

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 Mokule`ia, District of Waialua, O`ahu,
TMK: (1) 6-8-003:018

OCCL/DLNR File No. OA-07-06

Hearings Officer's
Revised Findings of Fact, Conclusions of Law, &
Decision and Order:
On Remand

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1 **Hearings Officer’s Revised Findings of Fact,**
2 **Conclusions of Law, and Decision and Order: On Remand**
3

4 On March 20, 2015, the Circuit Court of the First Circuit issued its "Order Remanding
5 Proceedings to Amend Findings of Fact, Conclusions of Law and Decision and Order" including
6 the following:
7

8 1. The Court finds that the burden of proof was improperly shifted to the Appellant
9 to establish that the original revetment was a nonconforming use and there was a legal
10 assumption that it was not nonconforming. The Appellant submitted testimony and declarations
11 supporting the original revetment's nonconforming status as having been built before June 22,
12 1970 and outside the Conservation District. The record does not indicate whether there was any
13 evidence submitted to controvert the testimony that the revetment that was built was a
14 nonconforming structure built within the shoreline setback area and specifically whether, at that
15 point in time, the revetment was not there.
16

17 2. The proceedings in this matter are remanded for amended Findings of Fact,
18 Conclusions of Law and Decision and Order by the Hearings Officer and the BLNR, regarding
19 whether the DLNR can meet its initial burden to prove by a preponderance of the evidence that
20 the original structure was not nonconforming.
21

22 3. This order does not reopen the hearing before the Hearings Officer for the taking
23 of further evidence or evidentiary proceedings but directs the Hearings Officer, based upon the
24 existing record to make specific findings regarding whether the parties met their respective
25 burdens of proof with regard to producing evidence and persuasion in accordance with Haw.
26 Rev. Stat. § 91-10 and, if the structure is found to have the status of a nonconforming use in the
27 Conservation District, whether subsequent actions were in conformance therewith.
28

29 On remand, the hearings officer makes the following amended Findings of Fact ("FOF"),
30 Conclusions of Law ("COL"), and Decision and Order ("D&O"), based on the records
31 maintained by the Department of Land and Natural Resources (“DLNR”) on Conservation
32 District Enforcement File No. OA-07-31, Regarding Alleged Unauthorized
33 Repair/Reconstruction of a Boulder Revetment Within the Conservation District at Mokule`ia,
34 District of Waialua, O`ahu, TMK no. (1) 6-8-003:018, and the witness testimonies and exhibits
35 presented and accepted into evidence.

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

1 Proposed FOF not incorporated in this Decision and Order have been excluded because
2 they may be duplicative, not relevant, not material, taken out of context, contrary (in whole or in
3 part) to the found facts, an opinion (in whole or in part), contradicted by other evidence, or
4 contrary to law. Proposed FOF that have been incorporated may have minor modifications or
5 corrections that do not substantially alter the meaning of the original findings.
6

7 **I. FINDINGS OF FACT¹**

8 **A. Sequence of Events Regarding Violation Allegations**

9 1. On December 29, 2004, after receiving complaints regarding unstable rocks along the
10 Mokule`ia (O`ahu) shoreline of Petitioners' (Michael Dailey and Elizabeth Dailey--the
11 "Daileys") property, posing a hazard and blocking pedestrian access, the Department of Land and
12 Natural Resources' Office of Conservation and Coastal Lands ("OCCL/DLNR") conducted a site
13 inspection and noted that large portions of a rock pile revetment² were scoured by wave energy,
14 and the structural integrity of the revetment was compromised. Rocks had dislodged from the
15 revetment and rolled down onto the beach. (Exh. B-7, p. 2.) [Daileys FOF 6; OCCL/DLNR FOF
16 15-16.]

17 2. On February 7, 2005, the landowners, Michael Dailey and his mother, Elizabeth Dailey,
18 were sent and received a Notice and Order dated January 14, 2005, of the presence of an
19 unauthorized shoreline structure that was beginning to fail due to wave scour and recommended
20 its removal. A second Notice and Order dated March 2, 2005, was issued on March 4, 2005, as
21 the condition of the revetment had worsened since the previous site inspection. (Exhs. B-1, B-2,
22 B-7, p. 2.) [Daileys FOF 6; OCCL/DLNR FOF 17-19.]

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.

² "Revetment" is not defined in conservation district rules but taken in pari materia per Haw. Rev. Stat. (H.R.S.) § 1-16, is found and defined in Hawaii Administrative Rules (H.A.R.) § 13-222-2 as "a sloping facing of stone, concrete, blocks or other similar material built to protect the embankment or shore against erosion by wave action or current."

1 3. In the January 14, 2005 Notice and Order, OCCL/DLNR further noted that it had no
2 record authorizing the placement of the structure, that its staff had confirmed that the City and
3 County of Honolulu Planning and Permitting Department ("C&C's DPP") had no records of
4 approval for the structure. Historic photographs showed no rockpile in 1967 and the rockpile in
5 1986. An approximate 1975 shoreline boundary line superimposed on a photo of the rockpile in
6 December 2004 showed that much of the rockpile, as it existed then, would have been makai of
7 the shoreline, so OCCL/DLNR concluded that the structure had to have been placed in the
8 Conservation District when it was built. (Exh. B-1, pp. 1-2, figures 2- 3.)

9 4. On March 15, 2005, correspondence was received by OCCL/DLNR from the Daileys'
10 attorney at the time, stating that the partial failure of the rock pile revetment appeared to be
11 endangering the home on the property and that no action had been taken because the homeowner
12 was not sure what action could be taken. The correspondence also stated that the Daileys would
13 work as quickly as possible to obtain the necessary permits for repairing the revetment. (Exh. B-
14 7, p. 2.)

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

18 6. On May 17, 2005, the Daileys surveyor reported that, due to wave impact the previous
19 winter, a portion of the rock pile revetment was now located makai of the shoreline. (Exh. A-5,
20 pp. 4-5.)

21 7. On August 22, 2005, an Emergency Permit Conservation District Use Application
22 ("CDUA") was received by OCCL/DLNR from the Daileys to repair the failed structure and to
23 remove those portions that were encroaching on state land. (Exh. B-7, p. 2.)

24 a. The Daileys' CDUA stated that it would "restore the rock revetment to its
25 condition as existed prior to the damage. The repairs will not result in more than a twenty percent
26 increase in the footprint of the damaged structure." (Exh. A-5, p. 5.)

27 b. OCCL/DLNR was unable to accommodate the application to repair the structure,
28 because OCCL/DLNR had no evidence it was legal or nonconforming and also believed the
29 structure was not authorized by any government agency. In response to the CDUA,
30 OCCL/DLNR staff also noted that the City and County of Honolulu's ("C&C") Department of
31 Planning and Permitting ("DPP") stated to OCCL/DLNR in a letter of November 5, 2005 (No.

1 2005/ELOG-2469) that the boulder revetment was illegal and the Daileys had been cited in 1992
2 (No. BV-92-06-004) for the unauthorized placement of boulders in the shoreline setback area.
3 The 1992 violation had been referred to C&C's Division of Land Utilization, but for unknown
4 reasons, it had never been pursued. (Exhs. A-15, p. 2; B-1, pp. 1-2; B-7, pp. 2-3.) [Daileys FOF
5 8; OCCL/DLNR FOF 22-23.]

6 8. On December 20, 2005, OCCL/DLNR informed the applicant that: 1) it could not support
7 the granting of an after-the-fact permit, because the revetment clearly has had and will continue
8 to have a negative impact on the shoreline through the loss of beach area and accelerated erosion
9 fronting the structure; 2) there was no clearly demonstrated "emergency" present for the land
10 owner, because the erosion rate did not pose a significant immediate erosion threat to the
11 dwelling; 3) the unstable nature of the structure was perceived by OCCL/DLNR to be a
12 significant safety issue to the general public traversing the area and could be considered
13 "emergency" in nature; and 4) the loss of land through erosion was a secondary concern to
14 OCCL/DLNR, which has a primary function of protecting and preserving the public beach area
15 for future generations. (Exh. A-6, p. 2.) [Daileys FOF 9.]

16 9. In the same December 20, 1995 letter, OCCL/DLNR also stated that "(i)t is clear that the
17 structure was built sometime between 1969 and 1988³ and thus NOT eligible for state non-
18 conforming status, however, it is unclear if the structure was placed within the Conservation
19 District at the time of construction."⁴ (Exh. A-6, p. 1.)

20 10. OCCL/DLNR further determined that: 1) it could not process the emergency permit
21 request, because the legality of the structure had to be resolved before any requests for land use

³ OCCL/DLNR had previously estimated that the structure had been built between 1967 and 1986, *supra*, FOF 3.

⁴ Nonconforming use in the Conservation District is defined as "the lawful use of any building, premises, or land for any trade, industry, residence, or other purposes which is the same as and no greater than that established prior to October 1, 1964, or prior to the inclusion of the building, premises or land within the Conservation District (emphasis added)." H.A.R. § 13-5-2: Definitions.

Since the rock pile revetment was built after 1964, the remaining issue was whether it was a lawful use prior to its inclusion within the Conservation District through erosion of the shoreline. If it had been built in the shoreline setback area, which is under the jurisdiction of the City and County of Honolulu, two of the six exemptions in H.R.S. § 205A-44(b) are relevant to this case: "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."

1 were processed by OCCL/DLNR; 2) the pending conservation district violation case was being
2 withdrawn and would be closed upon removal of the portions of the structure that were
3 encroaching onto state lands as mapped in the May 2005 survey map included in the
4 Daileys' August 2005 CDUA submittal (*supra*, FOF 6); and 3) once the encroaching portions of
5 the revetment were removed from the conservation district, it should be replaced with a new
6 engineered revetment located as far mauka as possible and designed to enhance public access
7 along the structure with a public easement along a clear walkway, conducted in conjunction with
8 relocating the dwelling landward to allow for more accommodation space for the beach. (Exh. A-
9 6, pp. 1, 3.) [Daileys FOF 9.]

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

14 12. In December 2006, the violation case was re-opened after numerous complaints were
15 received that construction on the shoreline structure was continuing, and on December 23, 2006
16 a Notice and Order was delivered to Michael Dailey by a Conservation Enforcement Officer for
17 "unauthorized placement of rocks as part of a repair effort to an existing unauthorized
18 revetment." The Notice and Order stated that "[y]ou are hereby ordered to cease any further
19 activity on the subject premises. Should you fail to cease such illegal activity immediately, you
20 will be subject to fines up to \$2,000 per day pursuant to Chapter 13-5, H.A.R., in addition to
21 administrative costs incurred by the Department." (Exhs. B-5; B-7, p. 3.) [OCCL/DLNR FOF 31,
22 33.]

23 13. Site inspections by a Conservation Enforcement Officer on December 28, 2006, and
24 OCCL/DLNR staff on December 29, 2006, noted active work was still being conducted on the
25 shoreline structure. On December 28, 2006, conversation with the workers at the Daileys'
26 property indicated that the Notice and Order to cease construction was known to the workers, as
27 an individual stated that the owner told them he (the owner) was being fined anyway, so go
28 ahead with the construction. On December 29, 2006, conversation with the workers at the
29 Daileys' property indicated that it was known that the continued work was subject to daily fines.
30 (Exh. B-7, p. 3, exhibits 12-13.) [OCCL/DLNR FOF 32, 35.]

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

8 15. The evidence of wave overtopping, scour, debris and sandbag failure observed in the
9 February 16, 2007 site inspection showed that the highest wash of the waves was mauka of the
10 newly built wall, *supra*, FOF 14. (Exh. B-7, p. 6.)

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

14 17. On May 22, 2007, the Daileys' consultant conducted a site visit to assess the present
15 condition of the shoreline at the Daileys' and adjacent properties. Her description of the current
16 structure was as follows:

17 The existing shore protection structure is a seawall comprised of very large boulders with
18 a concrete cap. Boulders had been previously placed on the shoreline in the form of a
19 revetment. These boulders were re-used to build the existing seawall, and a few boulders
20 are still situated along the seaward base of the wall. The boulders also remain along a
21 short reach between the property's seawall and the Mokuleia Beach Colony (“Colony”)
22 seawall. The seawall has a curved flank section at the east end of the property. The top
23 elevation of the wall is estimated to be about +10 to +12 feet MLLW. The sand elevation
24 along the base of the seawall is estimated to vary between +3 to +5 feet MLLW
25 (*emphasis added*). (Exh. A-11, p. 1.)

