals:

- (1) Departmental permit (see section 13-5-33);
- (2) Board permit (see section 13-5-34);
- (3) Emergency permit (see section 13-5-35);
- (4) Temporary variance (see section 13-5-36);
- (5) Site plan approval (see section 13-5-38); or
- (6) Management plan or comprehensive management plan (see section 13-5-39).

¹⁹ HAR § 13-5-35: **Emergency permits.** (d) Repair and reconstruction of any structure or land use being investigated for possible violation of this chapter, or in situations in which fines for a violation have not been collected, shall not be processed until the violation is resolved.

1 **D. Issues Presented by the Daileys**

2 **1. Does DLNR have jurisdiction over the revetment?**

3 28. The Daileys' contention that OCCL/DLNR has no jurisdiction is based on their
4 assumption that the revetment is in the shoreline setback area and therefore OCCL has no
5 authority to enforce the provisions of shoreline setbacks under HRS 205A-43.6 (*supra*, COL 25).
6 OCCL/DLNR has no authority to enforce violations in the conservation district through the
7 statute governing shoreline setbacks, but it has jurisdiction over the seawall, which is in the
8 conservation district, through HRS Chapter 183C and HAR Chapter 13-5 (*supra*, COL 22-24).

9 **2. Is construction or repair of the revetment permitted by the law? The**
10 **law allows the continued use, and repair, of a nonconforming**
11 **structure that existed when the land was placed in the conservation**
12 **district.**

13
14 29. The rock pile revetment is not a nonconforming use. When boulders were placed in the
15 shoreline setback area, it was done in violation of C&C's shoreline setback rules and therefore
16 was not a nonconforming use. When the shoreline moved mauka of the rock pile revetment, it
17 and its successor seawall, also did not qualify as a nonconforming use in the conservation
18 district, because it was not a lawful use at the time it came to be included in the conservation
19 district (*supra*, COL 1-10).

20 **3. Should DLNR have granted the Daileys' Emergency Permit? Because**
21 **DLNR acknowledged a hazardous condition and it withdrew the**
22 **alleged violation, DLNR should have issued an emergency permit.**

23
24 30. OCCL/DLNR did not grant the emergency CDUA because there was no evidence the
25 structure was legal or nonconforming, the structure had not been authorized by any government
26 agency and had been cited by C&C's DPP for the unauthorized placement of boulders in the
27 shoreline setback area, and the legality of the structure had to be resolved before any requests for
28 land use were processed by DLNR. FOF 6, 8.

29 31. Emergency permits for repair and reconstruction of the structure, which was being
30 investigated for possible violation of the conservation district statute and regulations, cannot be
31 processed until the violation is resolved. (HAR § 13-5-35. *See* footnote 19, *supra*.)

32 32. OCCL/DLNR did not acknowledge that a hazardous condition existed for the land owner,
33 because the erosion rate did not pose a significant immediate erosion threat to the dwelling but
34 instead was considered an "emergency" to the safety of the general public traversing the area. It

1 withdrew the pending conservation district violation and would close the case upon removal of
2 the portions of the structure that were encroaching onto state lands. The case was eventually
3 closed because, although the structure was unauthorized, OCCL could not determine exactly
4 when or where the structure had been built in relation to the shoreline. FOF 7-9.

5 33. The closure of the case by OCCL was based on an erroneous interpretation of the law.
6 OCCL had no obligation to determine when or where the structure had been built in relationship
7 to the shoreline. The obligation to determine the legality of the structure as a nonconforming use
8 was on the Daileys (*supra*, COL 7).

9 **4. Should the Board dismiss the enforcement action? Because DLNR**
10 **lacks jurisdiction and because the revetment is a nonconforming**
11 **structure that can be maintained and repaired, the Board should**
12 **dismiss the enforcement action.**
13

14 34. The Daileys argued that the revetment should be considered a nonconforming use under
15 *Waikiki Marketplace Inv. Co. v. Chair of Zoning Bd. of Appeals*, 86 Haw. 343, 949 P.2d 183
16 (1997), a case which held that the lack of evidence of building permits is not dispositive for
17 purposes of grandfathering under zoning laws. [Daileys Proposed COL 33].

18 35. The *Waikiki Marketplace* court held that for purposes of whether a structure was
19 grandfathered as a “previously lawful” nonconforming use under the LUO and HRS § 46-4,²⁰ the
20 legality should be measured in reference to the zoning code or ordinance in existence at the time
21 the structure was built rather than the building code, since the purpose of the building code
22 differs from that of the LUO. 86 Haw. at 354, 949 P.2d at 194.

23 37. The Daileys also posit that at the time the revetment was built, the Hawai‘i Coastal Zone
24 Management Act did not require variances for structures built within the shoreline area
25 (Landowners Elizabeth Dailey’s and Michael K. Dailey’s Exceptions to the Hearing Officer’s
26 Proposed Findings of Fact, Conclusions of Law, & Decision and Order, Jan. 24, 2014, p. 4, ¶ 2)
27 but do not otherwise indicate how the structure was in conformity with then existing zoning
28 laws.

²⁰ The ordinance regarding nonconforming use has similarities to the conservation statute in HRS § 183-5:
“Nonconforming use” means any use of a structure or a zoning lot which was *previously lawful* but which does not
conform to the applicable use regulations of the district in which it is located, either on the effective date of this
chapter or as a result of any subsequent amendment[.] 86 Haw. at 353, 949 P.2d at 193. *C.f.* FN 6.

