Of Counsel:
DAMON KEY LEONG KUPCHAK HASTERT
Attorneys at Law
A Law Corporation

GREGORY W. KUGLE 6502-0
BETHANY C.K. ACE 8469-0
1003 Bishop Street, Suite 1600
Honolulu, Hawaii 96813
http://www.hawaiilawyer.com
Telephone: (808) 531-8031
Facsimile: (808) 533-2242

Attorneys for Appellants
ELIZABETH DAILEY
AND MICHAEL DAILEY

FIRST CIRCUIT COURT
STATE OF HAWAII
FILED
2014 DEC 22 PM 2:29
F. OTAKE
CLERK

2014 DEC 23 A 11: 06

RECEIVED
2014 DEC 23 AM 10: 11
DEPT. OF LAND & NATURAL RESOURCES
STATE OF HAWAII

RECEIVED
2014 DEC 23 A 11: 0
DEPT OF LAND & NATURAL RESOURCES
STATE OF HAWAII
OF CONSERVATION

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

ELIZABETH DAILEY AND MICHAEL DAILEY, Appellants, vs. DEPARTMENT OF LAND AND NATURAL RESOURCES; BOARD OF LAND AND NATURAL RESOURCES, Appellees.	CIVIL NO. 14-1-1541-07 (Agency Appeal) **APPELLANTS ELIZABETH DAILEY AND MICHAEL DAILEY'S REPLY BRIEF; CERTIFICATE OF SERVICE**

APPELLANTS ELIZABETH DAILEY AND MICHAEL DAILEY'S REPLY BRIEF

This case is about a revetment that was originally built in 1970 outside of the Conservation district at a time it was legally permissible to do so under Haw. Rev. Stat. § 205A-44(b)(1). *See* Daileys' Opening Brief ("OB") at 24-26. The DLNR admits the Revetment was not built in the Conservation district, but rather claims that the shoreline and therefore the Conservation district have moved inland over the past 40 years to encompass some or all of the

Revetment today. Thus, argues the DLNR, when Appellants ELIZABETH DAILEY and MICHAEL DAILEY ("Daileys") repaired a portion of the 1970 revetment in 2007, they violated Conservation district rules. These facts alone makes the BLNR's demand that the entire rock Revetment be removed, exposing the Daileys' house to undisputed imminent danger, an unfair and unreasonable, arbitrary and capricious penalty that is totally disproportionate to the alleged violation. The DLNR itself has admitted that removing the Revetment and moving the house inland is "draconian" (ROA Vol. 403 Doc. 69 at Ex. A-6 pp.1-5) and yet that is exactly what the DLNR has told the Daileys to do. This Court should not countenance such a severe result. Even if the DLNR had carried its burden of proof and persuasion – and for the reasons stated in the Opening Brief it has not – then removal of the entire Revetment is too harsh of a penalty and the case must be reversed for that reason alone.

Moreover, what is missing from the BLNR's Answering Brief ("AB") is telling. The BLNR ignores in large part what it said in its Decision and Order (ROA Vol. 401 Doc. 96 pp. 1-29), and does the same with most of the analysis in the Opening Brief. For example, the BLNR does not address that its conclusion that it had jurisdiction was based on the wrong measuring date, the date it issued the Decision and Order. The BLNR also offers no response to Point Of Error five (OB at 16, 30-33), that the BLNR's draconian remedy of removing the Revetment is arbitrary and capricious. The Answering Brief ignores the BLNR's espoused reasoning and attempts, but fails, to justify its decision under new rationale. This post-hoc justification is improper and only proves the myriad errors underlying the conduct of the contested case and the Decision and Order.

A. THE BLNR MISAPPLIED THE EVIDENTIARY BURDENS.

The BLNR continues to miscomprehend what needed to happen in the contested case. That DLNR was allowed to present first is not probative or dispositive. It is self-evident from

the Decision and Order that the BLNR did not apply the proper burdens of proof and persuasion, expressly citing inapplicable BLNR rules that put the onus on the Daileys. *See, e.g., Id.* ROA Vol. 404 Doc. 96 (COLs 8-9) pp.16-17. The authority cited by the BLNR[1] in its misguided attempt to put the burden on the Daileys does not support its argument. In fact, those cases support the Daileys' argument. Both cases required that the government first demonstrate the violation existed and then, and only then, the burden would shift to the landowner to demonstrate its nonconforming use. Even if nonconforming use was to be considered as akin to an affirmative defense, the DLNR did not first prove it had jurisdiction or that a violation existed, and the BLNR erroneously did not require the DLNR to do so.[2] The burden never shifted to the Daileys to raise any affirmative defense. Yet the BLNR required the Daileys to prove the Revetment was not in the Conservation district and that no violation existed, and because the BLNR refused to dismiss, to also prove that all their work conformed to Conservation district rules and regulations.[3] These reversible errors warrant dismissal of the enforcement action.