26
27 18. At the Board of Land and Natural Resources’ (“Board”) meeting on May 25, 2007,
28 OCCL/DLNR stated that: 1) the Board had jurisdiction over land lying makai of the shoreline
29 (the conservation district) pursuant to H.R.S. § 205A-1; 2) there was sufficient cause to bring the
30 matter to the Board since it was evident that portions of the structure were within the
31 conservation district pursuant to H.A.R. § 15-15-20 (Standards for determining “C” conservation
32 district boundaries); 3) the Board may undertake enforcement actions on unauthorized artificial
33 shoreline structures even without benefit of a shoreline delineation in order to uphold the

1 directives of H.R.S. §205A-43.6(a), which requires the landowner in violation to either remove
2 the structure or correct the problem; and 4) “[t]herefore the Board, under [§ 205A-43.6] (c), may
3 assert its authority to compel the removal of the structure or correct the problem in order to
4 protect the coastal resources and uphold the directives of Chapter 205A, H.R.S.” (Exh. B-7, pp.
5 4, 7.) [OCCL/DLNR FOF 43.]

6 19. Because OCCL/DLNR has a “no tolerance” policy in regards to shoreline structures
7 constructed after 1999, the work on the structure without authorization fell under this policy.
8 (Exh. B-7, p. 6.)

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

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

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

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

22 24. On October 11, 2007, a hearing on standing and a scheduling meeting were held. In
23 addition to the Daileys and OCCL/DLNR, Mokule`ia Beach Colony (“Colony”) had also applied
24 to be a party “as an immediately adjacent property owner and as otherwise permitted by law.”
25 (Minute Order #2.)

26 25. At the October 11, 2007 hearing on standing, the Daileys and OCCL/DLNR were granted
27 standing and the Colony withdrew its application. (Minute Order #3.)

28 26. At the October 11, 2007 hearing on standing, counsel for the Daileys and OCCL/DLNR
29 had agreed to have further discussions before the contested case proceedings were scheduled.
30 And after the standing hearing, the Colony had re-applied to be a party. Scheduling of the

1 hearing on standing and contested case proceedings were deferred until they were announced
2 through a Minute Order. (Minute Order #4.)

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

7 28. On July 24, 2008, the Daileys submitted to the C&C's DPP, the Draft Environmental
8 Assessment for a Shoreline Setback Variance ("SSV") Application for a Seawall, and on June
9 30, 2009, the Daileys submitted their SSV application. (Letter to the Hearings Officer from
10 Michael C. Carroll, then attorney for the Daileys, October 14, 2009.)

11 29. The August 22, 2005 emergency CDUA that the Daileys had submitted to OCCL/DLNR
12 had stated that they would "restore the rock revetment to its condition as existed prior to the
13 damage. The repairs will not result in more than a twenty percent increase in the footprint of the
14 damaged structure (*emphasis added*)." FOF 7, *supra*. However, the Draft Environmental
15 Assessment submitted on July 24, 2008, *supra*, FOF 28, described the current structure as a new
16 seawall (see also FOF 17, *supra*, re: seawall), which the Daileys' attorney also referenced on
17 October 14, 2009:

18 After the rocks were moved around again in the winter of 2006-2007 the boulders were
19 re-used to build the existing seawall and a few boulders are still in situ along the seaward
20 base of the wall (*emphasis added*). (Letter to the Hearings Officer from Michael C.
21 Carroll, then attorney for the Daileys, October 14, 2009, Exhibit A, p. 9.)
22

23 30. A May 26, 2009 letter to OCCL/DLNR on the Daileys' request for a Shoreline
24 Delineation or Certification depicted only a portion of the seawall as seaward of the shoreline
25 proposed by the Daileys. (Letter from Michael C. Carroll, Exhibit B; Exh. A-15, p. 5.)

26 31. On April 23, 2010, C&C's DPP:

27 a. Stated that most of the revetment--approximately 147 feet of a shoreline boulder
28 structure--was reconstructed into a grouted seawall ranging in height from two to six feet above
29 the beach, with a two- to three-foot wide concrete cap (Exh. A-15, p. 2.);

30 b. denied the request to allow a two-tiered seawall in the shoreline setback area by
31 adding another tier to an existing unauthorized seawall and boulder structure (revetment);

1 c. approved a SSV to allow a seawall and/or revetment (as redesigned to feature a
2 varied slope, steeper in proximity to the dwelling and less steep in other open areas⁵)
3 further mauka in the shoreline setback area; and

4 d. required the Daileys to submit a current certified shoreline survey, landward of
5 which the new structure shall be constructed, with no part of the structure constructed in
6 the Conservation District. ⁶ (Exh. A-15, p. 11.) [OCCL/DLNR FOF 61-63.]

7 32. Whether in fact the shoreline was as depicted in the Daileys' SSV application--just mauka
8 of the shoreline and in the shoreline setback area, with only a portion in the Conservation
9 District, *supra*, FOF 30--was the basis for C&C's DPP assuming that the unauthorized seawall
10 and boulder structure was in the shoreline setback area, and the certified shoreline survey would
11 either confirm or deny the representation.

12 33. On December 7, 2010, Michael C. Carroll and A. Bernard Bays, of Bays Deaver Lung
13 Rose & Holma, withdrew as counsel for the Daileys. ("Notice of Withdrawal of Counsel for
14 Petitioners Elizabeth M. Dailey and Michael K. Dailey," December 7, 2010.)

15 34. On September 15, 2011, the shoreline was certified by the Chairperson as being mauka of
16 the rock structure, thereby placing the entire new wall in the Conservation District. ⁷ (Exh. B-10.)
17 [OCCL/DLNR FOF 53.]

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

20 36. On May 3, 2013, Gregory W. Kugle, of Damon Key Leong Kupchak Hastert, informed
21 the Hearings Officer that he now represented the Daileys. (Letter to the Hearings Officer from
22 Gregory W. Kugle, May 3, 2013.)

⁵ "As calculated by the applicant's coastal engineer, a properly designed revetment (a 1-to-2 slope) requires a 30-foot horizontal footprint given the 12-foot crest elevation and 3 feet below msl toe (foundation)." (Exh. A-15, pp. 8-9.) The Daileys' final plans called for a structure of varied slope, steeper in proximity to the dwelling and less steep in other areas, with a maximum of 9 feet in height with the existing grade of the beach a minimum of 3 feet. (Analytical Planning Consultants, Inc., Agent for Applicant, letter to William Ammons, C&C's DPP, June 21, 2012.)

⁶ Whether in fact the new seawall had been built within the 40 feet shoreline setback area and only partly encroached into the Conservation District, as the Daileys had asserted (*supra* FOF 30), would be determined by the certified shoreline survey.

⁷ In their responsive brief, the Daileys made the following claim: "Had OCCL/DLNR honored the shoreline depicted in the (Daileys) 2007 shoreline survey, the County SSV would have allowed modification of the existing structure in place. However, in 2011, when it re-interpreted the shoreline to be located behind/mauka of the existing structure, the existing structure purportedly could no longer be used." (Daileys' Responsive Brief, September 24, 2013, p. 7.) This is clearly a misrepresentation of the County SSV, which denied the Daileys request to modify the illegal seawall, *supra*, FOF 31.

1 37. On May 3, 2013, the Daileys submitted a status report identifying a meeting to be held on
2 May 8, 2013, between attorneys for the Daileys and the adjoining Colony with the following
3 objectives: 1) to reach an agreement on the interface between the Daileys' approved SSV
4 revetment (*supra*, FOF 31) and the Colony's seawall, in which case a revised building plan
5 would be submitted to C&C's DPP within 30 days of the agreement; or 2) if no agreement could
6 be reached, the Daileys would request a meeting with OCCL/DLNR to discuss an acceptable
7 alternative that would allow implementation of the SSV to the extent practicable. (Status Report
8 to the Hearings Officer, from Gregory W. Kugle, Damon Key Leong Kupchak Hastert, attorney
9 for the Daileys, May 3, 2013.)

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

14 39. In the Notice of Hearing, OCCL/DLNR alleged that the landowner has not removed the
15 unauthorized structure or obtained a permit to repair it in violation of HAR Chapter 13-5, HRS
16 Chapter 183C, HRS Chapter 205A, Coastal Zone Management, and more specifically, HRS
17 §205A-43.6. (Minute Order #11.)

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

24 41. On August 19, 2013, a hearing was held on OCCL/DLNR's motion to quash a Subpoena
25 Duces Tecum and to strike the Notice of Taking Deposition Upon Written Questions that was
26 served on the custodian of records for OCCL/DLNR by the Daileys. The Motion to quash and to
27 strike the notice were granted by the Hearings Officer, who concluded that records maintained at
28 OCCL/DLNR are public and reviewable by the Daileys and that subpoenas can be requested for
29 witnesses to appear at the evidentiary hearing. ("Hearing on Respondent Department of Land and
30 Natural Resources, Office of Conservation and Coastal Lands' Motion to Quash Subpoena

1 Duces Tecum and to Strike Notice of Taking Deposition Upon Written Questions,” August 23,
2 2013.)

3 42. At the August 19, 2013 hearing, a revised schedule was established for the contested
4 case’s evidentiary hearing, setting October 15 and 16, 2013 as the dates. (Minute Order #12.)

5 43. On August 22, 2013, a site visit was conducted at the Daileys’ property. (Minute Order
6 #10.)

7 44. On September 16, 2013, the shoreline certification (*supra*, FOF 34) expired.⁸
8 (Bolander, Tr., 10/15/13, pp. 115-116.)

9 45. On October 8, 2013, a hearing on three motions was held:

- 10 a. Daileys’ motion to dismiss for lack of enforcement jurisdiction;
- 11 b. OCCL/DLNR’s motion in limine (for an order precluding the Daileys from
12 presenting any evidence or argument pertaining to the CDUA that they submitted
13 to OCCL/DLNR in 2005); and
- 14 c. OCCL/DLNR’s motion to add witnesses, or, in the alternative, to extend the
15 deadline for filing witness statements.

16 Daileys’ motion to dismiss was denied without prejudice; OCCL/DLNR’s motion in limine was
17 denied; and OCCL/DLNR’s motion to add witnesses or to extend the deadline was denied but
18 not summarily prohibited during the evidentiary hearing. (“Order Regarding Hearing on
19 Motions,” Minute Order #14.)

20 46. The evidentiary hearing before Hearings Officer Lawrence Miike began and concluded
21 on October 15, 2013. The Daileys were represented by counsel Gregory Kugle, and
22 OCCL/DLNR was represented by Deputy Attorney General Robyn Chun.

23 47. On December 6, 2013, the parties submitted their proposed FOF, COL, and D&O to the
24 Hearings Officer. (Minute Order #15.)

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

27 49. On June 13, 2014, the Board issued its decision.

28 50. On March 20, 2015, the Circuit Court of the First Circuit issued its "Order Remanding
29 Proceedings to Amend Findings of Fact, Conclusions of Law and Decision and Order."

⁸ 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 OCCL/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 51. On June 25, 2015, the Hearings Officer submitted his revised FOF, COL, and D&O to
2 the Board.

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**B. The Rock Pile Revetment was Built in the Shoreline Setback Area,
but Through Mauka Movement of the Shoreline, it Ended Up
Completely in the Conservation District**

8 52. The Colony’s and Daileys' properties are on a reef “headland” that protrudes seaward
9 from shore, with embayments situated eastward and westward. The beach is narrowest fronting
10 the Colony’s and Daileys’ properties because of their location at the tip of the headland. (Exh. A-
11 11, p. 2.)

12 53. The house located on the Daileys’ property was constructed in 1965 by Michael Dailey’s
13 parents, Fred and Elizabeth Dailey, approximately 40 feet from the shoreline at that time.
14 Currently, the house is about 20-28 feet from the shoreline. (Michael Dailey, WDT, p. 2;⁹
15 Elizabeth Dailey, WDT, ¶¶ 2-3; Exh. A-15, p. 8.) [Daileys FOF 2.]

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

20 55. Over the decades since the rock pile structure was built, the beach in front of the Daileys’
21 house eroded such that the shoreline and the ocean moved gradually inland. (Elizabeth Dailey,
22 WDT, ¶ 8; Michael Dailey, WDT, pp. 4-5.)

23 56. Michael Dailey stated that an aerial photograph from 1967 shows the vegetation line to
24 be approximately 30-40 feet from the rear of the house and that the rock structure is now
25 approximately 20 feet from the rear of the house, confirming, in his opinion, that the rocks were
26 placed mauka of the 1967 vegetation line. Based on Land Court maps for 1965 and as amended
27 in 1975, he concluded that the 1975 shoreline was significantly mauka/inland of the 1965
28 boundary, leading him to observe that considerable erosion must have occurred between the date
29 of the enactment of the Conservation District provisions in 1964, and 1975; and if the rock
30 revetment had been placed on or near the shoreline as it existed in 1965—i.e., on or near the

⁹ 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 Conservation District—then these maps would not show such significant erosion by 1975.
2 (Michael Dailey, WDT, pp. 4-5.)

