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BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

In The Matter of a Contested Case to the Board of Land and Natural Resources re alleged violation for repair and reconstruction of a boulder revetment at Mokulei'ia, District of Waialua, O'ahu, TMK (1) 6-8-003:018.	DLNR File No. OA-07-06 (Contested Case Hearing) **LANDOWNERS ELIZABETH DAILEY AND MICHAEL K. DAILEY'S EXCEPTIONS AND OBJECTIONS TO THE HEARING OFFICER'S REVISED FINDINGS OF FACT, CONCLUSIONS OF LAW, & DECISION AND ORDER ON REMAND; EXHIBITS "A-C"; CERTIFICATE OF SERVICE** **Date: August 14, 2015** **Time: 8:00 a.m.**

LANDOWNERS ELIZABETH DAILEY AND MICHAEL DAILEY'S EXCEPTIONS AND OBJECTIONS TO THE HEARING OFFICER'S REVISED FINDINGS OF FACT, CONCLUSIONS OF LAW, & DECISION AND ORDER ON REMAND

Pursuant to Haw. R. Admin. § 13-1-42 and Minute Order No. 20 entered herein, respondent landowners and appellants on remand, Elizabeth Dailey and Michael Dailey ("the Daileys") submit their exceptions and objections to the Hearing Officer's Revised Findings of Fact, Conclusions of

Law, & Decision and Order On Remand ("Revised FOF, COL, D&O"). The Board of Land and Natural Resources ("Board") should reject the Hearing Officer's proposed decision in total.

The Revised FOF, COL, D&O does not address the Court's very specific instruction on remand. *See* Order Remanding Proceedings to Amend Findings of Fact, Conclusions of Law, Decision and Order, filed March 20, 2015 ("Remand Order"), attached as Exhibit "A." Rather, the Hearing Officer completely rewrote the Original Findings of Fact, Conclusions of Law, Decision and Order, filed June 13, 2014 ("Original FOF, COL, D&O"), attached as Exhibit "B." The Hearing Officer went far beyond the instruction of the Court, in violation of the terms of the Remand Order. The Hearing Officer also considered evidence that was not submitted by the parties at the contested case hearing, thereby denying the Daileys their right to cross-examine, to introduce rebuttal evidence, and violating their fundamental right to due process, as well as Haw. Rev. Stat. Ch. 91 and the administrative regulations. The Hearing Officer even punished the Daileys for appealing by **imposing additional penalties** there were not part of the Original FOF, COL, D & O. It is unfair, unjust and a denial of due process to impose additional penalties on respondents who simply exercise their right to appeal an adverse decision. The Circuit Court did not remand for the imposition of additional penalties.

The Hearing Officer disregarded the Court's instructions and rewrote the decision to mask what the Court had already determined: the DLNR did not sustain its burden of proof and there was no evidence submitted to contradict the Daileys' evidence establishing that the rock revetment was a nonconforming use. But he did so by reversing credibility determinations already made and considering evidence that was not in the record, engaging in one-sided and effectively ex parte fact finding and record supplementation, directly violating the Circuit Court's admonition against "taking further evidence".

More importantly, the Hearing Officer has stepped out of his role of impartial fact-finder, and is using the Revised FOF, COL, D & O to advocate DLNR's position in this case. In fact, new conclusions of law say as much: the Hearing Officer does not believe that he or the Board should be an impartial "umpire" in this contested case proceeding, but should be a partisan advocate. In addition, although unrelated to the Remand Order, he has omitted FOFs or COLs which are not helpful for DLNR, and he has added FOFs and COLs that are, as well as making legal arguments to defend his decision.[1]

These exceptions and objections address only the changes made by the Hearing Officer in the Revised FOF, COC, D & O. The Daileys do not waive and hereby incorporate by reference their original exceptions to the Original FOF, COL, Decision and Order. *See* Daileys' Exceptions to the Hearing Officer's Proposed Findings of Fact, Conclusions of Law, & Decision and Order, filed January 24, 2014, attached hereto and incorporated herein by reference as Exhibit "C." These objections and exceptions also apply to any FOFs that the Hearing Officer has renumbered.

The Land Board should reject the Revised FOF, COL, D & O. The Hearing Officer should have gone no further than confirming what Sam Lemmo's testimony established, and what the Court and the parties already knew; there was no other evidence.

> Question: And you've read the written testimony of some of the Dailey witnesses like Mike Dailey, Elizabeth Dailey, Don Rohrbach, Bill Paty, that state that the revetment was built in 1970 [after] the severe surf event in 1969. Do you recall reading that?
>
> Mr. Lemmo: Yes.
>
> Question: And you have no evidence that contradicts that testimony, do you?
>
> Mr. Lemmo: No.

[1] The Daileys also object to the form of the Revised FOF, COL, D & O used by the Hearing Officer and adopted by the Board as its proposed decision, by failing to specifically indicate what material was added and deleted. This will make it more difficult for the Court to review to determine whether the Board complied with the Court's Remand Order.

Transcript at p. 25, line 19 to p.26, line 2. *See also id.* at p.27, line 4-25 (Mr. Lemmo agreeing in 2008 that he wrote to the City's Department of Planning and Permitting ("DPP") that "it appeared that the revetment was originally constructed landward of the shoreline while under the City's jurisdiction.") (emphasis added).

Similarly, Dolan Eversole testified for DLNR that there was no conclusive evidence that the revetment was constructed in the Conservation District: "[I]t became clear that we did not have conclusive evidence one way or the other that the original rocks were placed within the Conservation District, and thus my memo to Sam recommending that we close the violation case because there was not conclusive evidence to support a violation proceeding." Transcript, p.89, l. 18-24.

In its Remand Order, the Court was simply asking the Hearing Officer to make explicit that which was implicit in the Original FOF, COL, D & O: DLNR submitted no evidence "to controvert the testimony that the revetment that was built was a nonconforming structure built within the shoreline setback area and specifically, whether, at that point in time, the revetment was not there." Remand Order at ¶ 1. The Hearing Officer was supposed to, but did not, state "whether the DLNR can meet its initial burden to prove by a preponderance of the evidence that the original structure was not nonconforming." Remand Order at ¶ 2.

I. SPECIFIC EXCEPTIONS

A. REVISED FINDINGS OF FACT

In addition to the general objections and exceptions noted above, the Daileys object to the following FOFs.

The Daileys object to new FOF 2 because the added material is beyond the scope of the Remand Order.

The Daileys object to new FOF 3 because it is beyond the scope of the Remand Order. Further, it mischaracterizes the evidence in the record. It does not indicate that information purportedly received from the DPP is hearsay and that DLNR called no witnesses from the DPP, nor submitted any record of the citation from the DPP establishing such "facts" and violates the best evidence rule.[2] Moreover, FOF 3 mischaracterizes the evidence concerning the photograph, which contained nothing more than Mr. Eversole's "approximation", about which he testified "It's important to keep in mind that the term "approximate" is an important term there, that this is not a surveyed line, because it's a ground photograph." Transcript, p.93, line 17-20. Mr. Eversole testified that he "interpreted where the surveyed boundary line was relative to some coconut trees" and "it was purely an interpretation of a survey map to a ground photo." *Id.* at p. 93, line 21 to p. 94, line 4. No survey equipment or metes and bounds were used. *Id.* at line 7.[3] DLNR did not introduce the alleged "survey map" from which the interpretation was made and it is therefore without foundation. Thus, this is a guess, nothing more, and certainly not a "1975 shoreline boundary line superimposed on a photo" as characterized by the Hearing Officer. Moreover, in a 2008 letter written by Sam Lemmo, Ex. A-18 at p.2, Mr. Lemmo concedes that "the revetment was originally constructed landward of the shoreline while under the City's jurisdiction." The admittedly amateurish attempt by Mr. Eversole to depict a guestimate of the 1975 shoreline in relation to the revetment, with the inference that the revetment was constructed makai of the

[2] In a glaring demonstration of the continued shift of burdens of proof, the Hearing Officer faults the Daileys for lacking corroborating documentary evidence as to the date the revetment was constructed, COL 10(b)(2), but the Hearing Officer does not even mention that OCCL/DLNR failed to introduce the alleged "citation" or any testimony of any witness who knew why the citation was issued but abandoned. *See* COL 24. Had he employed a consistent application of reasoning and a correct application of the burden of proof, the Hearing Officer should have concluded that the OCCL/DLNR did not produce any witness or separate documentary evidence of the hearsay report of an abandoned citation, and thus OCCL/DLNR did not sustain its burden of producing evidence or persuasion.

[3] The Hearing Officer thought it significant to note that no metes and bounds property description was used by Mr. Rohrbach when he testified that the rock revetment was originally placed on the Daileys' property, ____, but he fails to point out that very same situation with respect to Mr. Eversole's "shoreline" guess.

shoreline, if flatly contradicted by Mr. Lemmo's letter conceding that the revetment was originally built landward of the shoreline.

The Daileys' object to the deletion of former FOF 5 because it exceeds the scope of the Remand Order. There is no reason for the Hearing Officer to remove or alter his prior finding that DLNR encouraged the Daileys to take action to reduce or eliminate the hazard of loose rocks prior to the onset of winter surf. This is clear evidence that the Hearing Officer has shed any pretense of impartiality,[4] and has instead engaged in whitewashing of facts that are harmful to DLNR, despite this not being within the scope of the Remand Order, and despite neither party having asked him to.[5]

The Daileys object to new FOF 6 because it exceeds the scope of the Remand Order. The Court did not require or allow the Hearing Officer to add, remove or change facts relative to 2005.

The Daileys object to the new FOF 7. It is not supported by Ex. B-7, p.2. The Daileys also incorporate by reference their objection to FOF 3 concerning the alleged hearsay and lack of evidence or witnesses. FOF 7(a) should also note that due to the urgency and threat, the Daileys requested that OCCL/DLNR resolve any alleged violations at the same time as the request. Ex. A-5 at p.5. FOF 7 should also reflect the fact that in response to the OCCL/DLNR's request for information about the construction of the revetment, the Daileys stated "Based on personal accounts, when the rock revetment was first constructed, the shoreline was makai of its current location, and the rock revetment was constructed mauka of the shoreline on the Property." Ex. A-5 at p.4. This is important because the Hearing Officer accuses the Daileys of waiting until the 2013 contested case hearing to argue that the revetment was a nonconforming use constructed outside of

[4] The Hearing Officer admits as much in COL 46-47, when he argues that the role of the Board (and his role as it's Hearing Officer) is not to act a neutral and unbiased finder of fact, in his words "a mere umpire" in this contested case, but rather must actively advance the State's interests over the Daileys' interests.

[5] The Daileys were not asked to or allowed to provide supplemental information to the Hearing Officer. It is unclear why the Hearing Officer would delete FOFs that were never challenged on appeal by DLNR and which were not the subject of the Remand Order. The Hearing Officer exceeded his jurisdiction.

the conservation district on their own property, when in fact this was a common theme from their first interactions with OCCL/DLNR in 2005. *See also* Ex. A-5 at 5 ("Additionally, by all accounts, the rock revetment was constructed well before December 1, 1975, the enactment of the Coastal Zone Management Act (the "Act") and is, therefore, exempt from the requirements of the Act.").[6] For more than 10 years, from 2005 to the present, the Daileys have consistently claimed the rock revetment was built outside of the conservation district on their own property and was exempt from City/shoreline setback variance requirements when it was built. The Hearing Officer, in his zeal to punish the Daileys, has simply chosen to ignore this evidence.

The Daileys also object to new FOF 7(b). The Hearing Officer misdescribes the reason given by OCCL/DLNR for refusing to allow the Daileys to repair the revetment: "It is clear the structure was built sometime between 1969 and 1988 and thus NOT eligible for state non-conforming status, however it is unclear if the structure was placed within the Conservation District at the time of construction." Ex. B-4 a p.1. Thus, the Hearing Officer glosses over the underlying erroneous legal reasoning of the OCCL/DLNR, which was two-fold. First, if the structure was not built before 1964 it could not be nonconforming, despite the fact that the statute also provides that if the structure existed at the time it was placed in the conservation district, it could be nonconforming. Haw. Rev. Stat. § 183C-2, -4(b) and -5. Second, if "unauthorized by any agency" the structure must be "illegal." This ignores the clear requirements of Haw. Rev. Stat. Ch. 205A, which establish that a structure completed prior to June 22, 1970 does not need a shoreline setback variance, nor would a structure built pursuant to a building permit, board approval, or shoreline variance prior to 1989. This also ignores the Waikiki Marketplace case, which held that a building permit did not establish a "lawful use" for nonconforming use purposes, but rather whether the

[6] As has been briefed by the Daileys, and accepted by the Hearing Officer, the Coastal Zone Management Act and the Shoreline Setback provisions in particular, acknowledge that no variance was needed for shoreline structures constructed before June 22, 1970.

structure was not prohibited by the zoning law in effect at the time. With respect to the shoreline setback area, that law is Chapter 205A. FOF 7(b) does not indicate, as it should, that OCCL/DLNR never produced the alleged "citation" issued by the City in 1992, never produced a witness to testify as to the nature or meaning of the citation, and never explained why the citation was not pursued and proven to be a violation, and in the absence of any such proof, why the hearsay reference to a citation that was never prosecuted somehow establishes "illegality" when the only inference to be drawn is the opposite. The failure of the City to prosecute a citation through its legal process to establish a violation of shoreline setback laws only suggests the City did not believe such an allegation could be proven. In fact, this is no different that OCCL/DLNR's own decision in 2005 to withdraw its notice of violation because it could not establish that the rock revetment was built in the conservation district. Ex. B-4.

The Daileys object to new FOF 8, which mischaracterizes the evidence in several respects. First, the Daileys were not applying for "an after the fact permit for the structure" as mischaracterized by OCCL/DLNR in Ex. B-5 p.2. Second, OCCL/DLNR conceded in the same letter that removal of the revetment would cause a landward shift of the shoreline and the existing dwelling may soon become threatened and may require alternative erosion control measures. Ex. B-4, p.2. The Hearing Officer should have at least included these other admissions by OCCL/DLNR, which confirms that the only reason that, in OCCL/DLNR's opinion the dwelling was not threatened was because the rock revetment was preventing further erosion. Similarly, FOF 8 fails to note that the reason why the erosion rate did not pose an immediate erosion threat to the dwelling was because of the presence of the rock revetment. Ex. B-4, p.2 (the "erosion rate ... presumably has been zero since construction of the revetment."). Consistent with Ex. B-4, Mr. Eversole testified that if the revetment were removed "the shoreline would begin to migrate landward, and eventually that would, with enough time, encroach into the foundation of the house.

Question: The house would eventually be damaged or destroyed if that progressed? Answer: Potentially, yes." Transcript, p.105, line 19 to p.106, line 1.