B. THE BLNR IS TRYING TO CHANGE THE BASIS FOR ITS DECISION AFTER THE FACT; THE DLNR DID NOT PROVE JURISDICTION.

The question of jurisdiction is not a question of fact (AB at 12), but rather a mixed question of fact and law involving the legal requirements for determining the location of a

---

[1] *Shearl v. Town of Highlands*, 762 S.E.2d 877 (N.C. 2014) and *City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, 181 P.3d 219 (2008).

[2] Moreover, in *Shearl*, when the government had lost the official documents that would have established that the nonconforming use was legal when first made, the court found that the burden remained with the government to produce competent evidence to overcome the presumption of legal nonconforming use. *Id.* at 762 S.E.2d at 882. It is undisputed that the DLNR lacks records that would establish the location of the shoreline in 1970. *See* OB at 5. The Building Department for the City destroyed all pre-July 17, 1978 building plans for work valued less than $100,000, so the City would also lack records related to the Revetment's construction in 1970. *Waikiki Marketplace Inv. Co. v. Chair of Zoning Bd. of Appeals*, 86 Haw. 343, 347, 949 P.2d 183, 187 (1997); *see also* Decision and Order, ROA Vol. 404 Doc. 96 (FOF 6) p.2.

[3] Contrary to the BLNR's continued erroneously assertions (AB at 20), the Daileys repeatedly argued, presented witness testimony, and cross-examined the DLNR's witnesses that the Conservation district rules did not apply to the Revetment as a nonconforming use. *See* OB at 4-5, 10, 13-14 (reviewing the evidence presented and arguments made).

shoreline under Hawai'i law, the proper measuring time for this determination, and the burdens of proof and persuasion required for an enforcement action hearing. The BLNR erred in each aspect.

The BLNR now claims that the DLNR had jurisdiction at the time the violation notice was issued, but the BLNR did not base its decision on such conclusion. *See* Decision and Order, ROA Vol. 404 Doc. 96 (COLs 16-28, 42) pp. 18-23, 25. In fact, the BLNR's analysis was limited to finding that the DLNR lacked jurisdiction under the authority it claimed in 2006/2007, citing to inapplicable CZMA laws that did not vest the DLNR with jurisdiction. *Id.* at pp.18-22 (COLs 16-27). The BLNR found jurisdiction based on its conclusion that the Revetment is now in the Conservation district. *Id.* All references to jurisdiction in the COLs relate to the current location of the Revetment. *See, e.g., id.* at 14, COL 1 ("the [R]evement is currently entirely in the conservation district."); *id.* at p. 23, COL 28 ("but [the DLNR] has jurisdiction over the [Revetment], which is in the conservation district); *id.* at p. 25, Decision and Order ¶ 2 ("The unauthorized [Revetment] ... currently in the conservation district....") (Emphasis added).

Even if this drastic, post-hoc revision to its analysis were permissible, which it is not, the record and law do not support finding jurisdiction existed in 2006. The BLNR cites, in part, the standards and procedures for determining the location of the shoreline (AB at 11), but then ignores that the DLNR did not complete all requisite steps. Nothing in the BLNR rules suggest that a mere guess or the visual inspection by certain DLNR staff is sufficient to fix the shoreline and thus determine the scope of the DLNR's jurisdiction. To the contrary, the case cited by the BLNR (*Diamond v. Dobbin*, 132 Haw. 9, 319 P.3d 1017 (2014)) stands for the proposition that a detailed, thorough analysis is needed to determine the location of the shoreline to comply with Haw. Rev. Stat. Chapter 205A.

The BLNR also creates a new argument concerning the history of waves and erosion to establish jurisdiction (AB at 14-15), one not included in the Decision and Order. The BLNR makes new conclusions about what fragments of Michael Dailey's testimony and reports by certain Mokuleia Beach Colony owners "more likely than not" mean about the shoreline's location and thus the DLNR's jurisdiction. This argument is also based on the BLNR's misstatement of the record. For example, Michael Dailey testified that there was an unusual lack of sand on the beach fronting the Property not from wave erosion, but from a period of abnormally heavy rainfall. ROA Vol. 403 Doc. 68 pp.5-6 ¶ 9. The BLNR also pulls from thin air contentions about the behavior of waves, wave run-up and erosion, offering no evidence on the record to support them. AB at 14-15. Again, the appeal is not the time for the BLNR to first create a justification for its Decision and Order. More importantly, it is not for the BLNR to speculate about the location of the shoreline. It seeks to do so because it did not hold the DLNR to its burden of proof to demonstrate the location of the shoreline at the time of alleged violation.