3 57. An approximate 1975 shoreline boundary line superimposed on a photo of the rock pile
4 in December 2004 showed that much of the rock pile, if it existed then, would have been makai
5 of the shoreline, so OCCL/DLNR concluded that the structure had to have been placed in the
6 Conservation District when it was built (*supra*, FOF 3).

7 58. On December 1-4, 1969, an extreme storm/high surf event damaged the Daileys' and
8 Colony's properties, flooding the Daileys' house and the front row of the Colony units and
9 washing away the Colony's wooden seawall. (Michael Dailey, WDT, ¶ 5; Elizabeth Dailey,
10 WDT, ¶ 5.)

11 59. In 1978, when William Fraser and his wife first saw the Daileys' and Colony's properties,
12 the loose rock pile was already located in front of the Daileys' property. The Frasers bought their
13 Colony property in 1979. (Fraser, Tr., 10/15/13, pp. 146, 158.)

14 60. In 1983-1984, after the Colony decided to build a seawall or revetment, they were
15 advised by an expert that they should not do what the Daileys had done and stack loose rocks on
16 top of the sand. (William Fraser, WDT, October 14, 2013, ¶ 5.)

17 61. In 1985, the Colony received approval from the C&C for a shoreline protection structure
18 within the shoreline setback area, and in 1987 it received approval of a revision to its 1985
19 variance. OCCL/DLNR certified the shoreline on June 28, 1989, with the proposed structure
20 being above the debris lines as of April 22, 1985 and June 13, 1989. The Colony then built its
21 current seawall in 1989. (Exh. A-16; Fraser, WDT, ¶ 8.)

22 62. In 1989, the rock pile structure placed by the Daileys was on the eastern side of the
23 Colony's seawall. It was only loose rocks piled along the shoreline of the Daileys' property, with
24 a gap of five to six feet between the pile of rocks and the Colony's seawall. After the Colony
25 completed its seawall, it placed boulders between its seawall and the Daileys' pile of rocks in
26 anticipation of the Daileys building their seawall to join the Colony's. (Fraser, WDT, ¶¶ 8, 11-
27 16; Fraser, Tr. 10/15/13, pp. 148, 151-154, 167-168.)

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

1 64. On December 29, 2004, after receiving complaints regarding unstable rocks along the
2 Mokule`ia (O`ahu) shoreline of Petitioners' (Michael Dailey and Elizabeth Dailey) property,
3 posing a hazard and blocking pedestrian access, OCCL/DLNR conducted a site inspection and
4 noted that large portions of a rock pile revetment¹⁰ were scoured by wave energy, and the
5 structural integrity of the revetment was compromised. Rocks had dislodged from the revetment
6 and rolled down onto the beach (*supra*, FOF 1).

7 65. On January 14, 2005, OCCL/DLNR notified the Daileys that it had no record authorizing
8 the placement of the structure and that C&C's DPP had no record of approvals for the structure,
9 *supra*, FOF 3.

10 66. The Daileys reviewed all their personal files regarding the house and were unable to
11 locate any information as to when the rock pile structure was built. As with OCCL/DLNR, the
12 Daileys were further unable to locate any correspondence, permits, or applications with regard to
13 the rock structure. (Michael Dailey, WDT, p. 4.; Exh. A-5, p. 4;)

14 67. On May 17, 2005, the Daileys' surveyor reported that, due to wave impact the previous
15 winter, a portion of the rock pile revetment was now located makai of the shoreline, *supra*, FOF
16 6.

17 68. On February 16, 2007, Department of Accounting and General Services ("DAGS")
18 Survey Staff conducted a site inspection to investigate improvements relative to what was
19 previously submitted to OCCL/DLNR by the landowner's surveyor. Measurements indicated
20 that improvements fell along or slightly seaward of what was mapped as the former shoreline,
21 *supra*, FOF 6, 10, and it was noted that unauthorized sand bags littered the beach, sunken areas
22 were developing within the fill materials mauka of the unauthorized structure, and large sections
23 of a newly built wall were failing due to scouring and wave overtopping, *supra*, FOF 14.

24 69. The February 16, 2007 site inspection showed that the highest wash of the waves was
25 mauka of the newly-built wall, *supra*, FOF 15.

26 70. On September 15, 2011, the shoreline was certified by the Chairperson as being mauka of
27 the newly built wall, thereby placing it entirely in the Conservation District, *supra*, FOF 34.

28 71. "Conservation district" means those lands within the various counties of the State and
29 state marine waters bounded by the conservation district line, as established under provisions of

¹⁰ "Revetment" is defined in H.A.R. §13-222-2 as "a sloping facing of stone, concrete, blocks or other similar material built to protect the embankment or shore against erosion by wave action or current."

1 Act 187, Session Laws of Hawaii, 1961, and Act 205, Sessions Law of Hawaii, 1963, or future
2 amendments thereto. (H.A.R. § 13-5-2.)

3 72. The resource (R) subzone of the Conservation District includes "(l)ands and state marine
4 waters seaward of the shoreline to the extent of the State's jurisdiction, unless placed in a (P) or
5 (L) subzone." (H.A.R. § 13-5-13(b)(5).)

6 73. "Shoreline" means the upper reaches of the wash of the waves, other than storm or
7 seismic waves, at high tide during the season of the year in which the highest wash of the waves
8 occurs, usually evidenced by the edge of vegetation growth, or the upper limit of debris left by
9 the wash of the waves. (H.A.R. § 13-222-2.)

10 "Storm or tidal waves" means waves of unusual magnitude which occurred on a specific
11 date as part of a specific and identifiable hurricane storm or tsunami event, to exclude seasonal
12 high surf. (H.A.R. § 13-222-2.)

13 74. "Special management area" means the land extending inland from the shoreline as
14 delineated on the maps filed with the authority as of June 8, 1977, or as amended pursuant to
15 section 205A-23. (H.R.S. § 205A-22.)

16 75. "Shoreline area" is defined in the context of the special management area, and "shall
17 include all of the land area between the shoreline and the shoreline setback line¹¹ and may
18 include the area between the mean sea level and the shoreline; provided that if the highest annual
19 wash of the waves is fixed or significantly affected by a structure that has not received all
20 permits and approvals required by law or if any part of any structure in violation of this part
21 extends seaward of the shoreline, then the term "shoreline area" shall include the entire
22 structure." (H.R.S. § 205A-41.)

23 76. The purpose and applicability of the shoreline certification rules is "to standardize the
24 application procedure for shoreline certifications for purposes of implementing the shoreline
25 setback law and other related laws." (*emphasis added*) (H.A.R. § 13-222-1.)

26 77. Thus, the Board need not perform a shoreline certification for purposes of enforcing the
27 Conservation District's laws and can instead exert jurisdiction through a showing that the
28 definition of "shoreline," *supra*, FOF 73, has been satisfied.

¹¹ In this case C&C has established the shoreline setback line at forty feet mauka of the certified shoreline. (R.O.H. §23-1.4(a).)

1 78. An approximate 1975 shoreline boundary line superimposed on a photo of the rock pile
2 in December 2004 showed that much of the rock pile, if it existed then, would have been makai
3 of the shoreline, *supra*, FOF 57. On the other hand, Michael Dailey's testimony regarding the
4 original placement of the rock pile with regard to the shoreline at the time is plausible, *supra*,
5 FOF 53, 55, 56.

6 79. The first observation of the rock pile encroaching into the shoreline area was on
7 December 29, 2004, *supra*, FOF 1, 64.

8 80. An inspection on February 16, 2007, showed the highest wash of the waves was mauka
9 of the newly built seawall, *supra*, FOF 15, 69, and on September 15, 2011, the shoreline was
10 certified as being mauka of the seawall, *supra*, FOF 34, 70.

11 81. Thus, prior to December 29, 2004, jurisdiction over the rock pile was either exclusively
12 or primarily with C&C's DPP; by December 29, 2004, jurisdiction was either exclusively or
13 primarily with OCCL/DLNR, and from February 16, 2007, jurisdiction was exclusively with
14 OCCL/DLNR.

15 82. The rock pile was laid down sometime prior to 1978. On his first visit to explore buying
16 into the adjacent Colony, the Frasers saw the rock pile in front of the Daileys' property, *supra*,
17 FOF 59.

18 83. As for a more precise date when Fred Dailey originally stacked loose rocks on the sand
19 between the shoreline and his house, the Daileys' assertions that it was done in 1970, and
20 specifically before June 22, 1970, are not credible, *see infra*, sub-section D: "The Daileys'
21 Assertions That the Rock Pile Revetment Was a Nonconforming Structure and That it
22 Was Legally Repaired Are Not Credible."

23

24 **C. The Daileys Dismantled the Rock Pile Revetment and Constructed a New**
25 **Seawall Without a Variance From Either the State or City and County of**
26 **Honolulu**
27

28 84. "Revetment" is defined in H.A.R. §13-222-2 as "a sloping facing of stone, concrete,
29 blocks or other similar material built to protect the embankment or shore against erosion by wave
30 action or current."

31 a. Michael Dailey described the original structure as a "loose rock revetment."
32 (Michael Dailey, WDT, p. 3.)

1 b. The Daileys' neighbor, William Fraser, stated that the Daileys "stack(ed) loose
2 rocks on top of the sand." (Fraser, WDT, p. 2, and p.5 of photos.)

3 c. Lemmo does not consider the original structure as a revetment but just a pile
4 of rocks. "(A) revetment is an uncemented structure, but the rocks are placed strategically
5 so they're locked into place, and it's very well engineered." (Lemmo, Tr., 10/15/13, p.
6 81.)

7 d. Eversole hesitated to call the original structure a revetment and referred to it as a
8 "rock structure." (Eversole, Tr., 10/15/13, p. 90.)

9 85. On August 22, 2005, an Emergency Conservation District Use Application ("CDUA"),
10 which was eventually denied, was received by OCCL/DLNR from the Daileys to repair the
11 failed structure and to remove those portions that were encroaching on state land. The CDUA
12 stated that it would "restore the rock revetment to its condition as existed prior to the damage.
13 The repairs will not result in more than a twenty percent increase in the footprint of the damaged
14 structure." (*supra*, FOF 7).

15 86. However, from late 2006 to early 2007, the Daileys constructed a new seawall, re-using
16 the boulders from the loose rock revetment. (*supra*, FOF 13-17).

17 87. "Seawall" is defined in H.A.R. §13-222-2 as "a structure with a vertical face separating
18 land and water areas, primarily designed to prevent erosion and other damage due to wave
19 action."

20 88. Three months after OCCL/DLNR staff observed work on the structure, the Daileys'
21 engineering consultant described the current shoreline structure on the Daileys' property on May
22 22, 2007 as a "seawall comprised of very large boulders with a concrete cap" and that the
23 boulders previously placed on the shoreline as a revetment were "re-used to build the existing
24 seawall." (*supra*, FOF 17).

25 89. On June 30, 2009, the Daileys submitted to the C&C's DPP, the final Environmental
26 Assessment ("EA") and the Shoreline Setback Variance ("SSV") Application for a Seawall. The
27 EA stated:

28 After storm waves during the winter of 2006-2007 again moved the rocks around, the
29 entire structure failed. Subsequently, the boulders were re-used to build the existing
30 seawall, and a few boulders are still in situ along the seaward base of the wall, between
31 the seawall and the end of the Mokuleia Beach Colony seawall. The top elevation of the
32 wall is estimated to be about 10 to 12 feet above mean low-low-water (MLLW). Sand at

1 the base of the seawall is estimated to vary between 3 and 5 feet above MLLW.
2 (*emphasis added*). (Letter to the Hearings Officer from Michael C. Carroll, then attorney
3 for the Daileys, June 30, 2009, EA, p. 9.)
4

5 90. The Daileys' SSV described its request as adding a second tier to the face of its existing
6 seawall. (Exh. A-15, exhibit C.) The C&C's DPP described the existing seawall as "a grouted
7 seawall ranging in height from two to six feet above the beach, with a two- to three-foot wide
8 concrete cap." (Exh. A-15, p. 2)

9 91. On April 23, 2010, C&C's DPP denied the request to allow a two-tiered seawall in the
10 shoreline setback area by adding another tier to an existing unauthorized seawall and boulder
11 structure (revetment)¹²; approved a SSV to allow a seawall and/or revetment (as redesigned to
12 feature a varied slope, steeper in proximity to the dwelling and less steep in other open areas¹³)
13 further mauka in the shoreline setback area; and required the Daileys to submit a current certified
14 shoreline survey, landward of which the new structure shall be constructed, with no part of the
15 structure constructed in the conservation district (*supra*, FOF 31).

16 92. On October 13, 2011, C&C's DPP received a letter from Michael Dailey, in which Mr.
17 Dailey stated that "(b)ecause there is an existing seawall structure in place, this process (the
18 shoreline certification, *supra*, FOF 34) has been rather lengthy and complicated. However it is
19 now complete (*emphasis added*)." (Letter from Michael Dailey to DPP, David K. Tanoue,
20 Director, dated October 10, 2011.)