The Daileys object to new FOF 9, as it mislabels the date of Ex. B-4, which is December 20, 2005. Further, although the FOF notes that OCCL/DLNR have taken inconsistent positions with respect to the dates of construction of the revetment "between 1967 and 1986" and "between 1969 and 1988" it does not indicate that this inherent inconsistency undermines the credibility of OCCL/DLNR. FOF 9 also should indicate that this statement in the letter is an incorrect statement of the law under Chapter 183C, as described above, which resulted in a process that prevented the Daileys from performing repairs in 2005, which necessitated the emergency repair action they took in 2006-2007. Moreover, the FOF should explicitly note that in 2005, both OCCL/DLNR and the Daileys believed and understood that the majority of the rock revetment was located outside of the conservation district based on the R.M. Towill survey and OCCL/DLNR site visits, other than some rocks that had rolled onto the beach and encroached into the conservation district. *See* Ex. A-5 at 4-5.

The Daileys object to new FOF 11, which ignores the OCCL/DLNR's other position that the revetment was constructed "between 1969 and 1988." *See* objections to FOF 9, above. In addition, to the extent the FOF mentions that OCCL/DLNR believed the revetment to have been "unauthorized" the FOF should also note that the requirements for authorization under the Coastal Zone Management Act, Chapter 205A, applied differently, depending upon when structures were constructed.

The Daileys object to new FOF 12 because it fails to note that the Daileys had previously requested permission to repair the revetment, and because OCCL/DLNR did not put on any evidence, either in terms of oral testimony or written submissions, of the alleged "numerous complaints" violating the hearsay and best evidence rules, and lacking evidentiary support. The

FOF should also note that OCCL/DLNR itself described the ongoing work as "unauthorized placement of rocks as part of a repair effort to an existing unauthorized revetment", Ex. B-5 at p.1, and "realignment and placement of additional rocks" as these facts contradict the Hearing Officer's later unfounded conclusions that the rock revetment was completely dismantled and a new seawall was constructed in its place. Mr. Eversole testified that he saw "there was continued improvements and work done on the top of the existing rocks .... And those improvements included cleaning up some of the loose rocks, restacking them, and then building a new vertical stem wall on top of the rock revetment. We would typically refer to that, as it was an engineered structure, as a hybrid wall, where it's a seawall on top and a revetment on the bottom." Transcript, p.90, line 1-12. This is significant, because it flatly contradicts the Hearing Officer's conclusions, *see, e.g.* COL 41, that "the rock pile was dismantled and an illegal seawall built [...not the] "alternate reality" that the illegal seawall was the original rock pile". Mike Dailey freely admitted that the emergency repairs consisted of "retrieving and stacking of the rocks back to the original location/footprint of the revetment, and in some areas pulling the rocks further landward than their original footprint by more vertical stacking, and capping the structure with grout to insure its structural integrity and to address the danger to the public that had been identified by the DLNR". M. Dailey WDT, p.7.

The Daileys object to new FOF 13 because it relies on hearsay and OCCL/DLNR did not put on any evidence in the form of testimony of the workers who supposedly overheard statements made by Mr. Dailey. The Daileys also object to FOF 13 for the reasons stated above concerning FOF 12.

The Daileys object to new FOF 14, 15 and 16 because OCCL/DLNR offered no testimony of any witness present on February 16, 2007 or February 21, 2007, and no DAGS staff or DOCARE staff testified, respectively, about how measurements were taken or what observations made on those dates. The Daileys right to cross-examine witnesses is violated.

The Daileys object to new FOF 17 because it exceeds the scope of the Remand Order, and it is consistent with the eyewitness testimony and description of work by Mr. Eversole and Mr. Dailey.

The Daileys object to new FOF 19, which is a legal conclusion, and which lacks foundation concerning the scope of repair or rebuild. OCCL/DLNR introduced no evidence concerning the extent of damage in relation to the cost to repair. It exceeds the scope of the Remand Order. OCCL/DLNR are required to adopt rules to implement Chapter 183C through the rulemaking provisions of Chapter 91, but the "no tolerance policy" was not so enacted and therefore constitutes improper and unenforceable rulemaking. Moreover, there is a statutory exception to permit repair or maintenance of nonconforming structures.

The Daileys object to new FOF 28, which relies upon evidence that was not admitted into evidence or testified to by any witness. It exceeds the scope of the Remand Order.

The Daileys object to new FOF 29 because it relies upon evidence that was not admitted into evidence or testified to by any witness. It exceeds the scope of the Remand Order.

The Daileys object to new FOF 30 because it relies upon evidence that was not admitted into evidence or testified to by any witness. Also, Exhibit A-15 is not the best evidence. It exceeds the scope of the Remand Order.

The Daileys object to new FOF 31 to the extent it relies on evidence that was not admitted into evidence or testified to by any witness, particularly at footnote 3. It exceeds the scope of the Remand Order.

The Daileys object to new FOF 32 because OCCL/DLNR did not put on any witnesses from or exhibits by the DPP and there was no evidence before the Hearing Officer about what the DPP "assumed." It exceeds the scope of the Remand Order.

The Daileys object to new FOF 33, as it exceeds the scope of the Remand Order.

The Daileys object to new FOF 34, and every other FOF, COL or other reference, in which the Hearing Officer has changed the term "revetment" for "structure" or "rock pile", as being beyond the scope of the Remand Order and a gross re-writing of the D & O after the litigation was concluded, and in contravention of numerous exhibits and testimony which referred to the rocks in a variety of manners at different times. Just by way of example, Mr. Lemmo's written direct testimony – which was prepared in advance of the hearing and with the assistance of counsel – refers to "revetment", *id.* at ¶ 7. The Daileys also object to new footnote 7, which is a paraphrase in a legal brief of a much longer factual description in Mike Dailey's written direct testimony at page 9, which discusses "repurposing" of the rocks for the SSV wall. Moreover, there was no evidence or testimony by any witness, or by the DPP, concerning the proposal to modify the existing seawall into a tiered structure, which was an accommodation made to the plan for the benefit of the Mokuleia Beach Colony. However, there was no evidence before the Hearing Officer on this issue. His accusation of misrepresentation is flat wrong: while the DPP did not allow modification of the SSV wall to include a tiered walkway (which was requested by the Colony), had the shoreline been accepted as delineated in the 2007 survey, then the existing rocks would have been located almost totally outside of the conservation district and therefore could have been repurposed into the structure authorized by DPP's SSV. It was not until OCCL/DLNR certified the shoreline to be mauka of the existing rocks, in 2011, that the SSV wall became problematic and would leave a gap between it and the Colony wall.

The Daileys object to new FOF 36 as it exceeds the scope of the Remand Order.

The Daileys object to new FOF 38 because it fails to state that that the reason why the Daileys could not reach an agreement with the Colony was because the Colony demanded that the Daileys grant an easement along the top of the structure for its residents to cross the Dailey property, just feet from the rear of the Dailey's dwelling, in violation of the Daileys privacy and

property rights. In addition, FOF 38 should state that the reasons why an agreement could not be reached with OCCL/DLNR, was because OCCL/DLNR would not be agreeable to the issuance of an easement to allow some or all of the rocks to remain in place but instead required that all rocks be removed, thereby leaving the Daileys with no choice but to require OCCL/DLNR to proceed with proving their allegations through the contested case proceeding.

The Daileys object to new FOF 57 for the reasons stated in their objection to FOF 3. Moreover, this FOF is flatly contradicted by Mr. Lemmo's and Mr. Eversole's testimony, as well as Ex. A-18, p.2 (Lemmo letter to DPP), that OCCL/DLNR concluded the original revetment was constructed outside of the Conservation district and within the shoreline setback area under the City's jurisdiction. In fact, as a result of the OCCL/DLNR 2005 investigation, OCCL/DLNR concluded it would withdraw its notice of violation because it could not determine the rock revetment was built in the conservation district. Ex. B-4 at p.1. Thus, the OCCL/DLNR never "concluded the structure had to have been placed in the Conservation District when it was built", as stated in new FOF 57. All evidence was to the contrary and it was conclusively established that the rock revetment was constructed mauka of the shoreline, outside of the conservation district, when it was built.

The Daileys object to the deletion of former FOFs 44, 45, 46, 47 and 48, as beyond the scope of the Remand Order. The Daileys also object to the failure at former FOF 47, or elsewhere, for the Hearing Officer to note that Mr. Eversole testified that the shoreline setback ordinance wasn't enacted until 1970 so the City would not have a setback variance for a structure built before that date, and further, that Mr. Eversole testified that he has never seen a building permit from the City for a seawall, revetment or any shoreline structure. Transcript, p.100, line 15 to p.101, line 16. Therefore, every instance in which the Hearing Officer suggests that no permits were located for the

structure, this is consistent with the testimony of both Mr. Dailey and Mr. Eversole that none was required.

The Daileys object to new FOF 59 because it exceeds the scope of the Remand Order and because it mischaracterizes the evidence. Mr. Frazier testified that he saw "the Dailey's wall" in 1978; he did not use the term "loose rock pile", which is nothing but argument by the Hearing Officer. Transcript at p.146, line 10.

The Daileys object to new FOF 60 because it exceeds the scope of the Remand Order. Further, lacks foundation as Mr. Frazier did not describe the source of his knowledge, and constitutes hearsay as to what un-named members of the MBC were told by an un-named consultant.

The Daileys object to the deletion of original FOF 52- 69 as exceeding the scope of the Remand Order.

The Daileys object to new FOF 64 as it goes beyond the scope of the Remand Order.

The Daileys object to new FOF 65 and 66 because it is incomplete in that it fails to note testimony by Mr. Dailey and Mr. Eversole of the lack of permitting regime at the time the revetment was constructed. Also lacks sufficient evidence, no testimony of the City or "citation", violating hearsay and best evidence. *See* objections to FOF 3 and 7, supra.

The Daileys object to new FOF 67 because it exceeds the scope of the Remand Order and because it is incomplete without noting that the rocks that had rolled onto the beach had been retrieved and the case closed by OCCL/DLNR. Also incomplete in describing which portion was makai of the shoreline and which portion was mauka.

The Daileys object to new FOF 68 and 69 on the same basis as they object to FOFs 6, 10, 14 and 15, on which they are based. No competent evidence. Hearsay. Incomplete by not describing which portion of the structure was "slightly seaward of what was mapped as the former shoreline",

and should clearly indicate which portions of the structure were not makai of the shoreline and therefore within City jurisdiction.

The Daileys object to new FOFs 71-76 on the basis that they are COLs, they go beyond the scope of the Remand Order, and they cites rules that were adopted after the revetment was originally constructed. Regulation 4 regulated the conservation district prior to 1994.

The Daileys object to new FOF 77, which is a COL not a FOF and for which there was no evidence before the Hearing Officer. Exceeds scope of Remand Order. Furthermore, it should state that it remains the Board's obligation, in a contested case hearing enforcement action, to establish the location of the "shoreline" to determine what activity occurred makai of the shoreline and mauka of the shoreline.

The Daileys object to that portion of new FOF 78 concerning the photograph with Mr. Eversole's admitted approximate, rough and non-scientific placement of a prior shoreline, as stated above. There is no dispute that the revetment existed in 1975 and OCCL/DLNR submitted no witnesses or documents establishing otherwise, so the statement "if it existed then" is unwarranted. Furthermore, in Ex. A-18, OCCL/DLNR admitted the revetment was built mauka of the shoreline within the City's jurisdiction. So not only is Mike Dailey's testimony "plausible," it is uncontradicted by any other evidence and Mr. Eversole's manipulated photograph is not evidence that the revetment was built in the conservation district. In fact, FOF 81 confirms that the Hearing Officer found that the revetment was outside of the conservation district prior to December 29, 2004. Exceeds scope of Remand Order.

The Daileys object to new FOF 79 (and the FOFs on which it relies) to the extent there was no witness who testified to observing the encroachment into the shoreline, and it mischaracterizes the testimony which was that certain individual rocks had rolled onto the beach, but were later retrieved and OCCL/DLNR closed its case, and it exceeds the scope of the Remand Order.

The Daileys object to new FOF 80 for the reasons they objected to FOFs 15 and 69 on which it is based. Exceeds scope of Remand Order.

The Daileys object to new FOF 81 as it exceeds the scope of the Remand Order, and to the December 29, 2004 finding and the February 16, 2007 finding, for the reasons stated elsewhere herein about the lack of evidence and witnesses as to the observations on those dates. Moreover, the critical question is: where was the shoreline located?, and hence the conservation district, before February 16, 2007, when OCCL/DLNR alleges the Daileys conducted the unauthorized repair work. If the repair work was performed prior to February 16, 2007 on those portions of the revetment located mauka of the shoreline, there could be no conservation district violation because the City would have exclusive jurisdiction. This was OCCL/DLNR's burden of proof.

The Daileys object to new FOF 82 because it exceeds the scope of the Remand Order, it mischaracterizes Mr. Frazier's testimony under cross-examination that he saw "the Dailey's wall" in 1978. The Hearing Officer compounds the error by substituting his own words – rock pile – for the witnesses' specific words, which ranged from "revetment" to "wall" when describing the pre-2006 structure, and "revetment with wall" or "hybrid wall" for post-2006.

The Daileys object to new FOF 83 because there was no testimony that Fred Dailey "stacked loos rocks on the sand", the Hearing Officer found elsewhere that Mike Dailey's testimony about the date was "plausible", and the Hearing Officer's newly invented credibility determinations, that were never included in the Original FOF, COL, D & O, are new fabrications made nearly 18 months after the Hearing Officer made his original recommendation, and was inserted to punish the Daileys for appealing. The other objections to FOFs and COLs concerning the date of construction are incorporated herein.

The Daileys object to new FOF 84 as exceeding the scope of the Remand Order, as mischaracterizing the evidence (both Mr. Lemmo and Mr. Eversole, in their written direct

testimony, called the structure variously a "seawall" or a "revetment"). Lemmo WDT, p. 2, 3, 4, 5, 6; Eversole WDT, p. 2, 3. The Daileys incorporate the other references herein, in which Lemmo and Eversole described the structure variously as a wall on a revetment or a hybrid wall.

The Daileys object to new FOF 85 by incorporating their objections to new FOF 7. Exceeds the scope of Remand Order.

The Daileys object to new FOF 86 because it exceeds the scope of the Remand Order and because FOFs 13-17 don't support the conclusion a new wall was built. It fails note there was no evidence by OCCL/DLNR on the percentage of damage or destruction, or the cost to repair or replace. The Daileys incorporate all objections concerning the nature of the repairs to the revetment that were made in 2006/2007.

The Daileys object to new FOF 87 because it is not a fact, there are other definitions of seawall, and it was not enacted at the time the revetment was constructed. In addition, to suggest as FOF 86-87 do, that the repair work resulted in a "seawall" as defined, is simply unsupported by the evidence, because Andrew Bohlander testified that in 2011 he witnessed water flowing through the rocks at the base of the structure, which is why he believed the rocks were now makai of the shoreline. Water flowing through loose rocks does not fit the Hearing Officer's definition of "seawall" but is consistent with Eversole's testimony that he was a wall on top of the revetment or a "hybrid wall."

The Daileys object to new FOF 88 as it exceeds the scope of the Remand Order, objections to the unsupported February site inspection are incorporated, and the description is not inconsistent with the descriptions of the work given by Mike Dailey and Dolan Eversole, described elsewhere herein.