1 38. As it was the Daleys' burden under HAR § 13-5-7(f) to introduce evidence that the
2 revetment structure is entitled to nonconforming status, we conclude the holding in the *Waikiki*
3 *Marketplace* case is inapposite to the facts at hand.

4 39. The revetment is not a nonconforming structure. COL 9-10.

5 40. A new wall was built from the existing boulders without a permit. COL 12, 15.

6 41. The recommended 2007 enforcement action focused specifically on HRS § 205A-43.6 as
7 its primary basis for jurisdiction and direction, and OCCL could not use a section for
8 enforcement of the shoreline setback, which was under the jurisdiction of C&C, for enforcement
9 actions in the conservation district (*supra*, COL 16, 22).

10 42. The unauthorized wall (*supra*, COL 40) was to be replaced by a new wall in the shoreline
11 setback area under a shoreline setback variance issued by C&C's DPP in April 2010, FOF 25;
12 but it has not been removed. The wall constitutes a continuing violation of the conservation
13 district statute and rules; specifically, HRS § 183C-4(b), HAR §§ 13-5-6(c) and (d); HAR § 13-
14 5-7, HAR § 13-5-30(b), and HAR §13-5-35(d) (*supra*, COL 27).

15 16 **III. DECISION AND ORDER**

17 1. The alleged unauthorized repair/reconstruction of a boulder revetment within the
18 conservation district located at Mokule'ia, Island of O'ahu, TMK (1) 6-8-003:018, first brought
19 before the Board on May 25, 2007, is dismissed for lack of jurisdiction, to the extent it was
20 brought under HRS § 205A-43.6 (i.e., enforcement of shoreline setbacks, which is under the
21 jurisdiction of the City and County of Honolulu).

22 2. The unauthorized new seawall, as initially charged on May 25, 2007 and stated in
23 OCCL's Bill of Particulars on September 6, 2013, on approximately the same footprint as the
24 original unauthorized rock pile revetment, and currently in the conservation district, constitutes a
25 continuing violation of HRS § 183C-4(b), HAR §§ 13-5-6(c) and (d); 13-5-7, 13-5-30(b), and
26 13-5-35(d).

27 3. Therefore, Petitioner Daileys are ordered:

28 a. to pay a fine of \$2,000 for the unauthorized construction of a seawall in the
29 conservation district; and

30 b. to remove the unauthorized seawall from the conservation district.

1 Payment of the fine shall be made effective immediately upon the date of the signing of this
2 order. Interest shall accrue on any unpaid fine at a rate as allowed by law.
3 4. The order to remove the unauthorized seawall is stayed until such time that the Daileys
4 apply and are approved for a shoreline setback variance (SSV) from C&C's DPP for a
5 replacement wall such as that approved on April 23, 2010. The application must be completed
6 within one year of the date of this order. The order to remove the unauthorized seawall is stayed
7 further for two years from the date the SSV is approved to allow for completion of the new wall.
8 If an application for a SSV is not made within the one-year period, the unauthorized seawall
9 shall be removed immediately. If the application is not approved, the unauthorized seawall shall
10 also be removed immediately.

DATED: Honolulu, Hawai'i June 13, 2014


WILLIAM J. AILA, JR. Chairperson

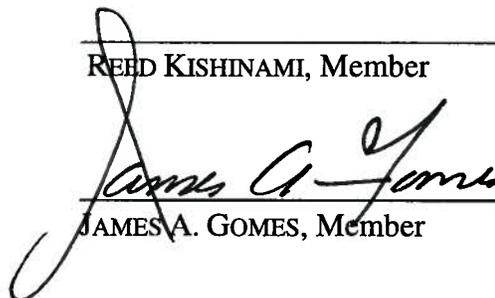

Dr. SAMUEL M. GON, III, Member

ROBERT PACHECO, Member



DAVID GOODE, Member

REED KISHINAMI, Member



JAMES A. GOMES, Member

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

In The Matter of a Contested Case to appeal the Board of Land and Natural Resources finding of violation for unauthorized repair and reconstruction of a boulder revetment at Mokulē`ia, District of Waialua, O`ahu, TMK (1) 6-8-003:018.

DLNR File No. OA-07-06

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Findings of Fact, Conclusions of Law, and Decision and Order on the above case, dated June 13, 2014, was served upon the following parties via email on June 13, 2014, and via regular mail on June 16, 2014, addressed as follows:

Gregory W. Kugle
Damon Key Leong Kupchak Hastert
1003 Bishop Street, Suite 1600
Honolulu, HI 96813
gwk@hawaiilawyer.com
Counsel for Landowners

Russell Suzuki, Deputy Attorney General
Robyn Chun, Deputy Attorney General
Administrative Division
Hale `Auhau
425 Queen Street
Honolulu, Hawai`i 96813
russell.a.suzuki@hawaii.gov
robyn.b.chun@hawaii.gov
Counsels for OCCL

Colin Lau, Deputy Attorney General
Land Transportation Division
Kekuanao`a Building
465 South King Street, Room 300
Honolulu, HI 96813
colin.j.lau@hawaii.gov
Counsel for the Tribunal

Dated: Honolulu, Hawai`i, June 13, 2014



S. Michael Cain
Department of Land & Natural Resources
State of Hawai`i