21 93. On September 6, 2012, the agent for the Daileys sent a letter to OCCL/DLNR stating that
22 "(t)he Department of Land and Natural Resources (DLNR) requires removal of the illegally
23 constructed wall along the shoreline of the owner's property. Removal of the existing wall and
24 construction of the new wall mauka of the present certified shoreline by necessity will be done in
25 one operation and requires several permits from several government agencies to be issued in
26 order to protect the subject and neighboring shoreline properties. Analytical Planning
27 Consultants has been coordinating this process since February 2012 (*emphases added*)."
28 (Analytical Planning Consultants, letter from Lauri Clegg, President, to OCCL/DLNR,
29 September 6, 2012, p. 1.)

¹² In their Responsive Brief, the Daileys misrepresent C&C's DPP's decision by stating that "(h)ad DLNR honored the shoreline depicted in the(ir consultant's) 2007 shoreline survey, the County SSV would have allowed modification of the existing structure in place." (Elizabeth Dailey and Michael Dailey's Responsive Brief, September 24, 2013, p. 7.)

¹³ See footnote 5, *supra*.

1 94. Photos of the original rock pile revetment are contained in Exhibit B-1, figures 1 and 2
2 and in the written testimony of William Fraser in his accompanying photos--three photos in the
3 fifth set and the third photo in the sixth set. Photos of the extensive construction that resulted in
4 the unauthorized seawall, including the capability of the concrete grouted cap for use as a
5 walkway to traverse the top of the seawall, are contained in Exhibit B-7, exhibits 10-17. Photos
6 of the current, unauthorized seawall are contained in the "Project Information for Shoreline
7 Setback Variance Application for a Seawall, TMK: (1) 6-8-003:018, 37, Mokule`ia Beach,
8 Waialua, O`ahu, Hawai`i," February 5, 2008, figure 5. Photos 1-5 and 8 are of the Daileys'
9 current unauthorized seawall; photo 6 is of the boulders placed in the gap by the Colony in 1989
10 between the Daileys' rock pile revetment and the Colony's seawall, Fraser, WDT, ¶ 8-16; and
11 photo 7 is of the Colony's seawall. Additional photos of the current unauthorized seawall are
12 contained in Exhibit B-12.

13
14 **D. The Daileys' Assertions That the Rock Pile Revetment Was a**
15 **Nonconforming Structure and That it Was Legally Repaired Are Not**
16 **Credible**

17
18 **1. The Daileys' Assertions That Their Rock Pile Revetment Was Laid**
19 **Down Prior to June 22, 1970 Are Not Supported by Their Evidence**
20

21 95. In their Emergency CDUA of August 22, 2005, the Daileys stated that their "house was
22 built in 1965 by Fred Dailey, who is now deceased. Additionally, based on personal accounts, a
23 rock revetment was constructed around this time to protect the house from high winter surf."
24 (Exh. A-5, p. 4.)

25 96. A nonconforming use in the conservation district has a cutoff date of October 1, 1964,
26 while the cutoff date in the Shoreline Setback area is June 22, 1970 (*supra*, footnote 4), so if the
27 rock pile revetment had been built in 1965, it would not be eligible for nonconforming status in
28 the conservation district but would be in the Shoreline Setback area.

29 97. However, historic photographs from 1967 showed no rock pile (*supra*, FOF 3), so the
30 rock pile could not have been laid down in 1965.

31 98. In preparation for the October 15, 2013, hearing, the Daileys for the first time submitted
32 testimonies asserting that they had built the rock pile revetment in the Shoreline Setback area
33 before June 22, 1970. (Michael Dailey, WDT, 09/23/2013, p. 4; Elizabeth Dailey, WDT,
34 09/19/2013, ¶ 7.) They also asserted that statements submitted by Don Rohrbach and William

1 Paty corroborate the Daileys' testimonies. (Kugle, transcript, 10/15/2013, p. 25; "Notice of
2 Submission of William Paty," Gregory W. Kugle, Bethany C.K. Ace, Attorneys for Landowners
3 Elizabeth Dailey and Michael Dailey, October 10, 2013.)

4 Through their attorney, the Daileys made these specific assertions:

5 a. In his cross examination of OCCL's administrator, the Daileys' attorney engaged
6 in this exchange:

7 Q And you've read the written testimony of some of the Dailey witnesses
8 like Mike Dailey, Elizabeth Dailey, Don Rohrback, Bill Paty, that state that the
9 revetment was built in 1970 on the severe surf event in 1969. Do you recall
10 reading that?

11 A Yes. (Transcript, October 15, 2013, p. 25.¹⁴)

12 b. And in his Notice of Submission of William Paty's declaration, the Daileys'
13 attorney stated: "Mr. Paty's testimony is important because it confirms the testimony of
14 other witnesses concerning the construction of the revetment in 1970 on private property
15 and mauka of the shoreline. ("Notice of Submission of William Paty," Gregory W.
16 Kugle, Bethany C.K. Ace, Attorneys for Landowners Elizabeth Dailey and Michael
17 Dailey, October 10, 2013.)

18 99. However, the record clearly shows that the Daileys' assertions are not supported by the
19 testimonies and declarations they submitted.

20 100. First, the Daileys never specifically stated that the rock pile was laid down prior to June
21 22, 1970, the cutoff date for qualifying as a nonconforming use in the Shoreline Setback area:

22 a. Elizabeth Dailey only stated that "(m)y husband constructed the rock revetment in
23 1970 following the December 1-4, 1969 flooding, in the form and in the location
24 suggested by Mr. Paty." (Elizabeth Dailey, WDT, 09/19/2013, ¶ 7.)

25 b. Michael Dailey made the exact same statement: "(m)y father constructed the rock
26 revetment in 1970 following the December 1-4, 1969 flooding, in the form and in the
27 location suggested by Mr. Paty." (Michael Dailey, WDT, 09/23/2013.)

28 c. On cross-examination, Mr. Dailey engaged in the following exchange:

29 Q Now, you also state in your declaration that this loose rock revetment is the pile of
30 rocks that were placed there in 1970, and specifically in the first half of 1970 as I
31 understand; is that correct?

32 A Well, I just said that it was there when I came home. You know, beyond that I
33 don't know. And that would be summertime.

¹⁴Michael Dailey is identified incorrectly as "William Dailey" in the Transcript. (Transcript, 10/13/2013, pp. 3, 173.)

1 Q When you came home?
2 A Yeah.
3 Q So sometime during the course of 1970?
4 A The first half, so I would assume that would put it somewhere in the first half of
5 the year.
6 Q But you don't know that?
7 A No.
8 Q It's just when you came home?
9 A It was there, they were.
10 Q The rocks?
11 A Yeah.
12 Q So it could have been January for all you know, could have been --
13 A Yeah, could have been June, could have been anytime. (Michael
14 Dailey, Transcript, 10/15/2013, pp. 182-183.¹⁵)
15

16 101. Second, Mr. Rohrbach had not identified a specific date nor even a year in his
17 Declaration: "Following the 1969 flood/wave damage, Fred Dailey placed large boulders and
18 rocks on his property to protect against future such events." (Don Rohrbach, WDT, 09/21/2013,
19 ¶ 3.)

20 102. Furthermore, the Daileys' attorney had signed a "Stipulation Pertaining to the Testimony
21 of Don Rohrbach," which stated that "Mr. Rohrbach did not have a metes and bounds description
22 of the Daileys' property or any other objective evidence concerning the boundary or property
23 lines for the Daileys' property to support his conclusion that following the 1969 flood/wave
24 damage, Fred Dailey placed the boulders and rocks on his property." ("Stipulation Pertaining to
25 the Testimony of Don Rohrbach," October 15, 2013.)

26 103. Third, Mr. Paty only stated that "(f)ollowing the extreme surf event (of December 1969),
27 I spoke with my friend, Fred Dailey, who lived in Mokuleia, about protecting his house with a
28 loose rock revetment located on his property, above the shoreline and the beach. It is my
29 understanding that Fred Dailey constructed such a revetment." (William Paty, WDT, October 9,
30 2013, ¶ 3.)

31 104. The attachment accompanying Mr. Paty's Declaration: 1) contains no reference to when
32 Fred Dailey might have put down his rock pile and also made no reference to the Dailey property
33 at all; 2) refers only generally to "some others have been using large boulders on their property";
34 3) is addressed to a "Ms. Sandy Parker"; and 4) is dated February 16, 1989, nearly nineteen
35 years after the cutoff date of June 22, 1970. (Exh. A-3.)

¹⁵Michael Dailey is identified incorrectly as "William Dailey" in the Transcript. (Transcript, 10/13/2013, pp. 3, 173.)

1 105. Finally, the Daileys reviewed all their personal files regarding the house and were unable
2 to locate any information as to when the rock pile structure was built. As with OCCL/DLNR, the
3 Daileys were further unable to locate any correspondence, permits, or applications with regard to
4 the rock structure. (Michael Dailey, WDT, p. 4.; Exh. A-5, p. 4;)

5 106. Based on the lack of any specific date or dates regarding construction of the rock pile
6 aside from the summer of 1970, the vagueness of written testimony and live testimony, and no
7 corroboration by Daileys' "supporting" witnesses, there is a lack of credible testimony that the
8 rock pile was constructed on the Daileys' property prior to June 22, 1970.

9 107. Based on the lack of any documentary evidence adduced regarding the construction date
10 of the rock pile, there is no other corroborating evidence that the rock pile was constructed by the
11 Daileys prior to June 22, 1970.

12
13 **2. Even if the Daileys' Rock Pile Had Qualified as a Nonconforming**
14 **Structure, its Alleged "Repair" is Inconsistent with Reconstruction**
15

16 108. Michael Dailey described this construction as having “consisted of retrieving and staking
17 of the rocks back to the original location/footprint of the revetment, and in some areas pulling the
18 rocks further landward than their original footprint by more vertical stacking, and capping the
19 structure with grout to insure its structural integrity,” and costing \$50,000. Completely removing
20 and reconstructing the revetment seawall was estimated as well as in excess of \$300,000. The 45
21 feet at the western edge of the property adjacent to the Colony's property was not grouted or
22 restacked and remains as loose boulders, as it was more stable and not in direct proximity to the
23 Dailey's house. (Michael Dailey, WDT, p. 7; Exh. A-7, A-8; Hida, WDT, p. 2.) [Daileys FOF
24 20.]

25 109. However, there is overwhelming evidence, most of which the Daileys themselves
26 submitted, that they dismantled the original loose pile of rocks and constructed a seawall, *supra*,
27 FOF 84-94. And Michael Dailey himself referred to the existing structure as a "seawall," *supra*,
28 FOF 92.

29 110. As for the Daileys' asserted costs of \$50,000 for construction and "in excess of \$300,000"
30 for "(c)ompletely removing and reconstructing the revetment seawall," the relevant section on
31 "Nonconforming uses and structures" in the Hawaii Administrative Rules Governing the
32 Conservation District (§ 13-5-7) is as follows:

1 (a) This chapter shall not prohibit the continuance, or repair and maintenance, of
2 nonconforming land uses and structures as defined in this chapter.

3 (b) Any land identified as a kuleana may be put to those uses which were historically,
4 customarily, and actually found on the particular lot including, if applicable, a single
5 family residence.

6 (c) The repair of structures shall be subject to development standards set forth in this
7 chapter, and other requirements as applicable, including but not limited to a county
8 building permit, shoreline setback, and shoreline certification.

9 (d) If a nonconforming structure is damaged or destroyed by any means (including
10 voluntary demolition) to an extent of more than fifty percent of its replacement cost at the
11 time of destruction, it shall not be reconstructed except in conformity with the
12 provisions of this chapter, except as provided under section 13-5-22 (P-8).

13 (e) Repairs or maintenance of a nonconforming structure shall not exceed the size,
14 height, or density of the structure which existed on October 1, 1964 or at the time of its
15 inclusion into the conservation district.

16 (f) The burden of proof to establish that the land use or structure is legally
17 nonconforming shall be on the applicant(*emphases added*).

18
19 111. The Daileys' asserted repair and original costs are moot, because they dismantled the rock
20 pile structure and built a new seawall, *supra*, FOF 84-94, but the costs are addressed in addition
21 to these express findings that the original and current structures are significantly different.

22 112. Allowable "replacement" after damage or destruction, H.A.R. § 13-5-7, is further defined
23 in subsection (d) as being a "reconstruct(ion)" and in (e) as "(r)epairs or maintenance...not (to)
24 exceed the size, height, or density of the structure which existed...at the time of its inclusion into
25 the conservation district."