The Daileys object to new FOF 89 as it exceeds the scope of the Remand Order and it is based on evidence that was not entered into evidence in the contested case hearing.

The Daileys object to new FOF 90 and 91 as they exceed the scope of the Remand Order and they mischaracterize the evidence and the Daileys arguments concerning the evidence, which was not that the DPP had allowed a two-tiered or stepped seawall, which it had not, but rather it would have allowed the existing structure to remain in the same general location, which was anticipated to be in large measure mauka of the shoreline, as evidenced by the 2007 shoreline survey.

The Daileys object to new FOF 92-93 which is purportedly based on exhibits that were never introduced or entered into evidence in the contested case hearing, depriving the Daileys of their contested case hearing and due process rights to offer evidence, cross-examine, rebut, and violating the statutory requirement that limits the evidence to the record and precludes consideration of evidence outside of the record, Haw. Rev. Stat. 91-9. Exceeds scope of Remand Order.

The Daileys object to new FOF 94. Exceeds scope of Remand Order. Portions of Frazier photos were objected to. Transcript p. 155-156. Relies on an exhibit, "Project Information for Shoreline Setback Variance Application" that was not introduced into or received in evidence.

The Daileys object to new subsection D and all of its FOFs as exceeding the scope of the Remand Order. The FOFs 95-97 misconstrue the exhibit, which said the revetment was constructed "around this time" referring to the 1965 construction of the Dailey house. FOF 96 is a legal conclusion and it misstates the nonconforming use provisions of the conservation district which, in addition to the 1964 date, also applies to uses or structures existing "prior to the inclusion of the ... land within the conservation district." Haw. Rev. Stat. § 183C-2; Haw. Admin. R. § 13-5-2.[7] FOF 98 is contradicted by FOF 95 – the Daileys consistently maintained that the revetment was constructed in or prior to 1970 and "around the time" of house construction is in or prior to 1970. The 2005 CDUA application and the 2013 written direct testimony are consistent. For 8 years the

[7] The Hearing Officer relies on conservation district rules adopted in 1994 and amended in 2011. The shoreline certification rules were adopted in 2002. None of these rules were not in effect in 1970.

Daileys maintained a consistent position that the revetment had been constructed outside of the conservation district in or prior to 1970, before the City's shoreline setback variance ordinance and when the City did not issue building permits for revetments. The Daileys object to FOFs 98-107, which exceed the scope of the Remand Order, and in addition misstates the evidence, takes the evidence out of context, and fails to address the issue the Court directed on remand – whether OCCL/DLNR produced any evidence to contradict the Daileys' evidence concerning date of construction and place of construction. OCCL/DLNR offered no evidence concerning the date of construction other than conceding it was after a 1967 photograph and that it was prior to 1978 based on the Fraser testimony. OCCL/DLNR admitted in Ex. A-18, p.2, that the place of construction was mauka of the shoreline ("OCCL closed this case as ... it appeared that the revetment was originally constructed landward of the shoreline while under the City's jurisdiction.").

The Daileys object to new FOFs 108-114, as they exceed the scope of the Remand Order, to the extent they rely on FOFs objected to previously, and for the following reasons. New FOF 109 relies on an exhibit that was not admitted into evidence. New FOF 111 incorrectly applies the regulation, which defines damage or destruction in relation to replacement cost, and misconstrues the evidence, which was undisputed that the loose rock revetment base boulders remained in place at all times, and only the upper portion of parts of the revetment were restacked and grouted. *See, e.g.*, WDT of Andrew Bohlander, who testified for OCCL/DLNR "During the July 5 [2011] site visit, I ... commented on, certain features that I saw pertaining to the wash of the waves and the porous structure of the boulder revetment." *Id.* at p. 2. FOF 112 is a conclusion of law. The Daileys object to new FOF 113, which mischaracterizes the testimony, which was "the cost of the repair work was approximately $50,000." M. Dailey WDT at p. 8, which was the cost of the repair work actually performed (restacking rocks and grouting); it was not for "design, planning, and permits" as stated in (a). The Daileys object to new FOF 114 because the cost estimates were for

replacement, not repair, and for the reasons stated in objecting to the underling FOFs cited therein, and because the Hearing Officer failed to follow the Court's instructions to identify evidence submitted by OCCL/DLNR, which failed entirely to proffer any evidence concerning replacement cost.

The Daileys object to new section E, including because it goes beyond the scope of the Remand Order, and to the extent the new FOFs rely on other FOFs to which the Daileys object. The Daileys also object to new FOF 116 because it misstates the evidence, which was that the erosion rate did not threaten the house because shoreline protection was in place, and as indicated above, Mr. Eversole testified that without shoreline protection, the ocean would undermine the dwelling. Likewise, in Ex. A-6, p.2, OCCL/DLNR states "Removal of the entire (failed) revetment. This would result in a landward shift of the shoreline[.] However the existing dwelling may soon become threatened and may require alternative erosion control measures" or relocation of the existing home elsewhere on the property. New FOF 117 also misstates the primary function of the OCCL/DLNR, which as stated in Ex. A-6, p.3 involves the balancing of concerns of the landowner with concerns of the public. New FOF 118 mischaracterizes the evidence, there was no evidence that the pre-existing rock revetment was "dismantled" and a seawall constructed, since Bohlander and others testified that the structure's base remained porous loose rocks, and there was no evidence of "knowing their actions were illegal" and even the Hearing Officer concedes that the evidence is uncertain as to what portions of the structure were mauka and makai of the shoreline in 2006/2007 when the repairs were made. New FOF 119 is contradicted by the undisputed evidence, and therefore lacking evidentiary support, that the rock revetment was originally constructed outside of the conservation district, but at some point, by virtue of the movement of the shoreline, came to be located in the conservation district, and is flawed for its failure to specify the date or dates that the conservation district boundary moved to include the rock revetment.

Daileys object to new FOF 121 because it is unsupported by the evidence, and it misapplies the regulation. OCCL/DLNR admitted (see above) that in the absence of shoreline protection, the Daileys' dwelling would be in jeopardy and lost. The evidence also showed that the beach in front of the Daileys' property was wider than that in front of the adjoining property with its permitted seawall.

The Daileys object to new FOFs 122-124 as beyond the scope of the Remand Order. OCCL/DLNR did not argue a violation of § 13-5-35 (which is only partially quoted in the FOF); OCCL/DLNR introduced no evidence from DPP concerning the alleged violation, and such is inadmissible hearsay, violates best evidence, and does not establish that the revetment was "illegal" as even OCCL/DLNR conceded that the alleged citation was never pursued or proven by DPP and thus there was never an adjudication that the revetment was "illegal." The FOF is also unsupported by evidence to the extent it ignores OCCL/DLNR's admission, in Ex. A-18 and elsewhere, that the revetment was originally constructed landward of the shoreline, rendering the focus on 1964 entirely irrelevant. The date to establish nonconformity is the date the boundary of the conservation district moved to include the revetment. The Daileys established the revetment was nonconforming within the terms of the regulations, statutes, and cases interpreting nonconforming use/structure provisions. From the Daileys' first interaction with OCCL/DLNR in 2005, the Daileys consistently maintained the revetment was more than 40 years old, was originally built outside of the conservation district and at a time when the City did not regulate construction within the shoreline setback area.

The Daileys object to new FOF 125 because it is beyond the scope of the Remand Order and is not supported by the evidence. In Ex. A-6, OCCL/DLNR withdrew the notice of violation because of "complications in determining if the structure was built in the Conservation District when it was placed" but the OCCL/DLNR made the legally incorrect assumption that because it

was constructed after 1969, it was "thus NOT eligible for state non-conforming status." Date of construction is irrelevant if the structure was constructed prior to inclusion of the land in the conservation district.

The Daileys object to new FOF 128-132 because they exceed the scope of the Remand Order, they are not supported by evidence, they mischaracterize evidence. FOF 128 fails to note that Ex. A-1 and Ex B-10 and other exhibits demonstrate that the revetment was built within the property line, just like the structure in Ex. A-19. New FOF 129 and 130 fails to note that, like the Daileys' property, portions of the seawalls at issue were found to be located within the conservation district and OCCL nevertheless approved easements that would allow the encroachments to remain, rather than requiring removal. Ex. A-21; Ex. A-22. FOF 131 is not supported by the evidence (a) and (c) and is contradicted by the evidence (b).

B. <u>REVISED CONCLUSIONS OF LAW</u>

The Daileys object to new COL 1 - 10 because it is in derogation of Haw. Admin. R. 13-1-35(k) and the law, and exceeds the scope of the Remand Order. Specifically, the Hearing Officer was instructed to determine whether the OCCL/DLNR could meet its initial burden to prove by a preponderance of the evidence that the original structure was not nonconforming. Instead, the Hearing Office attempts to re-argue for the DLNR that OCCL/DLNR did not have the initial burden. Further, "nonconforming use" is defined in §183C-2, not -5, and rather than a limited exception, it is a statutory recognition of the constitutional requirements to protect preexisting uses and vested rights. COL 2 continues to ignore the applicable burden of proof in a contested case hearing on an enforcement case brought by OCCL/DLNR. COL 3 and 4 are incorrect because the Daileys were not "applicants" in the enforcement proceeding or in demanding a contested case, as is their right when the OCCL/DLNR alleges a violation, or that they might become an applicant in the future when seeking an easement. The development standards of HAR don't apply to

nonconforming revetments. *See* HAR ch. 13-5 ex. 4 (single family development standards) and ex. 5 (fire buffer standards). Even if the Daileys were applicants for purposes of the CDUA to repair the revetment, COL 5 is erroneous because OCCL/DLNR improperly rejected that application on the erroneous legal basis that the revetment was not constructed prior to 1964 and therefore could not be "eligible for state-nonconforming status." Ex. B-4. Had OCCL/DLNR applied the correct legal standards and acknowledged that the structure existed at the time the land was placed into the conservation district, and was constructed at a time that the City did not require a shoreline setback variance for placement of structures in the shoreline setback area, then the subsequent events could have been avoided. OCCL/DLNR should have allowed the repairs to be made. COLs 6-9 are an erroneous statement of the law that, despite the statutory and constitutional protections afforded to nonconforming uses, preexisting structures and vested rights, that the provision within §183C-5 that provides for "subject to conditions" means that a nonconformity could be ordered removed or destroyed; conditions for consistency are not destruction or removal.

The Daileys object to COL 10, and the examples given as support for sustaining its burden of proof do not support the conclusion. That the Daileys put on proof at the contested case hearing that the revetment was built in early 1970 is not evidence that OCCL met its burden of proof, nor is the fact that the Daileys had previously estimated the date of construction to be "around" the time the house was constructed. In either case, they Daileys were consistent in maintaining that the revetment was very old. The hearsay statement that OCCL/DLNR was told by someone with the City that the City had no record of approval and/or had issued a citation which the City never pursued, is not admissible let alone evidence that the revetment was not nonconforming. To the contrary, even if assumed to be true, the fact that the City (like OCCL/DLNR in 2005) elected not to pursue and prove a citation is evidence that there was no actual violation of the shoreline setback laws, or at a minimum that no violation had ever been proven. It is manifest abuse and clearly

erroneous for the Hearing Officer to conclude otherwise. Furthermore, the Hearing Officer incorrectly determines that the burden of proof was met in 2007, when the BLNR made its determination that the Daileys were entitled to a contested case hearing on the alleged violation; this is clearly erroneous as the burden of proof must be met at the contested case hearing, not before. And the Hearing Officer continues to erroneously rely on the alleged citation issued by DPP (but never introduced into evidence nor testified to by any DPP official) as support for OCCL/DLNR's having sustained its burden of proof, which for the reasons stated above, it is not. The Daileys also object to COL 10(b), which doesn't address whether OCCL/DLNR sustained its burden of proof. Mike Dailey testified the revetment was built in 1970 before he returned to Hawaii in the summer, and after the 1969 high surf event. Elizabeth Dailey corroborated the 1969 damage and the 1970 construction. Rohrbach and Paty confirmed the 1969 damage and the revetment construction thereafter, and Rohrbach noted the location as well. The Hearing Officer continues, despite the Waikiki Marketplace case, to cite the absence of a building permit as evidence the revetment was not nonconforming, despite having been presented with the only statute regulating the placement of structures within the shoreline setback area, which expressly states that a variance wasn't required prior to June 22, 1970, or a building permit or setback variance prior to June 16, 1989, and testimony by Eversole and Mike Dailey that the City didn't issue building permits for seawalls or revetments, and although Eversole thought there could be some other record of construction, he did not identify what such record would be. The Daileys object to COL 10 to the extent it rests upon FOFs to which they objected. There was no evidence that the revetment was "dismantled", but rather the rocks were restacked and grouted. The ultimate conclusions at (v) and (vi) are also wrong and exceed the Remand Order.

The Daileys object to COL 13-18 as being incorrect statement of law, and the Daileys position is consistent. A structure can be "not authorized by government agency permits", such as

having been built when no permitting regime was in place, and still be a "legal" nonconforming use. Section 205A-43.6 does not say "illegal." Exceeds Remand Order.

The Daileys object to COL 19 to the extent they objected to the FOFs on which it is based, and for the reasons stated above, and because it exceeds the Remand Order.

The Daileys object to COL 20 as its timing is completely wrong. The Board did not render any effective decision and order in May 2007 because the Daileys demanded, and were granted, a contested case hearing on the underlying alleged violation. The BLNR practice of voting on an alleged violation at a public meeting, before affording the alleged violator its constitutional and statutory right to a contested case hearing, and before requiring that the OCCL/DLNR meet their burden of proof to establish a violation, amounts to improper pre-judging of the merits, and in any event is not an effective decision since the Board determined the Daileys were entitled to a contested case hearing on May 29, 2007. Moreover, the Daileys original petition for contested case hearing, filed June 4, 2007 (Ex. B-9 at p.4) stated that Fred Daileys' death made establishing the exact date of construction difficult and that, from a shoreline survey, "it appears, however, that when the revetment was built, it was built entirely behind the shoreline." This and every other FOF and COL in which the Hearing Officer suggests that it was not until 2013 that the Daileys claimed the revetment was not built in the conservation district is patently wrong on its face, since the Daileys have consistently maintained that the revetment was constructed landward of the shoreline. It is clear error for the Hearing Officer to suggest that the date of the contested case, when the Daileys were finally able to put on their defense to the allegations, should somehow be construed as evidence against them.

The Daileys object to COL 21 on the same basis they objected to the other FOFs and COLs relative to the lack of evidence concerning, and the relevance of, the alleged DPP citation and decision by DPP not to prosecute it. The Daileys object to COL 24 because, even if the hearsay

statement that "DPP responded (No. 2005/ELOG-2469) that it had no record of approvals for the revetment and that in 1992 it issues a citation (BV-92-06-004) for installing boulders within the shoreline setback area [but the] 1992 violation had been referred to [DPP's predecessor, DLU] but for unknown reasons, it had never been pursued" were admissible, it does not stand for the proposition that the revetment was illegal or not lawful. That fact was never adjudicated because the DPP, "for unknown reasons" chose not to prosecute the citation. In fact, the opposite inference is more likely, that the DPP determined the rocks were placed in the shoreline setback area prior to the enactment of the ordinance prohibiting placement, *i.e.*, before June 22, 1970, and therefore it, like OCCL/DLNR in 2005, withdrew the citation. Exceeds Remand Order.