26 113. The Daileys assert construction costs of \$50,000, and completely removing and
27 reconstructing the revetment seawall was estimated as well as in excess of \$300,000, *supra*, FOF
28 108. However:

29 a. The \$50,000 was not for restacking the loose rock pile, but for "design, planning,
30 and permits for repairing a damaged seawall," and that "(c)onstruction of a seawall can be
31 \$1,000 to \$1,500 per linear foot." (Exh. A-7.)

32 b. The "in excess of \$300,000" was not for replacing the loose rock pile without
33 exceeding the size, height, or density at the time of its inclusion into the conservation
34 district (*supra*, FOF 1), but either:

35 i. the cost "to construct a new seawall (by)...remov(ing) the existing seawall
36 and rebuild(ing) it mauka of the certified shoreline," consisting of: 1) removing
37 and hauling away ten tall coconut trees behind the old seawall; 2) planning and

1 engineering fees to acquire building permits; 3) Army Corp and DoH Clean
2 Water and NPDES permit costs; and 4) labor, materials and equipment to remove
3 the old seawall and to construct the new seawall structure authorized by the
4 C&C's DPP (*supra*, FOF 31(c) and footnote 5), (Exh. A-8); or

5 ii. an estimate at 2007 costs to replace the rock revetment with the seawall
6 structure authorized by the C&C's DPP (*supra*, FOF 31(c) and footnote 5),
7 including re-using the existing rocks, would be \$340,000, which
8 was based upon 425 cubic yards CRM at \$800/cu.yd (*emphases added*). (Hida,
9 WDT, September 24, 2013, ¶ 3.)

10 114. Thus, even if the original rock pile had met the requirements of a nonconforming
11 structure, which it did not:

12 a. the "repair" costs asserted by the Daileys were for designing, planning, and
13 permits for a damaged seawall, the "replacement" costs were not for replacing the
14 rock pile at the time it was damaged, but for removing the illegal seawall and
15 constructing an entirely different one as specified by C&C's DPP; and

16 b. the original rock pile no longer exists, because the Daileys' dismantled it and built
17 an unapproved and un-engineered seawall in its place, *supra*, FOF 84-94.

18
19 **E. OCCL/DLNR's Treatment of Three Other Mokule`ia Property Owners**
20 **Was Consistent with its Treatment of the Daileys**
21

22 115. The Daileys introduced exhibits on three cases in Mokule`ia asserting that:

23 While the Daileys have been stuck in limbo, many of their neighbors have obtained
24 easements from DLNR allowing pre-existing seawalls to remain in the Conservation
25 District and on State lands (Exhs. A-21 through A-24). DLNR did not require those
26 owners to remove their seawalls. While this alternative was available to DLNR to address
27 the situation fronting the Dailey property, DLNR took a very different tact with the
28 Daileys, pursuing them with fines and violations and seeking removal of some or all of
29 the structure, despite conceding that the inhabited dwelling would be in imminent danger
30 of collapse without shoreline protection (*see e.g.*, Exh. A-6). (Elizabeth Dailey and
31 Michael Dailey's Responsive Brief, September 24, 2013, p. 8.)
32

33 116. The Daileys' assertion is incorrect that OCCL/DLNR had conceded that the dwelling
34 would be in imminent danger without shoreline protection. To the contrary, OCCL/DLNR had
35 informed the Daileys in denying the emergency CDDA that there was no clearly demonstrated
36 emergency present for the land owner, because the erosion rate did not pose a significant

1 immediate erosion threat to the dwelling, and that the unstable nature of the structure was a
2 significant safety issue and could be considered "emergency" in nature to the general public
3 traversing the area, *supra*, FOF 8.

4 117. In addition to the findings summarized in FOF 8 and 114, *supra*, OCCL/DLNR had
5 informed the applicant that the rock pile revetment clearly has had and will continue to have a
6 negative impact on the shoreline through the loss of beach area and accelerated erosion fronting
7 the structure; loss of land through erosion was a secondary concern to OCCL/DLNR, which has
8 a primary function of protecting and preserving the public beach area for future generations;
9 OCCL/DLNR had no evidence that the rock pile revetment was legal or nonconforming; and
10 OCCL/DLNR believed the rock pile revetment was not authorized by any government agency,
11 because C&C's DPP had issued a citation (BV-92-06-004) in 1992 for installing boulders within
12 the shoreline setback area, *supra*, FOF 7, 8.

13 118. Furthermore, after its CDUA was denied, the Daileys dismantled the rock pile revetment
14 and constructed a seawall, knowing that their actions were illegal and despite three notices to
15 cease and desist, *supra*, FOF 12, 13.

16 119. The rock pile revetment was, and the seawall continues to be, in the resource (R) subzone
17 of the Conservation District, *supra*, FOF 71, 72.

18 120. One of the land uses allowed in the resource subzone is:

19 (D-1) Seawall, revetment, groin, or other coastal erosion control structure or device,
20 including sand placement, to control erosion of land or inland area by coastal waters,
21 provided that the applicant shows that (1) the applicant will be deprived of all reasonable
22 use of the land or building without the permit; (2) the use would not adversely affect
23 beach processes or lateral public access along the shoreline, without adequately
24 compensating the State for its loss; or (3) public facilities (e.g., public roads) critical to
25 public health, safety, and welfare would be severely damaged or destroyed without a
26 shoreline erosion control structure, and there are no reasonable alternatives (e.g.,
27 relocation). Requires a shoreline certification (*emphases added*). (H.A.R. § 13-5-22(b), P-
28 15 Shoreline erosion control [for the Protective subzone]).¹⁶
29

30 121. Removal of the original rock pile and now, the unauthorized seawall, would not deprive
31 the Daileys of all reasonable use of the land or building, and both the prior rockpile and existing

¹⁶H.A.R. §13-5-24(a): land uses in the resource subzone: includes land uses and their associated requirements for the protective and limited subzones. H.A.R. §13-5-24(c)(4): Identified land uses beginning with the letter (D) require a board permit, and where indicated, a management plan.

1 seawall did and would continue to adversely affect beach processes or lateral public access along
2 the shoreline, *supra*, FOF 114, 115.

3 122. H.A.R. § 13-5-35 Emergency permits:

4
5 (c) If there is a question regarding the legality of a land use or structure, the burden of
6 proof shall be upon the applicant. For nonconforming structures, this section shall not
7 supersede the provisions contained in section 13-5-7.

8 (d) Repair and reconstruction of any structure or land use being investigated for
9 possible violation of this chapter, or in situations in which fines for a violation have not
10 been collected, shall not be processed until the violation is resolved (*emphases added*).

11
12 123. H.A.R § 13-5-7 Nonconforming uses and structures:

13 (a) This chapter shall not prohibit the continuance, or repair and maintenance, of
14 nonconforming land uses and structures as defined in this chapter.

15 (b) Any land identified as a kuleana may be put to those uses which were historically,
16 customarily, and actually found on the particular lot including, if applicable, a single
17 family residence.

18 (c) The repair of structures shall be subject to development standards set forth in this
19 chapter, and other requirements as applicable, including but not limited to a county
20 building permit, shoreline setback, and shoreline certification.

21 (d) If a nonconforming structure is damaged or destroyed by any means (including
22 voluntary demolition) to an extent of more than fifty percent of its replacement cost at the
23 time of destruction, it shall not be reconstructed except in conformity with the
24 provisions of this chapter, except as provided under section 13-5-22 (P-8).

25 (e) Repairs or maintenance of a nonconforming structure shall not exceed the size,
26 height, or density of the structure which existed on October 1, 1964 or at the time of its
27 inclusion into the conservation district.

28 (f) The burden of proof to establish that the land use or structure is legally
29 nonconforming shall be on the applicant (*emphases added*).

30
31 124. C&C's DPP had informed OCCL/DLNR that the rock pile was illegal, and the burden
32 was on the Daileys to prove that the rock pile was legal, *supra*, FOF 122. The Daileys offered no
33 evidence to rebut this finding, *supra* FOF 7, 117. Also, at the time of the CDUA, the Daileys had
34 stated that the rock pile had been built shortly after their home was erected in 1965, *supra*, FOF
35 95, after the cutoff date of October 1, 1964, for nonconforming structures in the Conservation
36 District, *supra*, FOF 96. The burden was on the Daileys to prove that the rock pile was legally
37 nonconforming, *supra*, FOF 123. The Daileys first asserted that the rock pile had been built in
38 the shoreline setback area and before its June 22, 1970 deadline for nonconforming uses in its
39 submittals for the contested case hearing, *supra*, FOF 98.

1 125. OCCL/DLNR could not approve the CDUA, because "(r)epair and reconstruction of any
2 structure or land use being investigated for possible violation of this chapter, or in situations in
3 which fines for a violation have not been collected, shall not be processed until the violation is
4 resolved," *supra*, FOF 122.

5 126. Similarly, the May 25, 2007, Board action against the Daileys was for unauthorized
6 construction activities on shoreline structures and failing to cease and desist after written
7 notification on at least three occasions, *supra*, FOF 18-20.

8 127. The three Mokule`ia structures that the Daileys identified as having obtained easements
9 from OCCL/DLNR allowing pre-existing seawalls to remain in the conservation district and on
10 State lands are as follows.

11 128. The first was a July 21, 2004 recommendation to close a violation case, because all the
12 recent work was done mauka of the existing walls and well within the property boundaries, and
13 did not appear to be a conservation district violation or an encroachment. In addition, C&C's
14 DPP was handling the case and would be enforcing Special Management Area ("SMA") and
15 setback variance violations. (Exhs. A-19, A-20; Lemmo, Tr., 10/15/13, p. 72.)

16 129. The second involved a May 24, 2013, Request to Resolve State Land Encroachment, in
17 which DLNR's Land Division recommended the grant of a Term, Non-Exclusive Easement for
18 Seawall and Concrete Purposes, and Issuance of a Management Right-of-Entry. The applicant
19 was in the process of obtaining a shoreline certification, and during the survey process, portions
20 of the seawall and concrete footing (264 square feet) were found to be makai of the shoreline.
21 The entire seawall and concrete footing had originally been found to be mauka of the original
22 shoreline and within the recorded boundary of the private property. OCCL/DLNR determined
23 that the seawall was an authorized land use based on C&C's DPP's December 21, 2009, approval
24 of a Shoreline Setback Variance (No. 2009/SV-10) for the subject seawall. OCCL/DLNR also
25 found no discernible effect on beach and recreational resources nor on public access.

26 OCCL/DLNR therefore did not ask for an after-the-fact Conservation District Use Application,
27 but stated it might reconsider if it found that the seawall was built without permits within the
28 conservation district after 1964. (Lemmo, Tr., 10/15/13, pp. 65-69; Exh. A-21, A-23.)

29 130. The third involved a similar May 24, 2013 Request to Resolve State Land Encroachment,
30 in which DLNR's Land Division recommended the grant of a Term, Non-Exclusive Easement for
31 Seawall and Concrete Purposes, and Issuance of a Management Right-of-Entry, which was

1 granted. A survey to obtain a shoreline certification similarly had found that a portion of a
2 seawall and rock pile (143 square feet and 313 square feet) that was previously mauka of the
3 shoreline was now makai of the shoreline. In this case, C&C had authorized both encroachments
4 after-the-fact under its Emergency Repair Work and Shoreline Setback Variances (Nos.
5 2009/SV-12 and 2009/SV-13) dated March 13, 2012. OCCL/DLNR also found no discernible
6 effect on beach and recreational resources nor on public access. OCCL/DLNR therefore did not
7 ask for an after-the-fact Conservation District Use Application, but stated it might reconsider if it
8 found that the seawall was built without permits within the conservation district after 1964.
9 (Lemmo, Tr., 10/15/13, pp. 69-71; Exhs. A-22, A-24.) [OCCL/DLNR FOF 56-60.]

10 131. The Daileys' circumstances were clearly distinguishable from the three cases they
11 offered:

- 12 a. the Daileys' rock pile revetment clearly had and would continue to have a
13 negative impact on the shoreline through the loss of beach area and accelerated erosion
14 fronting the structure;
- 15 b. there was no evidence that the Daileys' rock pile revetment was legal or
16 nonconforming; C&C's DPP had issued a citation (BV-92-06-004) in 1992 for installing
17 boulders within the shoreline setback area; and
- 18 c. after its CDUA was denied, the Daileys dismantled the rock pile revetment and
19 constructed a seawall, knowing that their actions were illegal and despite three notices to
20 cease and desist, *supra*, FOF 117-119.

21 132. In contrast, the first case the Daileys offered was not pursued by OCCL/DLNR because it
22 was not even in the conservation district. In the other two cases, the structures were legally
23 authorized by C&C's DPP, and no discernible effects were found on beach and recreational
24 resources nor on public access, *supra*, FOF 128-130.

25 26 **II. CONCLUSIONS OF LAW**

27 28 **A. OCCL/DLNR Met Its Burden of Proof in the Enforcement Action**

29 30 **1. OCCL/DLNR Proved That the Rock Pile Was Not a Nonconforming** 31 **Structure** 32

1 1. On remand, the Circuit Court of the First Circuit instructed the hearings officer and the
2 Board to determine whether OCCL/DLNR can meet "its initial burden to prove by a
3 preponderance of the evidence that the original structure was not nonconforming."

4 a. Under this mandate and upon the preceding findings of facts, OCCL/DLNR is
5 therefore found to have met its burdens of producing evidence and of persuasion as the
6 initiating party to the enforcement action under this contested case proceeding,
7 OCCL/DLNR File No. OA-07-06, that the Daileys' rock pile revetment at Mokule`ia,
8 District of Waialua, O`ahu, TMK no. (1) 6-8-003:018 is an unauthorized and unpermitted
9 structure pursuant to H.R.S. § 183C-4 and H.A.R. § 13-5-30, as indicated in the
10 OCCL/DLNR submittal as of the May 23, 2007 board meeting.

11 b. H.R.S. § 183C-4(b) creates a limited exception for a nonconforming use defined
12 in H.R.S. § 183C-5, to the general zoning rule requirements in the conservation district.

13 2. OCCL/DLNR, as the party initiating the enforcement action, has the burden of proof by a
14 preponderance of the evidence, but there is an exception for claims that the land use or structure
15 is legally nonconforming:

16 Except as otherwise provided by law, the party initiating the proceeding shall have the
17 burden of proof, including the burden of producing evidence as well as the burden of
18 persuasion. The degree or quantum of proof shall be a preponderance of the evidence
19 (*emphasis added*). (H.R.S. § 91-10(5).)

20
21 The burden of proof to establish that the land use or structure is legally nonconforming
22 shall be on the applicant (*emphases added*).¹⁷ (H.A.R § 13-5-7(f) Nonconforming uses
23 and structures.)

24
25 3. Are the Daileys "applicants"?

¹⁷ The Daileys argued that the rock pile should be considered a nonconforming use under *Waikiki Marketplace Inv. Co. v. Chair of Zoning Bd. of Appeals*, 86 Haw. 343, 949 P.2d 183 (1997), a case which held that the lack of evidence of building permits is not dispositive for purposes of grandfathering under zoning laws. [Daileys Proposed COL 33.] The *Waikiki Marketplace* court held that for purposes of whether a structure was grandfathered as a "previously lawful" nonconforming use under the LUO and HRS § 46-4, the legality should be measured in reference to the zoning code or ordinance in existence at the time the structure was built rather than the building code, since the purpose of the building code differs from that of the LUO. 86 Haw. at 354, 949 P.2d at 194. The Daileys also posit that at the time the rock pile was laid down, the Hawaii Coastal Zone Management Act did not require variances for structures built within the shoreline area (Landowners Elizabeth Dailey's and Michael K. Dailey's Exceptions to the Hearings Officer's Proposed Findings of Fact, Conclusions of Law, & Decision and Order, Jan. 24, 2014, p. 4, ¶ 2.), but do not otherwise indicate how the structure was in conformity with then existing zoning laws. As it was the Daileys' burden under H.A.R. § 13-5-7(f) to introduce evidence that the rock pile was entitled to nonconforming status, the holdings in *Waikiki Marketplace* are inapposite to the facts in hand.

1 “Applicant” is its ordinary meaning and in conservation district rules is understood in the
2 context of H.A.R. §13-5-31 Permit applications, including “[a]pplications for all permits and
3 approvals provided for in this chapter.”

4 4. There are several avenues through which the Daileys meet the definition of “applicants.”

5 a. The Daileys have petitioned the board for relief from its decision to adopt the staff
6 recommendation through the Daileys’ request for a contested case hearing, *supra*, FOF
7 21-22.

8 b. The Daileys applied for an Emergency Conservation District Use Permit, and
9 when it was denied, they proceeded with their activities on the rock pile anyway and
10 replaced it with an unauthorized seawall, *supra*, FOF 13-17. These activities were
11 intentionally and directly related to their status as unsuccessful applicants for an
12 emergency permit.

13 c. Even assuming *arguendo* that the Daileys have and maintain a nonconforming use
14 in the rock pile shoreline structure, in order to conduct any repair or reconstruction on the
15 structure, H.R.S. § 183C-5 (“Nonconforming uses”) states that “[a]ny structures may be
16 subject to conditions to ensure they are consistent with the surrounding environment.”
17 H.A.R. § 13-5-7 imposes conditions, including (c) that “repair of structures shall be
18 subject to development standards set forth in this chapter, and other requirements as
19 applicable, including but not limited to a county building permit, shoreline setback, and
20 shoreline certification.” As an encroaching structure to state land, to maintain a land use
21 in the public shoreline, the Daileys would also have to obtain an easement or other
22 disposition under H.R.S. § 171-53, including the Governor’s approval and Legislative
23 concurrence (*see* H.R.S. § 171-53(c)), and a conservation district use permit or other
24 approval.¹⁸ *See* also H.A.R. § 13-222-19 (Encroachment upon State Land and
25 Unauthorized Shoreline Improvements) requiring resolution of an encroachment or
26 violation before a shoreline may be certified.

27 5. If the Daileys are not applicants, under COL 4c, *supra*, they cannot repair the rock pile
28 under H.A.R. § 13-5-7, which applies to applicants.

¹⁸ If reconstruction is involved, H.R.S. § 183C-6(d) requires that the department regulate any “construction, reconstruction, demolition, or alteration of any structure, building, or facility by the issuance of site plan approvals.”

1 6. If the burden is with OCCL/DLNR to prove that the Daileys' rock pile was not a
2 nonconforming structure and OCCL/DLNR fails to meet its burden of proof, nonconforming
3 structures in the conservation district are still "subject to conditions to ensure they are consistent
4 with the surrounding environment" (H.R.S. § 183C-5), *supra*, COL 4c, which are required to be
5 met under conservation district laws.

6 7. The rock pile revetment clearly had a negative impact on the shoreline through the loss of
7 beach area and accelerated erosion fronting the structure, *supra*, FOF 8; so even if the rock pile
8 had been a nonconforming structure, OCCL/DLNR had the authority under H.R.S. § 183C-5 to
9 ensure that the rock pile was consistent with the surrounding environment, including ordering its
10 removal.

11 8. H.A.R. § 13-5-7, cited in OCCL/DLNR's Bill of Particulars, includes subsection (a),
12 which does not prohibit the continuance or repair and maintenance of nonconforming land uses
13 and structures, but under subsection (c) subjects repairs of legally nonconforming structures "to
14 development standards set forth in this chapter, and other requirements as applicable, including
15 but not limited to a county building permit, shoreline setback, and shoreline certification."

16 H.A.R. § 13-5-7(c), OCCL/DLNR's "Bill of Particulars," p. 2, September 6, 2013.

17 9. Thus, even if the rock pile had been a legally nonconforming structure, under both COL 7
18 and 8, *supra*, OCCL/DLNR had the authority to regulate its continued use, and the Daileys,
19 without regard to the authority and without having obtained permission from any regulatory
20 authority, proceeded with its construction activities even when presented with multiple cease-
21 and-desist orders, *supra*, FOF 12,13, 20.

22 10. Nevertheless, OCCL/DLNR, as the party initiating the enforcement action, did establish
23 at the time of the enforcement action by a preponderance of the evidence that the rock pile
24 revetment was not a nonconforming structure.

25 a. Nonconforming use in the conservation district is defined as "the lawful use of
26 any building, premises, or land for any trade, industry, residence, or other purposes which
27 is the same as and no greater than that established prior to October 1, 1964, or prior to the
28 inclusion of the building, premises or land within the conservation district (*emphasis*
29 *added*).\" (H.A.R. § 13-5-2: Definitions.)

30 i. Until early 2007, when the rock pile was dismantled and the seawall was
31 constructed, the Daileys had stated that the rock pile was laid down soon

1 after their home was constructed in 1965, *supra*, FOF 95, and other evidence
2 showed that it could not have been built before 1967, *supra*, FOF 3.

3 ii. It was not until the contested case hearing in 2013 that the Daileys
4 asserted that the rock pile was laid down in 1970 in the shoreline setback area,
5 *supra*, FOF 98.

6 iii. In response to a request for comments to the Daileys' CDUA of August
7 22, 2005, C&C's DPP had responded (No. 2005/ELOG-2469) that it had no
8 record of approvals for the revetment and that in 1992 it issued a citation (BV-92-
9 06-004) for installing boulders within the shoreline setback area. (*supra*, FOF
10 7b.)

11 iv. Therefore, when the Board issued its May 25, 2007 decision
12 and based on the available evidence, including information provided by the
13 Daileys, the Board met its burden of proof by a preponderance of the evidence
14 that the rock pile was not a nonconforming use in the conservation district,
15 because it had been built after October 1, 1964 and was not a lawful use prior to
16 its inclusion in the conservation district, the Daileys having been issued a citation in 1992
17 for unauthorized installation of the rock pile within the shoreline setback area.

18 b. "Structures in the shoreline area shall not need a variance if: (1) they were
19 completed prior to June 22, 1970;...[or] (2) they received either a building permit, board
20 approval, or shoreline setback variance prior to June 16, 1989." (H.R.S. § 205A-44(b).)

21 i. Based on the lack of any specific date or dates regarding construction of
22 the rock pile aside from sometime in 1970, the vagueness of written testimony
23 and live testimony, and no corroboration by Daileys' "supporting" witnesses, there
24 is a lack of credible testimony that the rock pile was constructed on the Daileys'
25 property prior to June 22, 1970, *supra*, FOF 95-104, 106.

26 ii. Based on the lack of any documentary evidence adduced regarding the
27 construction date of the rock pile, there is no other corroborating evidence that the
28 rock pile was constructed by the Daileys prior to June 22, 1970, *supra*, 105, 107.

29 iii. C&C's DPP had no record of approvals for the revetment, and in 1992 it
30 issued a citation (BV-92-06-004) for installing boulders within the shoreline
31 setback area, *supra*, FOF 7b.

1 iv. In late 2006 through early 2007, the Daileys dismantled the rock pile and
2 constructed an unauthorized seawall in the conservation district, *supra*, FOF 84-
3 94.

4 v. Therefore, when the Board issued its June 2014 Decision and Order and
5 based on the available evidence, the Board met its burden of proof by a
6 preponderance of the evidence that the rock pile was not a nonconforming use in
7 the conservation district, because it had not been built prior to June 22, 1970 and
8 the Daileys had not received either a building permit, board approval, or shoreline
9 setback variance prior to June 16, 1989.

10 vi. The Board has also met its burden of proof by a preponderance of the
11 evidence that the rock pile no longer exists, because the Daileys dismantled the
12 rock pile and built an unauthorized seawall in the conservation district.

13 14 **2. OCCL/DLNR had Jurisdiction over the Rock Pile Structure**

15 11. The Daileys stated that: 1) the rock pile revetment was in the shoreline setback area and
16 not in the conservation district; 2) OCCL/DLNR had applied the shoreline setback rules to
17 actions outside the conservation district; and 3) OCCL/DLNR's authority is limited by its
18 enabling statute, HRS § 183C-4(b), which expressly limits its rule-making authority and the
19 applicability of those rules to "use of land within the boundaries of the conservation district."
20 (Elizabeth Dailey and Michael Dailey's Motion to Dismiss for Lack of Enforcement Jurisdiction,
21 September 24, 2013, p. 8.)

22 12. The Daileys first assertion is addressed here. The second and third assertions are
23 addressed in "I.C. OCCL/DLNR Brought the Enforcement Action Under the Shoreline Setback
24 Laws," *infra*.

25 13. At least from the time of the original complaints in December 2004, OCCL/DLNR had
26 jurisdiction over the original rock pile structure and the seawall that was subsequently built in
27 2006-2007, because they were at least partly in the conservation district, *supra*, FOF 62-81.

28 14. The Daileys' contention that OCCL/DLNR has no jurisdiction is based on their
29 assumption that the rock pile was and the seawall is in the shoreline setback area and therefore
30 OCCL/DLNR has no authority to enforce the provisions of shoreline setbacks under H.R.S. §
31 205A-43.6 (*supra*, COL 11).