The Daileys object to COL 25 for the same reasons that they objected to the underlying COLs and FOFs on the same subject. Exceeds Remand Order.

The Daileys object to COLs 26-28 for the reasons stated above with respect to FOFs 84-94, 15, 34. No evidence or witness testified that the "rock pile" was dismantled and "a new seawall constructed". Even Eversole and Lemmo conceded the same rocks were used and located in the same general area. Bohlander confirmed the vertical portion sits atop porous boulders, which were the original revetment boulders, and it was the porous nature of the base that allowed OCCL/DLNR to conclude in the 2011 shoreline certification that the shoreline had moved mauka through the structure. If, as the Hearing Officer wrongly concludes, a new "seawall" had been built, as he defines the term, then the ocean would not flow through it but would be stopped at its vertical face. The shoreline certification expired prior to the contested case hearing. No variance was required by the state or city for repair of a nonconforming structure.

The Daileys object to COL 29 to the same extent they objected to the related and underlying COLs and FOFs with respect to the three other properties, against which OCCL/DLNR did not

pursue violations and for which OCCL/DLNR agreed to issue easements to allow the portions of those structures that were located in the conservation district to remain.

The Daileys object to COL 41-49 as they exceed the scope of the Remand Order. Many of the witnesses, including OCCL/DLNR witnesses and exhibits, used the terms "revetment" and "seawall" interchangeably. The underlying FOFs were based on evidence that was not introduced or admitted at the hearing. The Hearing Officer is seeking to punish the Daileys for insisting that OCCL/DLNR satisfy their burden of proof and persuasion at a contested case hearing and prove up the allegations, and in fact, the Hearing Officer and the Board already found that certain of the OCCL/DLNR allegations were baseless (such as the assertion of jurisdiction and enforcement of the shoreline setback provisions) and the Court also found errors, resulting in the remand. Neither the Court's precedent on the water commission, nor the constitutional provision or the public trust doctrine, applies as the Hearing Officer suggests. OCCL/DLNR concedes it must balance public and private concerns. The Board, and the Hearing Officer when appointed by the Board, must be a fair, unbiased, neutral fact finder, an "umpire" when acting in its adjudicatory capacity in determining allegations of a violation asserted by the OCCL/DLNR. The Hearing Officer committed error when he stepped out of the role of neutral fact finder to become an active participant and advocate.

C. REVISED DECISION AND ORDER

The Daileys object to the Decision and Order for the reasons stated above. Moreover, it exceeds the Remand Order. Mr. Lemmo repeatedly called the structure a "revetment" in his WDT. Mr. Eversole testified that "there was continued improvements and work done on top of the existing rock" and "building a new vertical stem wall on top of the rock revetment" and "I would just refer to that as a hybrid wall." Transcript, p. 90, line 1-12. The new Decision and Order continues to rely on exhibits that were not introduced or admitted into evidence at the contested case hearing.

Moreover, the imposition of additional penalties which were not imposed originally is in excess of the Remand Order, and is unfair, unjust and in violation of due process. The OCCL/DLNR did not appeal the original D & O's penalties as being unfair or inadequate, and the Hearing Officer was not free to increase penalties on remand.

II. CONCLUSION

The Board should reject the Revised FOF, COL, D & O. The Board should conclude that the Hearing Officer refused to adhere to or implement the Remand Order, and that given the extensive problems with this enforcement case as previously identified by the Board, the Circuit Court, and the Daileys, the Board should dismiss the case with prejudice.

DATED: Honolulu, Hawai'i, July 16, 2015.

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

ELIZABETH DAILEY AND MICHAEL DAILEY, Appellants v. DEPARTMENT OF LAND AND NATURAL RESOURCES; BOARD OF LAND AND NATURAL RESOURCES, Appellees.	Civil No.: 14-1-1541-07 (Agency Appeal) ORDER REMANDING PROCEEDINGS TO AMEND FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION AND ORDER

ORDER REMANDING PROCEEDINGS TO AMEND FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION AND ORDER

On January 23, 2015, oral argument on Petitioners/Appellants Elizabeth Dailey and Michael Dailey's (collectively, the "Daileys") appeal of the Board of Land and Natural Resources' Findings of Fact, Conclusions of Law and Decision and Order dated June 13, 2014 was held at 9:30 a.m. before the Honorable Rhonda A. Nishimura. Gregory Kugle, Esq. appeared on behalf of the Daileys; Petitioner/Appellant Michael Dailey was also present.

EXHIBIT "A"

Colin Lau, Deputy Attorney General, appeared on behalf of the Board of Land and Natural Resources ("BLNR") and Robyn B. Chun, Deputy Attorney General, appeared on behalf of the Department of Land and Natural Resources, Office of Conservation and Coastal Lands.

The Court, having reviewed the briefs submitted by the parties and all exhibits attached thereto and having heard and considered the argument of counsel and for good cause shown,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

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

2. The proceedings in this matter are remanded for amended Findings of Fact, Conclusions of Law and Decision and Order by the Hearings Officer and the BLNR, regarding whether (*) ~~or not there was any evidence to controvert the testimony and declarations submitted by the Appellants that the original structure, a revetment, was built when and where the Appellants' testified;~~

3. This order does not reopen the hearing before the Hearings Officer for the taking of further evidence or evidentiary proceedings but directs the Hearings Officer, based upon the existing record to make specific findings regarding whether the parties met their

(*) the DLNR can meet its initial burden prove by a preponderance of the evidence that the original structure was not nonconforming
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respective burdens of proof with regard to producing evidence and persuasion in accordance with Haw. Rev. Stat. § 91-10 and, if the structure is found to have the status of a nonconforming use in the Conservation District, whether subsequent actions were in conformance therewith;

4. Following the Hearings Officer's amendment/clarification of his Findings of Fact and Conclusions of Law, (a) the parties may file exceptions thereto and a response to the exceptions as may be appropriate; (b) the parties may present oral argument before the BLNR; and (c) the BLNR shall enter a final decision and order; and

5. Following the issuance of a final decision and order by the BLNR, the parties may appeal that decision to the Circuit Court as provided by Haw. Rev. Stat. § 91-14.

DATED: Honolulu, Hawaii, MAR 18 2015.

RHONDA A. NISHIMURA

FIRST CIRCUIT COURT SEAL STATE OF HAWAII

THE HONORABLE RHONDA A. NISHIMURA

APPROVED AS TO FORM:

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Attorney for Appellee
DEPARTMENT OF LAND AND NATURAL RESOURCES, OFFICE OF CONSERVATION AND COASTAL LANDS

COLIN LAU
Deputy Attorney General for Appellee
BOARD OF LAND AND NATURAL RESOURCES

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

In The Matter of a Contested Case to Appeal The Board of Land and Natural Resources Finding of Violation for Unauthorized Repair And Reconstruction of a Boulder Revetment At Mokule'ia, District of Waialua, O'ahu, TMK: (1) 6-8-003:018	DLNR File No. OA-07-06

Findings of Fact, Conclusions of Law, &

Decision and Order

EXHIBIT "B"

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

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

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

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

I. FINDINGS OF FACT[1]

A. Sequence of Events Regarding Violation Allegations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

a. Daileys' motion to dismiss for lack of enforcement jurisdiction;

b. OCCL's motion in limine (for an order precluding the Daileys from presenting any evidence or argument pertaining to the CDUA that they submitted to OCCL in 2005); and

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

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

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

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

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

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

B. Construction and Location of the Rock Pile Revetment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Mauka Movement of the Shoreline

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

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

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

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

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

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

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

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

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

D. Reconstruction of the Rock Pile Revetment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

E. The Shoreline Setback Variance

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

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

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

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

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

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

II. CONCLUSIONS OF LAW

A. Nonconforming Use and the Rock Pile Revetment

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

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

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

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

3. The Daileys argue that the revetment 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)) if a previously lawful use under the zoning code in existence when the structure was built [Daileys Proposed COL 31, 32], i.e., a lawful use in the shoreline area.

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

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

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

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

(1) They were completed prior to June 22, 1970;

(2) They received either a building permit, board approval, or shoreline setback variance prior to June 16, 1989;

(3) They are outside the shoreline area when they receive either a building permit or board approval;

(4) They are necessary for or ancillary to continuation of existing agriculture or aquaculture in the shoreline area on June 16, 1989;

(5) They are minor structures permitted under rules adopted by the department which do not affect beach processes or artificially fix the shoreline and do not interfere with public access or public views to and along the shoreline; or

(6) Work being done consists of maintenance, repair, reconstruction, and minor additions or alterations of legal boating, maritime, or watersports recreational facilities, which are publicly owned, and which result in little or no interference with natural shoreline processes; provided that permitted structures may be repaired, but shall not enlarged within the shoreline area without a variance.

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

7. In the conservation district, "'(n)onconforming use' means 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 in the conservation district." (HAR § 13-5-2.) (*emphasis added*).

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

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

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

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

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

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

10. Thus, the Daileys' rock pile revetment is not a nonconforming use in the conservation district that would qualify for continued use under HRS § 183C-5.[7]

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

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

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

B. The Rock Pile Revetment became a Hybrid Seawall

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

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

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

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

C. OCCL/DLNR's Jurisdiction to Fine the Daileys and Require Removal of the Structure

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

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

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

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

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

a. Part I. ("Coastal Zone Management"): "Coastal zone management area" means all lands of the State and the area extending seaward from the shoreline to the limit of the State's police power and management authority, including the United States territorial sea. (HRS § 205A-1: Definitions.)

b. Part II. ("Special Management Areas"): "Special management area" means the land extending inland from the shoreline as delineated on the maps filed with the authority as of June 8, 1977, or as amended pursuant to section 205A-23. (HRS § 205A-22: Definitions.)

c. Under Part III. ("Shoreline Setbacks"): "Shoreline area" shall include all of the land area between the shoreline and shoreline setback line[9] and may include the area between mean sea level and the shoreline; provided that if the highest annual wash of the waves is fixed or significantly affected by a structure that has not received all permits and approvals required by law or if any part of any structure in violation of this part extends seaward of the shoreline, then the term "shoreline area" shall include the entire structure. (HRS § 205A-41: Definitions.)

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

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

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

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

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

22. OCCL is in error:

a. Part II of HRS Chapter 205A assigns jurisdiction over the Special Management Area, or the lands extending inland from the shoreline, to the counties;[10] and Part III is a subset of the Special Management Area, limited to lands mauka of the shoreline to the shoreline setback, which in this case is forty feet (*supra*, COL 19, footnote 9). Thus, while a certified shoreline is obtained via DLNR pursuant to HAR Chapter 13-222 under the authority of HRS § 205A-42, it is the counties, not the state, that have jurisdiction over Part III, regarding the shoreline setback area;

b. OCCL claims jurisdiction through HRS § 205A-1(*supra*, COL 16), which does not address jurisdiction but is instead the definitions section to Part I of HRS Chapter 205A, which merely defines "coastal zone management area (*supra*, COL 19)," "agency,"[11] and "lead agency,"[12] among other terms;

c. HRS § 205A-43.6(c), through which OCCL asserts its authority (*supra*, COL 16), merely states that the authority of the Board under HRS Chapter 183C is not diminished by an artificial structure in violation of the shoreline setback statute (*infra*, COL 23), but OCCL interprets the section to give it jurisdiction over both HRS Chapter 183C and HRS § 205A-43.6;

d. the enforcement authority in Part III of HRS Chapter 205A is regarding shoreline setbacks—in this case extending from the shoreline to forty feet inland of the

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[10] HRS § 205A-22 defines:

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

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

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

[12] "Lead agency" means the office of planning.

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

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

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

§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.

(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.

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

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

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

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

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

(1) no use except a nonconforming use in the conservation district: HRS § 183C-4(b);[13]

(2) enforcement of shoreline setbacks: HRS § 205A-43.6(a), (b)[14];

(3) prohibitions: HRS § 205A-44(b);[15]

(4) penalty: HAR §§ 13-5-6(c), (d);[16]

(5) nonconforming uses and structures: HAR § 13-5-7;[17]

(6) permits: HAR §13-5-30(b);[18] and

(7) emergency permits: HAR § 13-5-35(d).[19]

(OCCL's "Bill of Particulars," p. 2, September 6, 2013.)

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

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

[14] See COL 23, *supra*.

[15] See footnote 4, *supra*.

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

[17] See footnote 5, *supra*.

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

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

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

D. Issues Presented by the Daileys

1. Does DLNR have jurisdiction over the revetment?

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

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

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

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

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

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

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

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

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

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

34. The Daileys argued that the revetment 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].

35. 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,[20] 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.

37. The Daileys also posit that at the time the revetment was built, the Hawai'i 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 Hearing 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.

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

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

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

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

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

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

III. DECISION AND ORDER

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

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

3. Therefore, Petitioner Daileys are ordered:

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

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

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

4. The order to remove the unauthorized seawall is stayed until such time that the Daileys apply and are approved for a shoreline setback variance (SSV) from C&C's DPP for a replacement wall such as that approved on April 23, 2010. The application must be completed within one year of the date of this order. The order to remove the unauthorized seawall is stayed further for two years from the date the SSV is approved to allow for completion of the new wall. If an application for a SSV is not made within the one-year period, the unauthorized seawall shall be removed immediately. If the application is not approved, the unauthorized seawall shall also be removed immediately.

DATED: Honolulu, Hawai'i June 13, 2014

WILLIAM J. AILA, JR. Chairperson

DR. SAMUEL M. GON, III, Member

ROBERT PACHECO, Member

DAVID GOODE, Member

REED KISHINAMI, Member

JAMES A. GOMES, Member

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI`I

In The Matter of a Contested Case to appeal the Board of Land and Natural Resources finding of violation for unauthorized repair and reconstruction of a boulder revetment at Mokulē`ia, District of Waialua, O`ahu, TMK (1) 6-8-003:018.	DLNR File No. OA-07-06

CERTIFICATE OF SERVICE

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

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

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BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

In The Matter of a Contested Case to the Board of Land and Natural Resources re alleged violation for repair and reconstruction of a boulder revetment at Mokulei'ia, District of Waialua, O'ahu, TMK (1) 6-8-003:018.	DLNR File No. OA-07-06 (Contested Case Hearing) **LANDOWNERS ELIZABETH DAILEY'S AND MICHAEL K. DAILEY'S EXCEPTIONS TO THE HEARING OFFICER'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, & DECISION AND ORDER; EXHIBIT "A"; CERTIFICATE OF SERVICE** **Date: February 28, 2014** **Time: 9:00 a.m.**

LANDOWNERS ELIZABETH DAILEY'S AND MICHAEL K. DAILEY'S EXCEPTIONS TO THE HEARING OFFICER'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, & DECISION AND ORDER

Pursuant to Haw. R. Admin. § 13-1-42 and Minute Order No. 17 entered herein, landowners Elizabeth Dailey and Michael Dailey ("Daileys") submit their Exceptions to the Hearing Officer's Proposed Findings of Fact, Conclusions of Law, & Decision and Order (collectively "Proposed Order").

EXHIBIT "C"

This contested case came before the Hearing Officer as an enforcement action brought by the Department of Land and Natural Resource, Office of Conservation and Coastal Lands ("DLNR") against the Daileys, before the Board of Land and Natural Resources ("BLNR") and referred by the BLNR to the Hearing Officer for determination. This contested case concerns a rock revetment (the "Revetment") on the Daileys' property located at 68-611 Farrington Highway, Mokulei'ia, Waialua, O'ahu, Tax Map Key (1) 6-8-003:018 (the "Property").

This contested case presented four related issues, which should be decided as follows:

a. Does the DLNR have jurisdiction over the Revetment? No, not at the relevant time, which was the time of the violation and initiation of this enforcement action.

b. Is construction or repair of the Revetment permitted by the law? Yes, the law allows the continued use, and repair, of a nonconforming structure that existed when the land was placed into the Conservation District.

c. Should DLNR have granted the Dailey's Emergency Conservation District Use Application? Yes, because DLNR acknowledged a hazardous condition and it withdrew the alleged violation.

d. Should the BLNR dismiss the enforcement action? Yes, because DLNR lacks jurisdiction and/or because the Revetment is a nonconforming structure that can be maintained and repaired.

The Daileys object to the Proposed Order as it does not accurately reflect the undisputed evidence in this case, improperly places the burden of proof on the Daileys, misapplies or fails to apply controlling authority, misapplies or ignores important policy considerations, and for these reasons (individually and in combination) reaches erroneous legal conclusions and proposed an inappropriate decision and order.

Unless noted otherwise, the Daileys take exception and object to each and every Finding of Fact ("FOF") and Conclusion of Law ("COL") that was not proposed by the Daileys, and to the exclusion of the Daileys' proposed FOFs and COLs that are not included, because the FOFs, COLs, and the Proposed Order as a whole do not accurately reflect the evidence and record, or the law applicable to this contested case.[1]

I. SPECIFIC EXCEPTIONS

The Daileys take exception to the following specific questions addressed by the Hearing Officer.

A. JURISDICTION AND LEGAL NONCONFORMITY

As a question of procedure, the Daileys take exception to the Proposed Order's incomplete and/or incorrect application of the burdens of proof for this contested case. The Hearing Officer placed the burden on the Daileys, not DLNR, to prove that the Revetment is a legally non-conforming use. The Proposed Order focuses on Haw. Admin. R. § 13-5-7(f), but does not address, let alone reconcile, the conflicting directives of Haw. Admin. R. § 13-1-35(k) and Haw. Rev. Stat. § 91-10(5). This is a "proceeding on alleged violation of law" and was initiated by DLNR, and thus the burden of producing evidence and burden of persuasion fell squarely on DLNR. *See* COLs 5, 7, and 8; *see also* Daileys' proposed COLs 1-3. As Haw. Admin. R. § 13-5-7(f) directly conflicts by placing the burden on the Daileys, the Hearing Officer was required to adhere to the controlling rules governing the contested case procedure, Haw. Admin. R. § 13-1-35(k) and Haw. Rev. Stat. § 91-10(5), and to hold DLNR to its burden of proof and persuasion. The Hearing Officer did not do so and as a result the entire Proposed Order is fatally flawed.

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[1] Attached as Exhibit "A" is a copy of the Daileys' Proposed Findings of Fact, Conclusions of Law, and Decision and Order, referred to herein as the "Daileys' proposed FOF", the "Daileys' proposed COL" and the "Daileys' proposed Decision and Order", respectively.

The Daileys further take exception to the Proposed Order's failure to dismiss this action for lack of jurisdiction as argued in the Daileys' motion to dismiss. *See* COLs 14-26, 32-35. The Hearing Officer correctly concluded that DLNR has no authority to maintain this enforcement action under Haw. Rev. Stat. 205A-43.6 (COLs 18-24), but the Daileys take exception to the conclusions that DLNR otherwise has authority to maintain this action (COLs 25, 26, 32-35). The Revetment was located in whole or in part within the shoreline setback in 2006/2007 and per Haw. Rev. Stat. 205A-43.6(b), the entire Revetment fell within the jurisdictional authority of the City and County of Honolulu ("City"), not DLNR, and no other law or rule cited in DLNR's Bill of Particulars vests it with the requisite enforcement authority. *See* Daileys' proposed COLs 6-22.

The Daileys take exception to the Proposed Order's failure to find that the Revetment was built in early 1970 at a time when the Hawaii Coastal Zone Management Act ("CZMA") did not require variances for structures built within the shoreline area (Haw. Rev. Stat. § 205A-44(b)(1)). This was established by undisputed evidence presented by the Daileys, including but not limited to testimony by multiple witnesses (*see* Daileys' proposed EOF 3), and the record is void of any contrary evidence.

The Daileys take exception to the related question of law regarding whether the Revetment was a legal non-conforming use as a lawful use preexisting the Revetment's placement into the Conservation District by DLNR (specifically COLs 1-10, and COLs 10-35 generally). First, the Proposed Order misapplies or fails to apply the decision in *Waikiki Marketplace v. Zoning Bd. Of Appeals*, 86 Hawai'i 343 (App. 1997), where the Intermediate Court of Appeals ("ICA") found that legal nonconformity (based on prior "lawful use") must be determined by lawfulness under the zoning law alone, and not all other legal requirements, such as building codes. Here, Chapter 183C and the administrative regulations are zoning laws and

contain the same terms interpreted by the ICA in *Waikiki Marketplace* (i.e., "lawful use"). For purposes of this contested case, the Hearing Officer was required, under *Waikiki Marketplace*, to look to the zoning laws in effect only, not other legal requirements such as a building permit. The Proposed Order makes the extraordinary and unwarranted leap to conclude that the Revetment was not lawfully constructed and thus could not be a lawful preexisting non-conforming use per Haw. Rev. Stat. § 183C-2 (COLs 8 and 9). The Hearing Officer reaches this conclusion based on (1) a hearsay statement by DLNR that the City issued a citation "for installing boulders within the shoreline setback area" (FOF 6) and (2) the statement in the 2010 shoreline setback variance ("SSV") that it was issued to "replace an existing unauthorized seawall and boulder structure (revetment) ... built ... without the necessary approvals" (FOF 25). The hearsay statement by DLNR staff regarding a purported City citation is not competent evidence and does not discharge DLNR's burden of proof or persuasion. DLNR presented no witness from the City to confirm whether such citation was issued, the meaning of such citation, or what became of the citation. Moreover, as the Hearing Officer recognizes, it is undisputed that no action was taken on the citation, i.e., no violation was proved and no enforcement action was taken. *See* FOF 6. To conclude the legality of the Revetment on the issuance of a citation would be akin to judging a man's guilt based on issuance of an arrest warrant. The SSV statement likewise does not prove or disprove the legality of the Revetment. The meaning or accuracy of this statement was not established by DLNR – as was its burden – through other evidence or witness testimony.

B. PERMISSIBLE REPAIRS

Assuming the Revetment is a legally nonconforming use, the Daileys take exception to the Proposed Order's determination of questions of fact and law as to the scope and permissibility of the repairs the Daileys made in 2006/2007. The DLNR regulations (Haw.

Admin. R. § 13-5-7) allow the repair of nonconforming uses, provided the repair does not exceed the size of the original structure or more than 50% of the replacement cost. The Daileys take exception to the finding that the repairs constituted or created a "new" structure (FOFs 64-65, COL 13) because the repairs "[did] not exceed the size, height, or density of the structure" as originally constructed. FOFs 64 and 65 and COL 13 describe certain attributes of the Revetment as repaired, but do not demonstrate how the 2006/2007 work violated the DLNR rules. Again, the burden was on DLNR, not the Daileys, to present this evidence. Its absence must be construed against DLNR and the violation claim dismissed.

The Daileys further take exception to the unsupported-by-evidence cost estimate used to reach a conclusion that the repairs exceeded the 50% replacement cost. The only evidence produced relating to the cost of the repairs were the estimates produced by the Daileys, namely Mr. Dailey's declaration (at ¶ 14) that the repair costs were approximately $50,000 and the estimates that replacement costs exceeded $300,000 (*id.*, Daileys' Exhibits A-7 and A-8, and Declaration of Harvey Hida, P.E. at ¶ 3). *See* the Daileys' proposed FOF 20. Without any support in the record or rationale basis in fact or law, the Hearing Officer created his own "reasonable estimate" for the replacement cost (which is not disclosed in the Proposed Order), which in his opinion "would not cost more than twice the $50,000 spent" on the repairs. *See* COL 13(b). The burden was on DLNR to demonstrate the costs involved and it failed to carry this burden. The Hearing Officer could not excuse this failing and could not create a "reasonable estimate" from the absence of any evidence.

DLNR did not prove the repairs were impermissible and the Proposed Order's conclusions to the contrary (COLs 11-13) cannot stand.

C. DECISION AND ORDER; POLICY DECISION TO ORDER REMOVAL

As explained above, the Hearing Officer should have found that the Revetment constituted a lawful nonconforming use and that it was lawfully repaired in 2006/2007. DLNR did not carry its burden to demonstrate either that the Revetment is an impermissible structure within the shoreline or that the 2006/2007 repairs were impermissible. The Proposed Order does not accurately reflect the record or accurately apply the applicable law, and thus the BLNR should not adopt the Proposed Order, including the proposed order for issuance of a $2,000 fine and removal of the Revetment. Instead, the BLNR should adopted the Daileys' proposed Decision and Order.

Even if the BLNR were to adopt the findings and conclusions of the Proposed Order, the Daileys take exception to the recommendation to remove the Revetment. The order of removal involves questions of fact and of policy, including the impact of the removal on the Property, the impact on the surrounding environment (the shoreline and the neighboring properties), and DLNR's obligations to protect these properties and the coastal lands as a whole. The Proposed Order does not address these effects, particularly the effect removal will have on the Mokuleia Beach Colony ("MBC") property – to the immediate west of the Property – given the fact that MBC's seawall lacks a return wall. Upon removal of the Revetment, MBC will have no lateral protection against flanking erosion from the resulting gap. The gap would exist even if a new seawall or revetment structure were constructed farther mauka on the Property because the new structure would not be in line with or connect to the MBC seawall.

Further, the Proposed Order does not account for the undisputed fact that for every other similarly situated property in the area (i.e., a property that DLNR claims has a seawall or revetment situated in whole or in part within the shoreline), DLNR has given the property owner an easement to allow continued use of the offending structure. There is no reason why the

Daileys should been treated disparately from their neighbors, particularly given the significant (and unaddressed) environmental implications of removing the Revetment.

Similarly, the Proposed Order does not address the issues of fact, law and policy that DLNR created the situation it now complains of by failing to approve the emergency repairs to the Revetment in 2005 per the Emergency Conservation District Use Application it received from the Daileys, despite recognizing the emergency facing the Daileys from the Revetment's damage (FOF 70). *See* Daileys proposed FOFs 8-13 and COLs 46-49. DLNR also created this situation by: recommending that the Daileys seek an SSV; when it received the 2007 shoreline survey submitted with the application that showed the shoreline to generally be makai of the Revetment, did not question or challenge the shoreline delineation; and only after the SSV was granted did it unilaterally redraw the shoreline completely mauka of the Revetment in the 2011 shoreline certification (the first certification or delineation of the shoreline by the State since 1975). *See* FOFs 25 and 27 and COLs 70-71; Daileys' proposed FOFs 24-25, 30, 33-34. Having led the Daileys down this expensive and time-consuming path to obtain an SSV (for a re-engineered revetment/seawall in generally the same location as the Revetment) and staying silent throughout, DLNR then changed the location of the shoreline, rendering the SSV all but useless. The BLNR should not further compound this by ordering the removal of the entire Revetment, thereby creating a gap with the MBC's seawall where none now exists. The Daileys take exception to the Proposed Order to the extent it does not reference DLNR's actions and omissions identified in this paragraph and to the extent it recommends ordering removal of the Revetment under these circumstances.

This Proposed Order puts the Daileys in an impossible situation. If the order is adopted, they will have to remove the Revetment. At best, they will have to construct a new structure further mauka on the Property and at worst they will have to do without shoreline protection.

Either way, a gap will be created between the Property's shoreline protection structure and that of its immediate neighbor, MBC. Both properties will likely suffer increased erosion and damage, including flanking erosion through the new gap. Indeed, this increased erosion could easily cause the Property's and/or MBC's walls to lose structural integrity. This could be avoided by granting of an easement and to choose removal over an easement does not serve DLNR's policy goals.

If the BLNR is still inclined to order removal of the Revetment, the Daileys need more than the one year to apply for a SSV and two years to complete a replacement Revetment. The timing of these actions is not wholly within the control of the Daileys and requires approvals and input from multiple City and State agencies, including DLNR. The Daileys require at least two years to submit an SSV application and three years from the date of SSV approval to complete the replacement structure.

The Daileys also take exception to the Proposed Order to the extent it calls for the Daileys to remove from the shoreline rocks that indisputably were placed by MBC in the 1980s (FOF 50). Based on the record and the findings of the Hearing Officer, any order by the BLNR should exclude any requirements directed to the Daileys with respect to these rocks. Instead, DLNR should proceed with a separate violation action against MBC with respect to these rocks.

Every exception is incorporated into the following objections as if fully restated therein.

II. OBJECTIONS TO FINDINGS OF FACT

1. The Daileys have no exceptions or objections to FOFs 18-24, 27-34, 36-39, 45, 54, and 72-77.

2. The Daileys have no exceptions or objections to FOFs 49-51 to the extent that they refer to MBC, but object to these FOFs to the extent that they refer to the Daileys and the Revetment as not reflective of the record before the Hearing Officer, and propose removing these offending

portions of the FOFs. In other words, FOF 50 should be revised to state: "In 1989, the Colony placed boulders along the western boundary of the Property in anticipation of the Daileys using the rocks to connect the Revetment to the Colony's seawall. (Fraser, WDT, ¶¶ 8, 11-16, exhibits 3-6; Fraser, Tr. 10/15/13, pp. 148, 151-154, 167-168.))"

3. For completeness, accuracy and clarity, and to better reflect the undisputed testimony at the hearing and the record, the Daileys object to FOFs 1-17, 55-71 and propose replacing them with the Daileys' proposed FOFs 6-26, 28-29.

4. For completeness, accuracy and clarity, and to better reflect the undisputed testimony at the hearing and the record, the Daileys object to FOFs 25,26 and 35, and propose replacing them with the Daileys' proposed FOFs 27-39.

5. For completeness, accuracy and clarity, and to better reflect the undisputed testimony at the hearing and the record, the Daileys object to FOFs 40-44, 46-48, and 52-53, and propose replacing them with the Daileys' proposed FOFs 1-5.