1 15. The Daileys cite only part (b) of H.R.S. § 205A-43.6 Enforcement of shoreline setbacks:

2 (b) Where the shoreline is affected by an artificial structure that has not been
3 authorized with government agency permits required by law, if any part of the
4 structure is on private property, then for purposes of enforcement of this part,
5 the structure shall be construed to be entirely within the shoreline area.
6

7 But the Daileys fail to cite subsection (c), which holds to the contrary of the Daileys' assertion
8 and establishes enforcement jurisdiction in OCCL/DLNR under the Board of Land and Natural
9 Resources:

10 (c) The authority of the board of land and natural resources to determine the shoreline
11 and enforce rules established under chapter 183C shall not be diminished by an artificial
12 structure in violation of this part.
13

14 16. Then the Daileys cite H.R.S. § 205A-41:

15 "Shoreline area" shall include all of the land area between the shoreline and the shoreline
16 setback line and may include the area between the mean sea level and the shoreline;
17 provided that if the highest annual wash of the waves is fixed or significantly affected by
18 a structure that has not received all permits and approvals required by law or if any part
19 of any structure in violation of this part extends seaward of the shoreline, then the term
20 "shoreline area" shall include the entire structure.
21

22 17. Even without subsection (c), the language of both H.R.S. §§ 205A-43.6(b) and -41 limit
23 their applicability to "enforcement of this part" and does not apply to the enforcement authority
24 of the Board in the conservation district.

25 18. Both H.R.S. §§ 205A-43.6(b) and -41 refer to structures that have not been authorized
26 with government agency permits required by law. From the May 2007 Board decision to the
27 onset of the contested case hearing in 2013, the Daileys had acknowledged that the rock pile had
28 not been authorized and that the seawall was illegal, *supra*, FOF 84-94. But from the onset of the
29 contested case, the Daileys have asserted that the original rock pile was a legal, nonconforming
30 structure, and that the current seawall is a legal repair of the rock pile, *supra*, FOF 95-114. Thus,
31 the Daileys assertions now contradict each other; i.e., H.R.S. § 205A-43.6 applies only if the
32 structure is illegal, but the Daileys are asserting that the structure is legal.
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1 **3. OCCL/DLNR Properly Denied the Daileys' Emergency Permit**

2
3 19. OCCL/DLNR's denial of the Daileys' CDUA was in compliance with H.A.R. § 13-5-35:
4 Emergency Permits; H.A.R § 13-5-7(e): Nonconforming uses and structures; and H.A.R. § 13-5-
5 22(b): P-15 Shoreline erosion control for the Protective subzone), *supra*, FOF 115-125.

6
7 **4. Dismantling of the Rock Pile and Building a Seawall Was Not**
8 **Permitted by Law**

9
10 **a. The Rock Pile was Illegal**

11
12 20. Until early 2007, when the rock pile was dismantled and the seawall was constructed, the
13 Daileys had stated that the rock pile was laid down soon after their home was constructed in
14 1965, *supra*, FOF 95, and other evidence showed that it could not have been built before 1967,
15 *supra*, FOF 3. It was not until the contested case hearing in 2013 that the Daileys asserted that
16 the rock pile was laid down in 1970, *supra*, FOF 98. Therefore, the rock pile was not a
17 nonconforming use in the conservation district when the Board issued its May 2007 Decision and
18 Order, because it had been built after October 1, 1964, *supra*, COL 10b.

19 21. In response to a request for comments to the Daileys' CDUA of August 22, 2005, C&C's
20 DPP had responded (No. 2005/ELOG-2469) that it had no record of approvals for the revetment
21 and that in 1992 it issued a citation (BV-92-06-004) for installing boulders within the shoreline
22 setback area. The 1992 violation had been referred to C&C's Division of Land Utilization, but
23 for unknown reasons, it had never been pursued, *supra*, FOF 7b.

24 22. Any oral or documentary evidence may be received, limited only by considerations of
25 relevancy, materiality, and repetition. H.R.S. §91-10(1); *Dependents of Cazimero v. Kohala*
26 *Sugar Co.*, 54 Hawai`i 479, 482-483; 510 P.2d 89, 92 (1973); *Chock v. Bitterman*, 5 Haw.App.
27 59, 65; 678 P.2d 576, 580-581 (1984).

28 23. Rules of evidence in administrative hearings allow admission of hearsay evidence (*Price*
29 *v. Zoning Bd. of Appeals of City and County of Honolulu*, 77 Hawai`i 168, 176; 883 P.2d 629,
30 637 (1994)); and the admission of such evidence is not a violation of H.R.S. § 91-10(3)'s "right
31 to conduct such cross-exam as may be required for a full and true disclosure of the facts." *Loui v.*
32 *Board of Medical Examiners*, 78 Hawai`i 21, 29; 889 P.2d 705, 713 (1995).

33 24. The Board did not err in admitting the evidence described in COL 21, *supra*, that the rock
34 pile was unauthorized and thus illegal.

1 **b. The Rock Pile was not a Nonconforming Structure**

2 25. The rock pile was not a nonconforming structure whether it was first laid down in the
3 shoreline setback area or in the conservation district, *supra*, COL 10.

4
5 **c. A New Seawall was Built Without Variances from Either**
6 **OCCL/DLNR or C&C's DPP**

7
8 26. The Daileys dismantled the rock pile and constructed a new seawall without a variance
9 from either the State or City and County of Honolulu, *supra*, FOF 84-94.

10 27. The seawall is wholly within the conservation district, *supra*, FOF 15, 34.

11 28. The seawall is illegal and under the jurisdiction of DLNR.

12
13 **B. OCCL/DLNR's Treatment of the Daileys Was Consistent with its Treatment**
14 **of Three Other Mokule`ia Property Owners**

15
16 29. The Daileys' circumstances were clearly distinguishable from the three cases they
17 offered, and OCCL/DLNR applied the relevant laws in a consistent and appropriate manner in all
18 four circumstances, *supra*, FOF 115-132.

19
20 **C. OCCL/DLNR Brought the Enforcement Action Under the Shoreline Setback**
21 **Laws**

22
23 30. In its Bill of Particulars, OCCL/DLNR identified the laws that the Daileys were alleged
24 to have violated:

25 (1) no use except a nonconforming use in the Conservation District: H.R.S. § 183C-
26 4(b);¹⁹

27 (2) enforcement of shoreline setbacks: H.R.S. § 205A-43.6(a), (b)²⁰;

¹⁹H.R.S. § 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 within a zoning rule.

²⁰ H.R.S. § 205A-43.6 : **Enforcement of shoreline setbacks**

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

- 1 (3) prohibitions: H.R.S. § 205A-44(b);²¹
- 2 (4) penalties: H.A.R. §§ 13-5-6(c), (d);²²
- 3 (5) nonconforming uses and structures: H.A.R. § 13-5-7;²³
- 4 (6) permits: H.A.R. §13-5-30(b);²⁴ and
- 5 (7) emergency permits: H.A.R. § 13-5-35(d).²⁵ (OCCL/DLNR’s “Bill of Particulars,”
- 6 p. 2, September 6, 2013.)

7 31. In asserting its jurisdiction, OCCL/DLNR’s May 2007 staff submittal concluded that the
 8 Board, under its jurisdiction pursuant to H.R.S. § 205A-1, could undertake enforcement actions
 9 in order to uphold the directives of H.R.S. Chapter 205A, §205A-43.6(a), which requires the
 10 landowner in violation to either remove the structure or correct the problem; and “(t)herefore the
 11 Board, under part (c), may assert its authority to compel the removal of the structure or correct
 12 the problem in order to protect the coastal resources and uphold the directives of Chapter 205A,
 13 H.R.S," *supra*, FOF 18.

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

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

²¹ H.R.S. § 205A-44(b): ... 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.

²² H.A.R. §§ 13-5-6(c) & (d): **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.

²³ See FOF 123, *supra*.

²⁴ H.A.R. § 13-5-30(b): **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).

²⁵ H.A.R. § 13-5-35(d): **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 32. The staff submittal then recommended that the Daileys be found to have violated H.R.S.
2 Chapter 183C and H.A.R. Chapter 13-5, *supra*, FOF 18.

3 33. H.R.S. Chapter 183C and H.A.R. Chapter 13-5 are the statutes and administrative rules
4 governing conservation districts, the subject of this contested case.

5 34. H.R.S. Chapter 205A are the statutes governing the coastal zone management area, of
6 which there are four parts:

7 a. Part I: “Coastal Zone Management Area” means all lands of the state and the area
8 extending seaward from the shoreline to the limit of the State’s police power and
9 management authority, including the United States territorial sea. (§ 205A-1:
10 Definitions.)

11 b. Part II: “Special Management Area” means the lands extending inland from the
12 shoreline as delineated on the maps filed with the authority as of June 8, 1977, or
13 as amended pursuant to section 205A-23. (§ 205A-22: Definitions.)

14 c. Part III: “Shoreline Setbacks”: “shoreline area” shall include all the land area
15 between the shoreline and shoreline setback line²⁶ and may include the area
16 between mean sea level and the shoreline; provided that if the highest annual
17 wash of the waves is fixed or significantly affected by a structure that has not
18 received all permits and approvals required by law or if any part of any structure
19 in violation of this part extends seaward of the shoreline, then the term “shoreline
20 area” shall include the entire structure. (§ 205A-41: Definitions.)

21 d. Part IV: “Marine and Coastal Affairs”: “Exclusive Economic Zone” or “EEZ”
22 means that area set forth in the Presidential Proclamation 5030 issued on March
23 10, 1983, whereby the United States proclaimed jurisdiction from the seaward
24 boundary of the State out to two hundred nautical miles from the baseline from
25 which the breadth of the territorial sea is measured. (§ 205A-61: Definitions.)

26 35. The 2007 staff submittal claimed jurisdiction through § 205A-1, which is in Part I;
27 asserted authority through § 205A-43.6(c) in order to uphold the directives of § 205A-43.6(a),
28 both of which are in Part III (Shoreline Setbacks), then found the Daileys in violation of H.R.S.

²⁶ In this case C&C has established the shoreline setback line at forty feet mauka of the certified shoreline, *supra*, footnote 11.

1 Chapter 183C and H.A.R. Chapter 13-5, which govern the conservation district (*supra*, COL 31-
2 32).

3 36. OCCL/DLNR asserts that Part I of H.R.S. Chapter 205A includes definitions of words as
4 they are used in the chapter; that each of the other Parts includes definitions of words used only
5 in that Part; and that the definition of “department” that Petitioners rely on is the definition of
6 that word as it is used in Part II, not as it is used in Part III. (Respondent Department of Land and
7 Natural Resources, Office of Conservation and Coastal Lands’ Memorandum in Opposition to
8 Elizabeth Dailey and Michael Dailey’s Motion to Dismiss for Lack of Enforcement Jurisdiction,
9 October 1, 2013, pp. 2-3.)

10 37. OCCL/DLNR is in error:

11 a. Part II assigns jurisdiction over the Special Management Area, or the lands
12 extending inland from the shoreline, to the counties;²⁷ and Part III is a subset of
13 the Special Management Area, limited to lands mauka of the shoreline to the
14 shoreline setback, which in this case is forty feet, *supra*, footnote 11. Thus, the
15 counties, not the state, have jurisdiction over Part III, the shoreline setback area;

16 b. OCCL/DLNR claims jurisdiction through H.R.S. § 205A-1(*supra*, COL 35),
17 which does not address jurisdiction but is instead the definitions section of Part I,
18 which merely defines “coastal zone management area (*supra*, COL 34),”
19 “agency,”²⁸ and “lead agency,”²⁹ among other terms;

20 c. H.R.S. § 205A-43.6(c), through which OCCL/DLNR asserts its authority (*supra*,
21 COL 31), merely states that the authority of the Board under H.R.S. Chapter 183C
22 is not diminished by an artificial structure in violation of the shoreline setback
23 statute (*supra*, COL 15), but OCCL/DLNR interprets the section to give it
24 jurisdiction over both H.R.S. Chapter 183C and H.R.S. § 205A-43.6;

²⁷ H.R.S. § 205A-22 defines:

“Department” as 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.

²⁸ “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. H.R.S. § 205A-1.

²⁹ “Lead agency” means the office of planning. H.R.S. § 205A-1.

- 1 d. Part III's enforcement authority is over shoreline setbacks—in this case
2 extending from the certified shoreline to forty feet inland, *supra*, footnote 11, of
3 the private property of the Daileys and unequivocally within the jurisdiction of
4 C&C, not the state; and
- 5 e. the administrative rules accompanying H.R.S. Chapter 205A, Parts II and III, are
6 under the purview of C&C. (See Department of Land Utilization, Part 2 Rules
7 Relating to Shoreline Setbacks and the Special Management Area at R.O.H.
8 Chapters 11-18.)