III. OBJECTIONS TO CONCLUSIONS OF LAW

1. The Daileys do not specifically object to COL 2, 6, and 17-21, but because the Daileys object to the remaining COLs as not accurately or completing stating the law, lacking evidentiary support, and/or being FOFs and for convenience and efficient review, the Daileys proposed replacing COLs 1-35 (including all subparts and footnotes thereto) with the Daileys' proposed COLs 1-49.

2. The Daileys object to COLs 1, 3-5, and 7-35 (including all subparts and footnotes thereto) because they are not an accurate or complete statement of the law and/or are not supported by evidence found in the record, and to accurately reflect the law and the record, these COLs should be replaced with the Daileys' proposed COLs 1-49.

3. The Daileys also object to COLs 3, 4, 15, 18, 19, 22, 23, 25, and 30 because they are FOFs or mixed findings of facts and conclusions of law, and thus should be removed from the COLs. The Daileys further object because these COLs do not reflect the record before the Hearing Officer and/or are redundant of other FOFs, and propose removing all of them.

IV. OBJECTIONS TO DECISION AND ORDER

1. The Daileys object to the entire Decision and Order as lacking basis in fact and law for the reasons set forth above, and to accurately reflect the record and applicable law should be replaced with the Daileys' proposed Decision and Order *en toto*.

DATED: Honolulu, Hawai'i, January 24, 2014.

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BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

In The Matter of a Contested Case to the Board of Land and Natural Resources re alleged violation for repair and reconstruction of a boulder revetment at Mokulei'ia, District of Waialua, O'ahu, TMK (1) 6-8-003:018.	DLNR File No. OA-07-06 (Contested Case Hearing) **PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER**

PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND DECISION AND ORDER

This contested case came before the Hearing Officer as an enforcement action brought by the Department of Land and Natural Resource, Office of Conservation and Coastal Lands ("DLNR" or "OCCL") against landowners Elizabeth Dailey and Michael Dailey ("Daileys"), before the Board of Land and Natural Resources ("BLNR") and referred by the BLNR to the Hearing Officer for determination. This contested case came on for hearing before the Hearing Officer on November 15, 2013. Robyn B. Chun appeared on behalf of DLNR. Gregory W. Kugle appeared on behalf of the Daileys. The Hearing Officer, having duly considered the parties' briefs, the exhibits attached thereto, the written testimony and oral testimony of the

EXHIBIT "A"

witnesses, the records and files of DLNR, having heard and considered the arguments of counsel, and good cause appearing therefore, makes the following Findings of Fact ("FOF"), Conclusions of Law ("COL"), and Recommended Order to the BLNR.

FINDINGS OF FACT

1. This contested case concerns a rock revetment (the "Revetment") on the Daileys' property located at 68-611 Farrington Highway, Mokulei'ia, Waialua, O'ahu, Tax Map Key (1) 6-8-003:018 (the "Property"). Most of the properties to the west of the Property are hardened with erosion protection structures, while the properties to the east of the Property are unprotected. Declaration of Michael Dailey filed with the BLNR on September 24, 2013 ("Michael Dailey Decl.") at ¶ 3.

2. At all relevant times, Elizabeth Dailey owned and resided at the Property with her husband, Fred Dailey, and/or her son, Michael Dailey, having built the house in 1965. Declaration of Elizabeth Dailey filed with the BLNR on September 24, 2013 ("Elizabeth Dailey Decl.") at ¶ 3; Michael Dailey Decl. at ¶¶ 2, 3.

3. As described below, the undisputed evidence establishes that the Revetment was built in early 1970 by Fred Dailey following an unprecedented severe surf event in December 1969, which caused wave and flood damage to the Property and to many other North Shore homes. The undisputed evidence further shows that the Revetment was constructed within the boundary lines of the Property and not makai of the shoreline fronting the Property. In other words, the Revetment was originally constructed outside of the Conservation District. The timing and location of the Revetment's construction was established by evidence from multiple sources:

a. Uncontroverted witness testimony proffered by the Daileys: Elizabeth Dailey Decl. at ¶¶ 5-7; Michael Dailey Decl. at ¶¶ 5-8; Declaration of William Paty dated

October 9, 2013 ("Paty Decl.")[1] at ¶¶ 3-4; Declaration of Don Rohrbach filed with BLNR on September 24, 2013 at ¶¶ 2-3; Tr. 174:2-25 (Michael Dailey).

b. The DLNR's admission in a letter to the City and County of Honolulu ("City"), dated September 19, 2008 and signed by OCCL's Sam Lemmo, which states in pertinent part "... therefore the OCCL closed this case as the offending rocks were removed from the shoreline and it appeared that the revetment was originally constructed landward of the shoreline while under the City's jurisdiction." (Ex. A-18 at p.2) (Emphasis added).

c. DLNR's 2011 shoreline certification which places all of the rocks mauka of the 1964 shoreline and vegetation line (Ex. A-14);

d. The 1965 and 1975 Land Court maps depicting the shoreline significantly makai of the Property (Exs. A-1 and A-1a);[2]

e. Aerial photographs from 1967 showing the historic vegetation line located much further makai than the current Revetment location (Ex. A-2);[3]

f. A 2007 shoreline survey which places most of the rocks mauka of the shoreline (Ex. A-12);

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[1] The parties stipulated to the submittal of late witness statements, including the Paty Decl., waiving objections to their late filing. Transcript of Contested Case Hearing on October 15, 2013 ("Tr.") at 5:16-6:10.

[2] The Daileys' exhibits are identified with the prefix "A" and the DLNR's exhibits are identified with the prefix "B." The parties stipulated to the authenticity and admissibility of Exs. A-1 through A-20 and Exs. B-1 through B-14. Tr. 6:14-7:10. The parties stipulated to the authenticity of Exs. A-21 through A-24 as authentic government records (Tr. 6:24-7:8) and based on the Hearings Officer overruling objection to the relevancy of the matters discussed in these exhibits (Tr. 66:1-13), DLNR withdrew its objection to admission of these exhibits and they were admitted into evidence. Tr. 67:11-71:20. Ex. A-25 was admitted into evidence without objection (Tr. 104:18-22).

[3] The maps and surveys show, among other things, that there was significant erosion to the beach fronting the Property between 1965 and 1975, which would not have occurred had the Revetment been constructed on or near the 1965 shoreline, as opposed to mauka of the shoreline within the boundaries of the Property. The 1965 Land Court boundary and shoreline would have been at or about the 1964 Conservation District boundary.

g. DLNR's admissions that, based on their review, the Revetment was built "sometime between 1967 and 1988" (*see* DLNR's Witness Statement – Samuel J. Lemmo filed with BLNR on September 10, 2013 ("Lemmo Stat.") at ¶ 10; Tr. 11:16-22); and

h. Witness testimony proffered by DLNR: Tr. 25:19-26:2 (Lemmo admitting he has no evidence to contradict the Daileys' witness testimony that the Revetment was built in 1970); Tr. 27:4-29:4 and 32:21-33:5 (Lemmo admitting the Revetment must have been constructed on the Property, not in the Conservation District).

4. Conversely, many of DLNR's own records demonstrate lack of knowledge about the location of the Revetment in relation to the shoreline and the Conservation District at the time of construction. (Ex. A-4, Ex. A-6, Ex. A-17). Significantly, DLNR offered no evidence to contradict the evidence that the Revetment was constructed in early 1970, mauka of the Conservation District.

5. The Revetment functioned exactly as intended and designed for approximately thirty five (35) years, protecting the Dailey home from damage from waves and storm surges, even after the Property began to suffer progressively more erosion following the construction of the adjacent Mokuleia Beach Colony ("MBC") seawall immediately to the west. Michael Dailey Decl. at ¶¶ 7-8; Tr. 175:1-2 (Michael Dailey).

6. However during the winter of 2004/2005, several rocks on the Revetment became destabilized due to high surf and an unusual lack of sand on the beach in front of the Revetment (following a period of abnormally heavy rainfall). Some of the rocks rolled makai, onto the beach. Michael Dailey Decl. at ¶ 9.

7. DLNR sent the Daileys two letters in January and March 2005 regarding the rocks that had rolled onto the beach (Exs. B-1and B-2). Michael Dailey Decl. at ¶ 10; Lemmo Stat. at ¶¶ 6-7.

8. In response, the Daileys submitted a Conservation District Use Application ("CDUA") "emergency permit" to DLNR to allow repairs to the Revetment and retrieval of the dislodged rocks (Ex. A-5). Michael Dailey Decl. at ¶¶ 10-12.

9. Eventually, on December 20, 2005, DLNR issued a letter informing the Daileys that it had refused to consider the CDUA emergency permit and that it had withdrawn the enforcement action (Ex. A-6). Lemmo Stat. at ¶ 8.

10. As stated in the December 20, 2005 letter, DLNR's refusal to consider the CDUA was based on its conclusion that the revetment was "illegal." Ex. A-6. However, this determination was made in error, DLNR having misapplied the test for determining legally "nonconforming use" under the applicable law and regulations, as explained in COLs 25 through 36 below.

11. DLNR further conceded that there were "complications in determining if the structure was built in the Conservation District when it was placed." Ex. A-6; *see also* Ex. A-17, Ex. A-18. In other words, DLNR purportedly determined the Revetment was illegal while admittedly failing to first determine a key element of legality and its enforcement jurisdiction.

12. Therefore, DLNR withdrew its enforcement case upon the Daileys' removal of the encroaching rocks at the eastern end of the Property, i.e. those rocks which had dislodged and rolled off the Revetment and onto the beach and onto "State land." *See* Ex. A-6; Michael Dailey Decl. at ¶ 13.

13. Also significantly, DLNR acknowledged, and it is undisputed, that removal of the Revetment in its entirety would cause a "landward shift of the shoreline" in which the existing dwelling "could soon become threatened" (Ex. A-6). DLNR also acknowledged that "the unstable nature of the structure is perceived by the OCCL to be a significant safety issue to the general public traversing the area and could be considered 'emergency' in nature." *Id.*; *see also*

Ex. A-4 (June 27, 2005 letter from DLNR indicating that the "stability of the structure" was an "immediate concern" and encouraging the Daileys to "take action to reduce or eliminate this hazard while there is still ample room to work on the beach and well before the onset of the winter surf.").

14. In this same letter (Ex. A-6), DLNR advocated the admittedly "draconian" step of removing Mrs. Dailey's existing dwelling. *Id.*

15. There is no dispute that without the Revetment, or repairs sought under the CDUA emergency permit application (Ex. A-5), the only options the Daileys had were to either let Mrs. Dailey's home be damaged or destroyed or take the "draconian" step of removing the home. *See* Ex. A-5, Ex. A-6.

16. The Daileys removed the rocks that had rolled onto the beach and by late 2005 OCCL withdrew its violation case, while refusing the Daileys' request to repair the Revetment. Michael Dailey Decl. at ¶¶ 12-13; Lemmo Stat. at ¶ 11; Tr. 50:6-16 (Lemmo).

17. The Revetment and the Property sustained additional damage in the winter of 2006/2007 from high surf. Rocks again became unstable, trees began to collapse, and the house developed cracks in the foundation and walls. Michael Dailey Decl. at ¶ 14.[4]

18. Mr. Dailey, concerned that ongoing high surf would destroy the remaining Revetment and render the house uninhabitable and reasonably believing that he had no alternative because DLNR had already denied a CDUA to repair the Revetment, undertook his own emergency repairs to stabilize the Revetment. Michael Dailey Decl. at ¶ 14; Tr. 175:25-176:14 (Michael Dailey).

19. The emergency repairs involved retrieving and restacking some of the rocks and capping portions of the structure with grout. There is no dispute that the repairs did not

[4] The cracks in the foundation are still visible to date, as the Hearing Officer observed during the site visit described in FOF 38 below.

significantly alter the location or effect of the original rock Revetment. *See* Michael Dailey Decl. at ¶ 14; DLNR's Witness Statement – Dolan Eversole filed with the BLNR on September 10, 2013 ("Eversole Stat.") at ¶ 9 (describing the activities as "repair" and "reconstruction," not expansion or relocation); Lemmo Stat. at ¶¶ 12-13 (same); Tr. 56:2-5 (Lemmo admitting the structure continues to be generally in the same location as the Revetment when originally constructed); Tr. 107:1-9 (Eversole testifying that the Revetment was "in the same location of where the original structure was located, but it had been reconfigured somewhat, same rocks, but restacked and in a slightly different configuration.").

20. The cost of the repair work was approximately $50,000. Michael Dailey Decl. at ¶ 14. The cost to completely remove and reconstruct a revetment/seawall in conformance with modern engineering and construction practices would cost in excess of $300,000 at that time. *See* Michael Dailey Decl. at ¶ 14; Ex. A-7 (2005 estimate from OCEANIT); Ex. A-8 (2013 estimate from Joe Correa/Shoreline Reconstruction); Declaration of Harvey Hida, P.E. filed with BLNR on September 24, 2013 at ¶ 3. Thus, the Revetment was not damaged or destroyed to a degree greater than 50% of its replacement cost.

21. The DLNR offered no evidence concerning the cost of repairs or the cost to reconstruct the Revetment.

22. Despite not significantly altering the location or effect of the original Revetment, in 2007 Mr. Dailey's repairs generated new notices of violation from DLNR (Ex. B-5), which are the subject of this proceeding.

23. In 2007, the Daileys retained Elaine Tamaye, a coastal engineer, who opined that: (1) the existing rock structure had no effect on the existing littoral processes at the site; (2) removal of the Revetment would result in catastrophic damage to the existing dwelling; (3) if

the existing boulders are removed, then erosion will likely cause flanking erosion of the MBC seawall (Ex. A-11).[5]

24. Also in 2007, the Daileys had shoreline survey done by R.M. Towill (Ex. A-12). The survey placed most of the structure mauka of the shoreline, except for the loose boulders near the MBC property. Significantly, this survey placed the entire portion of the Revetment that had been repaired was mauka of the survey's shoreline and therefore outside of the Conservation District.

25. DLNR received a copy of this survey in 2007 and did not challenge or question the location of the shoreline depicted therein until well after bringing this enforcement action (*see* FOFs 30 and 34 below). *See* Michael Dailey Decl. at ¶ 17; Ex. A-12; *see also* Ex. A-4 and Tr. 34:9-18 (Lemmo acknowledging receipt of the survey); Ex. A-13 (DLNR letter dated July 30, 2007 refusing to certify the shoreline as depicted in the 2007 survey, not for any issue with the location, but rather because of the pending violation); Tr. 58:7-14 (Lemmo).

26. As a result of the notices of violation, DLNR prepared a report to the BLNR (the "Staff Report;" Exhibit B-7) and placed the alleged violations on the BLNR agenda for the May 24, 2007 meeting. *See* Lemmo Stat. ¶ 18. Although not clear from the Staff Report, Lemmo later clarified that DLNR was seeking only removal of the repairs made in 2006/2007 that are the subject of the notices of violation. Tr. 53:17-54:13 (Lemmo).[6]

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[5] The parties stipulated to Tamaye's qualification as an expert in the field of coastal geology. Tr. 112:4-12.

[6] This makes the 2007 notice of violation ambiguous, as the Daileys could not know what was being alleged by DLNR, particularly in light of the 2005 correspondence (*see, e.g.*, Ex. A-6) alleging the entire Revetment was "illegal."

27. The Daileys' prior counsel timely requested a contested case hearing on the allegations of violations. Ex. B-9. The BLNR granted the contested case hearing request and appointed the Hearing Officer to conduct the contested case.[7]

28. Based upon the facts as alleged by DLNR in the Staff Report (Ex. B-7), "it was believed that the structure was built sometime between 1967 and 1986 (based on aerial photographs) (Exhibit 8)."[8] *Id.* at 3. Further, DLNR "could not determine exactly when or where (in relation to the shoreline), the structure had been built." *Id.; see also Id.* at Exhibit 7 ("it is unclear if the structure was placed within the Conservation district at the time of construction.").

29. As of the commencement of this enforcement action in 2007, the shoreline had never been certified by DLNR, *id.* at 4, nor had there been a shoreline delineation. *Id.* at 7; *see also* Ex. A-18 at 1-2. However, the shoreline was twice conclusively identified by the Land Court and the State Surveyor – in 1965 and 1975 – during Land Court proceedings (Ex. A-1).

30. In 2011, while the Daileys were pursuing a City shoreline setback variance, DLNR did certify the shoreline, confirming that all of the rocks were located mauka of the 1964 shoreline/vegetation line (Ex. A-14), but as of 2011 were now located makai of the shoreline. Thus, in 2011 the DLNR moved the Revetment into the Conservation District, bringing the Conservation District to the Revetment, not the other way around.[9]

31. DLNR's opening brief contends that the Daileys have done nothing since 2007 and that a "safety hazard" exists today at the Property. The record contradicts both contentions.

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[7] Contrary to DLNR's contention at page 9 of its opening brief, the BLNR did not issue a final order imposing fines for the violations, because the Daileys timely invoked their statutory and constitutional right to a contested case hearing.

[8] References to exhibits without prefixes (e.g., "Exhibit 8") refer to the exhibits attached to the Staff Report (Ex. B-7).

[9] The 2011 shoreline certification expired in 2012. DLNR did not provide a shoreline certification in effect at the time of the contested case hearing. *See also* Tr. 128:14-129:14 (Bohlander).

32. The Hearing Officer conducted a site inspection on August 22, 2013 at which time the Hearing Officer confirmed that none of the "dangerous" conditions noted in the 2007 Staff Report (Ex. B-7) exist today. In stark contrast to the 2006 and 2007 photographs and the report description (Exhibits 8 through 17 of Ex. B-7), sandbags and loose rocks are no longer present on the beach fronting the Property. The beach fronting the Property is clean and wide, unlike the beach to the west, which is thin to non-existent.

33. Furthermore, since 2007 the Daileys have spent years and thousands of dollars pursuing a Shoreline Setback Variance ("SSV") from the City, which would permit them to retain a shoreline protection structure (Ex. A-15). Tr. 177:1-8 (Michael Dailey). They pursued the SSV based in part on the 2007 shoreline survey submitted to DLNR (Ex. A-12).

34. Further, the Daileys obtained the SSV in 2010, which authorizes a revetment/seawall mauka of the shoreline. Had DLNR honored the shoreline depicted in the 2007 shoreline survey, the City SSV would have allowed modification of the existing structure in place. However, in 2011, when DLNR re-interpreted the shoreline to be located behind/mauka of the existing structure (Ex. A-14), the existing structure purportedly could no longer be used.[10] Michael Dailey Decl. at ¶ 18.

35. There is no dispute that, between 2007 and 2013, the Revetment has once again functioned as intended. The Property has been protected. The rocks have not collapsed onto the

[10] In addition, the MBC seawall lacks a "return wall" along its flank, which was required by the MBC SSV, which means if the rocks are removed from in front of the Dailey Property, the MBC property will be exposed to flanking and erosion (Ex. A-16). *See* DLNR's Witness Statement William Fraser ("Fraser Stat.") at ¶ 10; Tr. 148:9-149:5 (Fraser). Thus, the Revetment in its current location protects both the Dailey Property and the MBC property, and Mr. Fraser, the MBC resident who testified for DLNR, confirmed that the existing rocks protect MBC's property, and were in fact placed there by MBC, not by the Daileys. Tr. 167:24-168:3 (Fraser); Fraser Stat. at ¶ 11. Based on this undisputed admission, it would be patently unfair to penalize the Daileys for rocks placed by their neighbors, the MBC.

beach. The Hearing Officer also reports that he did not observe any loose rocks on the beach fronting the Property during the site inspection.

36. During the time of this enforcement action (2007 to present), while the Daileys have been stuck in limbo, many of their neighbors have obtained easements from DLNR allowing pre-existing seawalls to remain in the Conservation District and on State land (Exs. A-21 through A-24). *See* Tr. 65:4-72:22 (Lemmo testimony regarding Exs. A-21 through A-24 and easements granted to the neighboring properties). Indeed, DLNR has a "policy to allow the disposition of shoreline encroachments by either removal or issuance of an easement." *Id.* DLNR did not require those owners to remove their seawalls despite encroachment into the Conservation District and onto State Land. *See id.*

37. While this alternative was available to DLNR to address the situation fronting the Property, DLNR took a very different tact with the Daileys, pursuing them with fines and violations, and seeking removal of some or all of the structure, despite conceding that the inhabited dwelling would be in imminent danger of collapse without shoreline protection (*see e.g.*, Ex. A-6).

38. On September 24, 2013, the Daileys filed a motion to dismiss for lack of enforcement jurisdiction (the "Motion"), asserting that the City alone is vested with the exclusive authority to enforce violations related to the Revetment, not DLNR, because DLNR has no authority over structures mauka of the shoreline and the relevant laws and regulations clearly provide that "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" (Haw. Rev. Stat. § 205A-43.6(b)).

39. DLNR concedes in its staff report (Ex. B-7) that the City has jurisdiction over the Revetment. Moreover, as explained below in COLs 4 through 36 below, DLNR's arguments

attempting to stretch its jurisdiction into the area regulated exclusively by the City are unavailing.

40. The hearing on the Motion was held on October 8, 2013, at which time the Hearing Officer took the Motion under advisement pending completion of the contested case evidentiary hearing.

To the extent any of the foregoing Findings of Fact may constitute or be construed as a Conclusion of Law, it shall be treated as such.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Facts, the Hearing Officer makes the following Conclusions of Law:

1. There are four related issues presented in this contested case. The issues with the Hearing Officer's response are as follows:

a. Does the DLNR have jurisdiction over the Revetment? No, not at the relevant time, which was the time of the violation and initiation of this enforcement action.

b. Is construction or repair of the Revetment permitted by the law? Yes, the law allows the continued use, and repair, of a nonconforming structure that existed when the land was placed into the Conservation District.

c. Should DLNR have granted the Dailey's Emergency Permit? Yes, because DLNR acknowledged a hazardous condition and it withdrew the alleged violation.

d. Should the BLNR dismiss the enforcement action? Yes, because DLNR lacks jurisdiction and/or because the Revetment is a nonconforming structure that can be maintained and repaired.

2. Regarding the burden of proof, Haw. Admin. R. § 13-1-35(k) provides:

> The party initiating the proceeding, **and in the case of proceedings on alleged violations of law, the department, shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion.**

(Emphasis added); *see also* Haw. Rev. Stat. § 91-10(5) ("the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion.").

3. This is a "proceeding on alleged violated of law" and it was initiated by DLNR; and therefore the burden of proof is with DLNR. *See* Haw. Admin. R. § 13-1-35(k); Haw. Rev. Stat. § 91-10(5).

4. The disposition of this contested case turns on the pivotal fact of when the Revetment was placed in the Conservation District. If, as the Daileys' contend, the Revetment was placed wholly into the Conservation District by DLNR **after** the notices of violation were issued and this enforcement action initiated, then DLNR lacked the requisite jurisdiction and enforcement authority over the Revetment, such authority being vested solely in the County.

5. As a preliminary matter, the Hearings Officer must determine whether the enforcement action must be dismissed for lack of enforcement jurisdiction as argued in the Motion.[11]

6. In issuing any fine or bringing any enforcement action, DLNR bears a foundational burden to establish its authority (i.e., its jurisdiction) to do so.

7. DLNR attempts to rely upon Haw. Rev. Stat. § 205A-43.6 to maintain this enforcement action, but that statute confers no authority on DLNR to take action regarding the Revetment.

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[11] For purposes of a motion to dismiss brought under the Hawaii Rules of Civil Procedure, the allegations of the complaint are assumed to be true for purposes of the motion. *Blair v. Ing*, 95 Hawai`i 247, 252, 21 P.3d 452, 457 (2000). Although these rules do not apply to this proceeding and the Rules of Practice and Procedure of the DLNR are silent on the standard, the Hearing Officer assumed the facts as alleged by DLNR to be true for purposes of ruling on the Motion only.

8. Hawaii's Coastal Zone Management Act ("CZMA"), Haw. Rev. Stat. Ch. 205A, is an environmental law embodying "the state policy to preserve, protect, and where possible, to restore the natural resources of the coastal zone of Hawaii" (Haw. Rev. Stat. § 205A-21), through a detailed regulatory scheme expressly spelled out in the CZMA.

9. "The task of implementing the [CZMA] policy ...has been delegated in large part to the counties[,]" (*Kona Old Hawaiian Trails Group v. Lyman*, 69 Haw. 81, 88, 734 P.2d 161, 166 (1987), internal quotation and citation omitted), with the State of Hawai`i Office of Planning (the "lead agency" defined in Haw. Rev. Stat. § 205A-1) generally overseeing the counties' compliance with the CZMA requirements.

10. In Part III, the CZMA recognizes the authority of DLNR (specifically through the BLNR) to determine the location of the line demarcating the shoreline, which line, in turn, determines the boundary of authority between the CZMA authority (i.e., the counties) and DLNR. *See* Haw. Rev. Stat. § 205A-42. In other words, mauka of the shoreline is regulated by the City and makai of the shoreline is regulated by DLNR.

11. The CZMA sets forth, in no uncertain terms, how Part III is to be enforced and by whom, specifically vesting enforcement in the "department" (Haw. Rev. Stat. § 205A-43.5(a)), defined as "the planning department in the counties of Kauai, Maui and Hawaii, and the department of land utilization in the City" (Haw. Rev. Stat. § 205A-22, now known as the Department of Planning and Permitting). "Department" does not refer to DLNR or BLNR.

12. While Part III of the CZMA vests DLNR with the authority to determine the **location** of the shoreline, those same statutes clearly vest the counties with the authority to **enforce restrictions on uses and structures** in the "shoreline area."

13. "'Shoreline area' shall include all of the land area between the shoreline and the shoreline setback line and may include the area between mean sea level and the shoreline;

provided that if the highest annual wash of the waves is fixed or significantly affected by a structure that has not received all permits and approvals required by law or if any part of any structure in violation of this part extends seaward of the shoreline, then the term 'shoreline area' shall include the entire structure." Haw. Rev. Stat. § 205A-41. The counties, not DLNR, establish and regulate the "shoreline area." Haw. Rev. Stat. § 205A-45 (county may expand shoreline area mauka or makai); Haw. Rev. Stat. § 205A-43.6 (county enforces shoreline setback law and rules); Haw. Rev. Stat. § 205A-43 (county enforces shoreline setbacks and rules and adopts rules to determine shoreline setback line).

14. The jurisdictional statute couldn't be clearer:

> **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.

Haw. Rev. Stat. § 205A-43.6 (emphasis added).

15. "'Department' means **the county planning commission** 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." Haw. Rev. Stat. § 205A-22 (emphasis added);[12] *see also* Haw. Rev. Stat. §205A-43 ("The department shall adopt rules pursuant to chapter 91, **and shall enforce the shoreline setbacks and rules pertaining thereto**.") (Emphasis added).

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[12] "'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." Haw. Rev. Stat. § 205A-1. "'Authority' means 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 other body as the council by ordinance may designate." Haw. Rev. Stat. § 205A-22.

16. Thus, the statute clearly vests enforcement authority with the respective counties, not with DLNR. *See also Western Sunview Prop., LLC. v. Federman*, 338 F. Supp. 2d 1106, 1117-18 (D. Haw. 2004) (dismissing a lawsuit seeking private enforcement of Haw. Rev. Stat. § 205-43.6 "because the agency or department is given exclusive power to enforce setbacks, [so] Plaintiffs are not the appropriate party to bring an action against Defendants for an alleged violation of that setback.")

17. The statute goes further, expanding the county enforcement jurisdiction seaward in a situation exactly like DLNR claims to exist here:

> 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.

Haw. Rev. Stat. § 205A-43.6(b).

18. Thus, the Legislature has made clear that when an artificial structure that lacks government approvals is present along the shoreline, the structure is deemed to fall within the "shoreline area" and is subject to county enforcement jurisdiction.

19. Nothing in the three laws and three rules cited by DLNR in its Bill of Particulars – nor any other law – vested DLNR with the authority to levy the fines against the Daileys in 2006/2007 or to prosecute this action. Nothing in the CZMA allows the DLNR to enforce its provisions. That is the sole and exclusive authority of the City. Any DLNR authority or guidelines set forth in its administrative rules are limited by the enabling statute, Haw. Rev. Stat. § 183C-4(b), which expressly limits the rule-making authority (and thus the applicability of such rules) to "use of land within the boundaries of the conservation district." These administrative rules cannot be applied to actions outside of the Conservation District, which is precisely what DLNR has attempted to do.

20. The relevant measuring time for establishing DLNR's jurisdiction is 2006 through 2007, when the purported violation occurred and DLNR instituted this action. The 2011 shoreline certification, which places the entire structure makai of the shoreline, was done after-the-fact and cannot be used to justify an alleged 2006 or 2007 conservation district violation.

21. Further, based upon the undisputed facts (*see* FOFs 29 and 30 above), DLNR had not determined, let alone certified or delineated, the shoreline until 2011, after the purported violations and enforcement action were instituted, and thus has not determined whether the Revetment was located within the jurisdiction of DLNR (i.e., in the Conservation District) at the time it brought this enforcement action.[13]

22. Lacking proof of the location of the shoreline in 2006 through 2007, DLNR necessarily fails to meet its threshold burden of establishing its enforcement jurisdiction, requiring dismissal of the enforcement action.

23. Indeed, this is consistent with DLNR's own policies of not pursing violation cases when it cannot establish when the purportedly offending structure was built. *See* Tr. 48:22-49:7 (when asked to interpret Ex. A-20, Lemmo testified "... there is no record. We have no proof. Essentially we have no direct proof when it was built. So, you know, we don't pursue it as a violation."). [14]

24. Moreover, the subsequent shoreline certification, which moved the shoreline mauka of the Revetment, would not prevent the continued use, maintenance and repair of the

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[13] DLNR's 2011 certification of the shoreline – under which DLNR placed the entire Revetment within the Conservation District and upon which DLNR bases its claim for jurisdiction – is irrelevant and cannot bestow jurisdiction retroactively to validate the institution of this action. To find otherwise would also ignore that a motion to dismiss is confined to the 2007 pleadings, which necessarily cannot include the later 2011 certification.