9 38. In its entirety, H.R.S. § 205A-43.6 reads as follows:

10 **§ 205A-43.6 Enforcement of Shoreline Setbacks**

- 11 (a) The department or an agency designated by department rules shall enforce this
12 part and rules adopted pursuant to this part. Any structure or activity prohibited by
13 section 205A-44, that has not received a variance pursuant to this part or complied with
14 conditions on a variance, shall be removed or corrected. No other state or county permit
15 or approval shall be construed as a variance pursuant to this part.
- 16 (b) Where the shoreline is affected by an artificial structure that has not been
17 authorized with government agency permits required by law, if any part of the structure is
18 on private property, then for purposes of enforcement of this part, the structure shall be
19 construed to be entirely within the shoreline area.
- 20 (c) The authority of the board of land and natural resources to determine the shoreline
21 and enforce rules established under chapter 183C shall not be diminished by an artificial
22 structure in violation of this part.

23

24 39. While H.R.S. § 205A-43.6 refers to enforcement of shoreline setbacks (*supra*, COL 31),
25 OCCL/DLNR asserts that the section gives it authority to enforcement within the conservation
26 district and in fact used this section in its May 2007 staff recommendation to find that the
27 Daileys violated H.R.S. Chapter 183C and H.A.R. Chapter 13-5, the statute and regulations
28 pertaining to the conservation district (*supra*, COL 32).

29 40. OCCL/DLNR had no authority to enforce actions in the conservation district through the
30 laws applicable to shoreline setbacks, which are under the jurisdiction of C&C's DPP.

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1 **D. The Unauthorized Seawall is a Continuing Violation of the Conservation**
2 **District Laws**

3
4 41. There is voluminous, clear, and uncontested evidence that: 1) the original rock pile
5 revetment was dismantled and an illegal seawall built, *supra*, FOF 84-94, COL 26-28; 2)
6 Michael Dailey and his former attorney acknowledged the existence of the seawall, *supra* FOF
7 29, 92; and 3) the Daileys were proceeding with the SSV issued by C&C's DPP, which required
8 the removal of the illegal seawall and the construction of a properly engineered revetment in the
9 remaining shoreline setback space between the certified shoreline and the Daileys' home, *supra*,
10 FOF 91-93.

11 42. The Daileys never contested that the rock pile was dismantled and an illegal seawall
12 built, but chose instead at the 2013 contested case hearing to ignore that evidence and present for
13 the first time their discredited "alternate reality" that the illegal seawall was the original rock
14 pile, that it was a legally nonconforming structure, and that it was lawfully repaired, *supra*, FOF
15 95-113.

16 43. The Daileys had been charged with violations of H.R.S. Chapter 183C and H.A.R.
17 Chapter 13-5, but the enforcement action was undertaken under H.R.S. § 205A-46, *supra*, COL
18 31-32.

19 44. The Bill of Particulars identified the specific sections of H.R.S. Ch. 183C and H.A.R. Ch.
20 13-5 that the Daileys were alleged to have violated, *supra*, COL 30.

21 45. The Daileys had sufficient notice of the specific violations they were alleged to have
22 violated, *supra*, COL 30, 32.

23 46. The Hawai`i Supreme Court, in a decision on natural resource management before the
24 Commission on Water Resources Management ("Commission"), concluded that under the
25 Hawai`i Constitution:

26 [T]he Commission as the primary guardian of public rights in the State's water resources
27 must not relegate itself to the role of a mere "umpire passively calling balls and strikes
28 for adversaries appearing before it," but instead must take the initiative in considering,
29 protecting, and advancing public rights in the resource at every stage of the planning and
30 decisionmaking process. (*In re Water Use Permit Applications*, 105 Hawai`i 1, 16; 93
31 P.3d 643, 658 (2004) (*paraphrasing In re Water Use Permit Applications*, 94 Hawai`i 97,
32 143; 9 P.3d 409, 455 (2000).)

1 47. Similarly, the Board as the primary guardian of public rights in the State's land and
2 natural resources (Hawai`i Constitution, Article 11, § 1), is not a mere umpire, and must take the
3 initiative in considering, protecting and advancing public rights in the State's land and natural
4 resources.

5 48. The illegal seawall has been in the conservation district since its construction in early
6 2007 to the present time, *supra*, COL 26-27.

7 49. The unauthorized seawall was to be replaced by a revetment in the shoreline setback area
8 under a shoreline setback variance issued by C&C's DPP in April 2010, *supra*, FOF 91-93, COL
9 41; but it has not been removed. The seawall constitutes a continuing violation of the
10 conservation district statute and rules; specifically, H.R.S. § 183C-4(b), H.A.R. §§ 13-5-6(c) and
11 (d); H.A.R. § 13-5-7, H.A.R. § 13-5-30(b), and H.A.R. §13-5-35(d) (*supra*, COL 30).

12 13 **III. DECISION AND ORDER**

14 The Circuit Court's remand order focused on whether the parties met their respective
15 burdens of proof on whether or not the rock pile was a nonconforming structure, based on the
16 existing record.

17 OCCL/DLNR met its burden of proof that the rock pile was not a nonconforming
18 structure, *supra*, COL 1-10.

19 The Daileys' assertions during the contested case hearing that the rock pile was a
20 nonconforming structure and that it was legally repaired are not only contrary to the record, but
21 also without credible foundations, *supra*, FOF 7b, 84-114, COL 10b.

22 Moreover, the record is clear and unambiguous that the rock pile no longer exists. The
23 Daileys: 1) intentionally dismantled the rock pile and used its boulders to build an unauthorized
24 seawall, *supra*, FOF 17; 2) acknowledged that they did dismantle the rock pile and built an
25 unauthorized seawall, *supra*, FOF 17, 89, 90, 92, 93; and 3) were working with both
26 OCCL/DLNR and C&C's DPP to find a mutually agreeable solution, which would have been to
27 remove the illegal seawall from the conservation district and build an authorized revetment in the
28 shoreline setback area in front of the Daileys' home, *supra*, FOF 91-93.

29 The Daileys' own consultant described the current structure on its completion in May
30 2007 as follows: "The existing shore protection structure is a seawall comprised of very large
31 boulders with a concrete cap. Boulders had been previously placed on the shoreline in the form

1 of a revetment. These boulders were re-used to build the existing seawall, and a few boulders are
2 still situated along the seaward base of the wall. The boulders also remain along a short reach
3 between the property's seawall and the Mokule`ia Beach Colony ("Colony") seawall (*emphasis*
4 *added*), *supra* FOF 17."

5 The law clearly distinguishes a "revetment" from a "seawall." "Revetment" is defined in
6 H.A.R. §13-222-2 as "a sloping facing of stone, concrete, blocks or other similar material built to
7 protect the embankment or shore against erosion by wave action or current (*emphasis added*),"
8 *supra*, FOF 84. "Seawall" is defined in H.A.R. §13-222-2 as "a structure with a vertical face
9 separating land and water areas, primarily designed to prevent erosion and other damage due to
10 wave action (*emphases added*)," *supra*, FOF 87.

11 The rock pile barely qualified as a "revetment," if at all. "(A) revetment is an uncemented
12 structure, but the rocks are placed strategically so they're locked into place, and it's very well
13 engineered (*emphasis added*)," *supra*, FOF 84c.

14 No one's description, not even Michael Dailey's, met this definition. The rock pile was
15 variously described as: 1) a "loose rock revetment," *supra*, FOF 84a (Michael Dailey); 2)
16 "stack(ed) loose rocks on top of the sand," *supra*, FOF 84b (William Fraser, the Daileys'
17 neighbor); 3) "just a pile of rocks," *supra*, FOF 84c (Lemmo of OCCL/DLNR); and 4) a "rock
18 structure," *supra*, FOF 84d (Eversole, consultant to OCCL/DLNR).

19 On the other hand: 1) the Daileys and their consultants consistently described the new
20 structure as a "seawall," *supra*, FOF 89-93; 2) C&C's DPP described the structure as "a grouted
21 seawall ranging in height from two to six feet above the beach, with a two- to three-foot wide
22 concrete cap," *supra*, FOF 90; 3) the Daileys' consultant described the seawall as follows: "The
23 top elevation of the wall is estimated to be about 10 to 12 feet above mean low-low-water
24 (MLLW). Sand at the base of the seawall is estimated to vary between 3 and 5 feet above
25 MLLW," *supra*, FOF 89; and 4) the Daileys' Shoreline Setback Variance application described
26 its request as adding a second tier to the face of its existing seawall, *supra*, FOF 90.

27 During the contested case hearing, the Daileys, through their new attorney, *supra*, FOF
28 33, 36, completely ignored this clear and unambiguous record, made no attempt to rebut it, and
29 claimed that the new seawall was a repair of a nonconforming structure, assertions that were not
30 credible, *supra*, FOF 95-114.

1 It is clearly evident that the Daileys: 1) proceeded with building a new, unauthorized wall
2 in the conservation district despite orders to desist; 2) represented to the C&C's DPP that it was
3 in the shoreline setback area and that they would engineer the illegal wall to meet C&C's DPP's
4 requirements; 3) was turned down and ordered to tear down the illegal wall and build an
5 approved revetment further inland; and 4) now claim that the illegal seawall is a repair of the
6 original rock pile, a claim that has no credibility.

7 -----

8 1. Although the Daileys were clearly in violation of H.R.S. Chapter 183C and H.A.R.
9 Chapter 13-5, the unauthorized repair/reconstruction of an alleged rock revetment within the
10 conservation district located at Mokule`ia, Island of O`ahu, TMK no. (1) 6-8-003:018, first
11 brought before the Board on May 25, 2007, must be dismissed for lack of jurisdiction, to the
12 extent it was brought under H.R.S § 205A-43.6 (i.e., enforcement of shoreline setbacks, which is
13 under the jurisdiction of the City and County of Honolulu).

14 2. The unauthorized new seawall, in the conservation district, constitutes a continuing
15 violation of H.R.S. § 183C-4(b), H.A.R. §§ 13-5-6(c) and (d); H.A.R. § 13-5-7, H.A.R. § 13-5-
16 30(b), and H.A.R. §13-5-35(d), as initially charged on May 25, 2007 and stated in OCCL's Bill
17 of Particulars on September 6, 2013.

18 3. Therefore, Petitioners Daileys are ordered:

- 19 a. to pay a fine of \$2,000 for the unauthorized construction of a seawall in the
20 conservation district;
- 21 b. to remove the unauthorized seawall from the conservation district; and
- 22 c. to remove the boulders placed without authorization between the unauthorized
23 seawall and the Colony's seawall.

24 The nature of the Daileys' violation of the conservation district laws in building an
25 unauthorized seawall distinguishes it from the three other Mokule`ia structures referred to by the
26 Daileys. The Board's primary function is to protect and preserve the public beach area for future
27 generations, and the unauthorized seawall will continue to have a negative impact on the
28 shoreline through the loss of beach area and accelerated erosion fronting the structure. After its
29 CDUA was denied, the Daileys dismantled the rock pile revetment and constructed a seawall
30 entirely in the conservation district, knowing that their actions were illegal and despite three
31 notices to cease and desist. And in its application to C&C's DPP for a shoreline setback variance,

1 the Daileys acknowledged then and in later communications that the seawall was illegal. In
2 contrast, the two Mokule`ia structures that were granted easements (the first structure was not in
3 the conservation district) were legally authorized by C&C's DPP, involved only minor
4 encroachments into the conservation district, and no discernible effects were found on beach and
5 recreational resources nor on public access.

6 4. Payment of the fine shall be made effective immediately upon the date of the signing of
7 this order. Interest shall accrue on any unpaid fine at a rate as allowed by law.

8 5. The boulders placed between the unauthorized seawall and the Colony's seawall shall be
9 removed within sixty days of this order. A fine of \$100/day shall be imposed if the boulders are
10 not removed by the end of the sixty days.

11 6. The order to remove the unauthorized seawall is stayed until such time that the Daileys
12 re-apply and are re-approved for a shoreline setback variance (SSV) from C&C's DPP for a
13 boulder revetment in the shoreline setback area such as that approved on April 23, 2010. The
14 application must be completed within one year of the date of this order. The order to remove the
15 unauthorized seawall is stayed further for two years from the date the SSV is approved to allow
16 for completion of the boulder revetment. If an application for a SSV is not made within the one-
17 year period, the unauthorized seawall shall be removed immediately. If the application is not
18 approved, the unauthorized seawall shall also be removed immediately. A fine of \$100/day shall
19 be imposed if the unauthorized seawall is not removed by the end of the time periods specified.

20 The unauthorized seawall has been in place since at least May 2007, over eight years ago;
21 and it may be in place for another three years under the maximum time limits imposed for its
22 removal under this order. However, from November 28, 2007 to June 24, 2013, the Board's order
23 had been stayed with the agreement of OCCL/DLNR while the Daileys applied for and then
24 sought to implement the SSV from C&C's DPP, which would have resulted in the removal of the
25 unauthorized seawall in the conservation district and the construction of an approved, engineered
26 boulder revetment in the shoreline setback area for the Daileys. Thus, the Daileys cannot be held
27 solely responsible for what otherwise would be an unreasonable delay in removing the
28 unauthorized seawall.