[14] If the BLNR finds that DLNR lacked jurisdiction over the Revetment, the BLNR need not render any further findings related to DLNR's enforcement action. To the extent that the Hearing Officer does consider the merits of the enforcement action, the Daileys propose the remaining COLs. They may be presented to the BLNR as alternative bases for ruling.

Revetment to the extent it constituted a nonconforming structure (i.e., a structure constructed **before** being placed unilaterally by DLNR within the conservation district). *See* Haw. Rev. Stat. §§ 183C-2, 183C-5; Haw. Admin. R. § 13-5-7.

25. A nonconforming use arises if it was built either before enactment of the statute or before placement of the land in the Conservation District:

> "Nonconforming" use means 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**.

Haw. Rev. Stat. § 183C-2 (emphasis added); *see also* Haw. Admin. R. § 13-5-2 (same definition).[15]

26. DLNR wholly omitted the second alternative for establishing nonconforming use in its analysis of the Revetment. *See, e.g.*, Tr. 40:13-43:21(Lemmo), testifying that he did not consider this second factor in espousing the conclusion (in Ex. A-6) that the Revetment did not qualify as a nonconforming use. Yet DLNR later conceded that when a structure that is originally constructed outside the Conservation District is later put into the Conservation District by virtue of movement of the shoreline, it does become a nonconforming use. Tr. 44:12-45:25, 46:4-11 (Lemmo).

27. Indeed, DLNR has admitted it lacks jurisdiction over the Revetment and similar structures on neighboring properties, which were constructed before the underlying land was placed by DLNR into the Conservation District.[16] *See also* Paty Decl. at ¶ 4; Ex. A-3 (Paty letter

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[15] There is no dispute that the Revetment was not built prior to October 1, 1964, but that is only part of the statute.

[16] *See, e.g.*, Ex. A-17 (internal DLNR memorandum from Eversole recommending closing the 2005 violation case because "we cannot ascertain whether [the rocks] were placed in the Conservation District . . . ."), Ex. A-18 (DLNR's comments on the environmental assessment for the SSV application that ". . . [DLNR] closed this [2005 enforcement] case as the offending rocks were removed from the shoreline and **it appeared that the revetment was originally**

reflecting DLNR's position during his tenure as Chairman of the BLNR that DLNR did not regulate rocks or structures that were placed on private property because such were City matters). DLNR is bound by these admissions.

28. In addition, "Neither this chapter nor any rules adopted hereunder shall prohibit the continuance of the lawful use of any building, premises, or land for any trade, industrial, residential or other purpose for which the building, premises, or land was used on October 1, 1964, or at the time any rule adopted under the authority of this part takes effect.[17] All such existing uses shall be nonconforming uses." Haw. Rev. Stat. § 183C-5; *see also* Haw. Rev. Stat. § 183C-4(b) ("No use **except a nonconforming use** as defined in section 183C-5, shall be made within the conservation district... [unless allowed by rule]") (emphasis added).

29. In this case, the Revetment was built outside of the Conservation District in 1970. It was not until DLNR certified the shoreline in 2011 that the Revetment was located entirely in the Conservation District. In fact, the 2007 survey placed the majority of the Revetment mauka of the shoreline (Ex. A-12). In 2005, when dismissing the first enforcement action/violation against the Daileys, DLNR conceded it lacked sufficient evidence to prove the Revetment was placed in the Conservation District (Ex. A-6, Ex. A-7).

30. The statutory definition of nonconforming use is applicable to the Revetment: the structure was not located in the Conservation District when it was constructed in 1970. It was constructed outside of the Conservation District on private property. The Revetment was not

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constructed landward of the shoreline while under the City's jurisdiction.") (emphasis added); and Ex. A-19 (internal DLNR memo from Eversole regarding a similar enforcement action regarding a seawall on a neighboring property, stating that the work "doesn't appear to be a Conservation District violation or an encroachment. It appears that all the recent work was done mauka of the existing walls and well within the property boundaries" and that "Steve Chung of the [City] Planning Dept (sic) is handling this case and will be enforcing SMA and the setback variance violations.").

[17] The current rules were adopted in 1994. The prior rules were repealed with the passage of Act 270 on July 1, 1994. *See* Attorney General Opinion 97-04.

placed entirely into the Conservation District until 2011, when by the stroke of a pen the DLNR's State Surveyor drew the line mauka of the entire Revetment. In short, the Conservation District was moved to include the Revetment; the Revetment was not built in the Conservation District.

31. The Hawaii Intermediate Court of Appeals opinion in *Waikiki Marketplace v. Zoning Bd. Of Appeals*, 86 Hawai'i 343 (App. 1997) is directly on point. In that case, the City issued a notice of violation alleging that a building addition was constructed within a setback area and without permits, ordering removal of the addition and imposing daily fines. *Id.* at 346. The addition was built prior to enactment of the zoning code which required the setback area. *Id.* The City argued that the addition was not "nonconforming" because it was not a "lawful use" as required under Haw. Rev. Stat. § 46-4 – the very same terms used in § 183C-2 & 5 – because the owner could not produce a building permit for the addition.[18]

32. The ICA determined that "lawful use" is determined by lawfulness under the zoning law alone, and not all other legal requirements, such as building codes, stating:

> We conclude that for purposes of determining whether a structure was grandfathered in as a "previously lawful" nonconforming structure under the LUO, the lawfulness of the structure should be measured by reference to the zoning code or ordinance in existence at the time the structure was built. The fact that the current property owner cannot prove that a building permit for the structure was obtained prior to construction will not render the structure automatically unlawful under a zoning ordinance adopted after the structure was constructed.

Id. at 353.

33. The ICA reasoned that: (1) the right to use a nonconforming structure was a constitutionally protected vested right; (2) zoning codes and building codes serve different purposes, and nonconformities relate to zoning; (3) the great weight of legal authority from other

[18] The Honolulu Building Department destroyed all pre-July 17, 1978 building plans for work valued under $100,000. *Id.* at 347.

jurisdictions also confirms that building permits or other legal requirements do not determine zoning nonconformities. *Id.* at 353-356. Thus, the ICA reversed the decision of the Zoning Board of Appeals and the Circuit Court, and ruled in favor of the property owner.

34. In this case, Chapter 183C and the administrative regulations are zoning laws. *See* Haw. Rev. Stat. § 183C-4 (DLNR shall adopt zones). They contain the exact same term "lawful use" – to determine a legal nonconformity. The ICA in *Waikiki Marketplace* confirms that the analysis looks only to the zoning laws in effect, not other legal requirements, like a building permit.

35. Thus, the *Waikiki Marketplace* decision confirms that the Daileys need not produce a variance or permit to establish legal nonconforming status under Chapter 183C.[19]

36. Applied to the facts of this case, a revetment constructed outside of the Conservation District was lawful under Chapter 183C and the regulations, and thus became legally nonconforming when the Conservation District was moved to include the land and the structure in 2011, or even in 2007.

37. Moreover, shoreline structures completed prior to June 22, 1970 do not require a shoreline variance. Haw. Rev. Stat. § 205A-44(b)(1) ("Except as provided in this section, structures are prohibited in the shoreline area without a variance pursuant to this part. Structures in the shoreline area shall not need a variance if: (1) They were completed prior to June 22, 1970 ... provided that permitted structures may be repaired, but shall not be enlarged within the shoreline area without a variance."). Thus, under the law, the Revetment is permitted without a variance because it was built prior to June 22, 1970. *See* FOF 3 above.

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[19] DLNR's argument to the contrary further ignores that the burden rests with DLNR, not the Daileys, to establish each element of the purported violation, including the legality of the use. To hold otherwise would turn the statutory and regulatory burdens for such enforcement proceedings on their head. *See* COL 2 above.

38. With respect to the repairs made in 2007, the Daileys' actions do not constitute a violation because: (1) the applicable laws allow repairs to nonconforming structures built when this Revetment was built; (2) the Revetment, both before and after the repairs, was generally the same size, height and density and in the same location; and (3) the only evidence presented by the parties established the value of the repair work was significantly less than 50% of its replacement cost. In other words, DLNR did not carry its burden of proof to establish the Daileys' repairs were unlawful.

39. The Revetment is a shoreline structure permitted without a variance under Haw. Rev. Stat. § 205A-44. *See* COL 37 above. The statute specifically says "**permitted structures may be repaired,** but shall not be enlarged within the shoreline area without a variance." Haw. Rev. Stat. § 205A-44(b) (emphasis added). The undisputed evidence establishes that the Daileys' actions "repaired" rather than "enlarged" the permitted structure. There was no evidence that the structure was enlarged.

40. The Daileys need not first obtain permission from DLNR to make repairs to permitted structures because the right to repair is a statutory right protected by Haw. Rev. Stat. § 205A-44(b).

41. Similarly, Haw. Rev. Stat. §183C-5 states that "Neither this chapter nor any rules adopted hereunder shall prohibit the continuance of the lawful use of any building, premises or land..." And "[n]o use **except a nonconforming use** ... shall be made in the conservation district..." Haw. Rev. Stat. § 183C-4(b) (emphasis added). Thus, a nonconforming use is allowed in the Conservation District. If the owner of a nonconforming use is barred from repairing damage to a nonconforming use, then the continued lawful use would effectively be prohibited, contrary to the language of the statute.

42. Lastly, the DLNR regulations themselves also allow the repair of nonconforming uses, provided the repair does not exceed the size of the original structure or more than 50% of the replacement cost:

> (a) **This chapter shall not prohibit the continuance, or repair and maintenance, of nonconforming land uses** and structures as defined in this chapter.
> * * *
> (c) The repair of structures shall be subject to development standards set forth in this chapter, and other requirements as applicable, including but not limited to a county building permit, shoreline setback, and shoreline certification.
> (d) If a nonconforming structure is damaged or destroyed by any means (including voluntary demolition) to an extent of **more than fifty per cent of its replacement cost at the time of destruction**, it shall not be reconstructed except in conformity with the provisions of this chapter, except as provided under section 13-5-22 (P-8).
> (e) **Repairs or maintenance of a nonconforming structure shall not exceed the size, height, or density of the structure which existed on October 1, 1964 or at the time of its inclusion into the conservation district**.

Haw. Admin. R. § 13-5-7 (emphasis added).[20]

43. In this case, there is no allegation or evidence that the repair exceeded the size, height or density of the original rock Revetment. Nor is there any allegation or evidence that the repair cost exceeded 50% of the replacement cost, therefore, §13-5-22 (P-8) is not triggered.[21] *See, e.g.*, Tr. 63:21-64:10 (Lemmo confirming not only that he had no evidence regarding the value of the repairs or whether the original rocks were used in the repairs, but also that he had

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[20] To the extent the administrative regulations impose restrictions on the continued use of nonconforming uses, these limitations are beyond the authority of the DLNR to enact because the enabling legislation, Haw. Rev. Stat. § 183C-4, does not authorize DLNR to regulate or restrict nonconforming uses. By contrast, the Zoning Enabling Act, Haw. Rev. Stat. § 46-4(a) expressly authorizes the counties to enact zoning ordinances that provide for the elimination or amortization of nonconforming uses under certain circumstances.

[21] Even if the Revetment had been destroyed to an extent greater than 50% of its replacement cost, it could still be repaired as provided in § 13-5-22 (P-8). This provision states that minor repair of an existing structure that involves like-to-like replacement of component parts and that results in negligible change or impact to the land requires no approval of DLNR whatsoever. Other repairs may require certain approvals.

not even considered such factors in concluding there was a violation). To the contrary, all evidence before the Hearing Officer confirms that the repair was well within the permissible parameters of repair and maintenance.

44. Because the Revetment meets the legal requirements of a nonconforming use, the the Daileys' actions in 2007, which constitute a "repair" under law and DLNR regulation, were statutorily permissible. The Daileys' actions in repairing the Revetment and thrice disregarding DLNR's claims to the contrary, are not violations and are not punishable by fines.

45. In addition, because the Revetment is nonconforming and therefore protected under the statute and regulations, an order that all or a portion of the Revetment be removed is in violation of the law.

46. Based on the findings and conclusions above, the Hearing Officer further concludes that DLNR erroneously denied the 2005 emergency permit request (Ex. A-5).

47. Although in 2005 the DLNR acknowledged that the damaged condition posed a danger, it refused to allow an emergency repair based upon its incorrect interpretation of "lawful" and "nonconforming." *See* Ex. A-6.

48. The 2005 emergency permit request (Ex. A-5) met the requirements for issuance of an emergency permit but for DLNR's erroneous conclusion that the Revetment was illegal and therefore not eligible to be repaired. *See* Ex. A-5 and Ex. A-6; *see also* FOFs 10 through 15 above.

49. An emergency permit should have been issued, which would have prevented the events of 2006/2007 and the subject alleged violations would have never occurred.

To the extent any of the foregoing Conclusions of Law may constitute or be construed as a Finding of Fact, it shall be treated as such.

DECISION AND ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer recommends that the BLNR enter a decision and order as follows:

1. Declaring the Revetment to be a nonconforming structure under Haw. Rev. Stat. § 183C-2 and Haw. Admin. R. § 13-5-2.

2. Declaring the Revetment to be a permitted structure without a shoreline variance under Haw. Rev. Stat. § 205A-44(b)(1).

3. Declaring DLNR's denial of the 2005 emergency permit application to be unlawful.

4. Declaring that DLNR, and thus the BLNR, lack enforcement jurisdiction to order the fines levied and removal of the repairs made to the Revetment.

5. Denying the requests from DLNR for findings that the Daileys caused unauthorized repairs to the Revetment and that the authorized land uses are within the Conservation District, and denying the requests for an order imposing fines and requiring removal of portions of the Revetment.

DATED: Honolulu, Hawaii, December 6, 2013.

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ELIZABETH DAILEY and MICHAEL DAILEY

APPROVED AND ADOPTED BY
HEARING OFFICER LAWRENCE MIIKE:

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

In The Matter of a Contested Case to the Board of Land and Natural Resources re alleged violation for repair and reconstruction of a boulder revetment at Mokulei'ia, District of Waialua, O'ahu, TMK (1) 6-8-003:018.	DLNR File No. OA-07-06 (Contested Case Hearing) **CERTIFICATE OF SERVICE**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date, a true and correct copy of the foregoing document will be duly served on the following parties via first class mail, postage prepaid or via hand delivery at their last known address as follows:

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Honolulu, HI 96813
Counsel for the Tribunal

DATED: Honolulu, Hawai'i, January 24, 2014.

DAMON KEY LEONG KUPCHAK HASTERT

GREGORY W. KUGLE
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BOARD OF LAND AND NATURAL RESOURCES

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DATED: Honolulu, Hawai'i, July 16,2015.

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