The BLNR admits that there was no certification or delineation of the shoreline performed at the time of the violation was issued. AB at 16. It is incorrect, however, in claiming (*id.*) that it was prevented from doing so by an alleged pending violation. This logic is circular: if the DLNR refuses to determine the location of the shoreline when it thinks there is a violation, then it can never prove a necessary component of the violation. The DLNR could claim a violation exists without ever having to prove it. The DLNR cannot so excuse itself from proving jurisdiction. Moreover, the BLNR's contention is demonstrable false because the DLNR did certify the shoreline in 2011 (ROA Vol 401 Doc. 69 at Ex. A-14 p. 1) when not only it claimed a violation existed, but also the contested case proceedings were already underway. It was this 2011 certification that was used, in part, to justify jurisdiction (i.e., to determine, using the wrong measuring date, that the Revetment is presently in the Conservation district). Decision and

Order, ROA Vol. 404 Doc. 96 (FOF 56, COL 1 and COL 28) pp.11, 14, and 23. Had the DLNR done this certification at the correct measuring date, there would have been no guesswork or inference needed. This is all the BLNR used to determine jurisdiction and it erred in so doing. *See Shearl*, 762 S.E.2d at 882 ("A factual determination concerning the location of the line that is not supported by competent, material, and substantial evidence in view of the whole record will not be sustained on appeal.")

The BLNR claims that Haw. Rev. Stat. § 205A-43.6 does not provide for exclusive jurisdiction. Not so. Nothing it cites supports this contention. Sections 205A-22, -27 and -43.6(a and b) make clear that the shoreline area is regulated by the counties through their planning departments and structures therein are therefore under the exclusive jurisdiction of the counties. *Cf. Western Sunview Properties, LLC v. Federman*, 338 F. Supp. 2d 1106, 1117-118 (D. Haw. 2004) (in denying a private right to enforce Haw. Rev. Stat. Ch. 205A, recognizing the planning departments as being "given exclusive power to enforce setbacks.") Section 205A-43.6(b) requires a structure straddling the private property/shoreline boundary to be treated as entirely within the shoreline area and thus under the exclusive authority of the counties. Section 205A-43.6(c) confirms that an offending structure cannot diminish the authority to determine the shoreline or enforce the implementing rules related to the same, but says nothing about where the jurisdiction line lies, including for structures straddling the private/shoreline boundary. It merely reinforces that an artificial structure cannot fix the shoreline and thus the limits of the Conservation district. *Levy v. Kimball*, 51 Haw. 540, 545, 465 P.2d 580, 583 (1970) merely states that laws should be read to give them effect, and all three sections have effect when read in this way. Nothing in Chapter 183C gives the DLNR authority outside the Conservation district and it cannot be read into the silence of the CZMA that the DLNR can usurp the express authority of the counties to regulate activities within the shoreline area. The point is academic,

however, because the Revetment is not "an artificial structure that has not been authorized with government agency permits required by law[,]" but rather a legal nonconforming structure.

C. THE REVETMENT IS A NONCONFIRMING USE AND THE DAILEYS MADE PERMISSIBLE REPAIRS THERETO.

Even though they need not have done so, the Daileys demonstrated with uncontroverted testimony that (1) the Revetment was built before June 22, 1970, (2) the Revetment repairs did not change the location, functioning or other material characteristics of the Revetment, and (3) the costs did not exceed 50% of the cost to replace the total structure. *See* OB at 4-8. The Daileys proved that the Revetment was a nonconforming structure and the repairs at issue fell within those permitted to be made to nonconforming structures.[4]

The BLNR ignores this evidence and focuses instead on the lack of a claim of nonconforming use in the 2005 emergency permit application (ROA Vol. 403 Doc. 69 at Ex. A-5, pp.1-11) and the hearsay allegation that the City and County of Honolulu ("City") had cited the Daileys for "installing boulders within the shoreline setback area" in 1992 (ROA Vol. 403 Doc. 63 at Ex. B-7 pp. 2-3) to support its inference that that the Revetment is not a nonconforming use. AB at 3, 22. Neither is competent evidence to rebut the trove of evidence put forth by the Daileys that the Revetment was a nonconforming structure and that the work performed were permissible repairs thereto (*see* OB at 23-30).

The Daileys sought the emergency permit at the suggestion of the DLNR and in reliance upon the DLNR's assertion of jurisdiction, without conceding the DLNR's attempt to assert jurisdiction was proper. *See* Elizabeth Dailey and Michael Dailey's Responsive Brief, ROA Vol. 403 Doc. 71 p.14, n.15. Further, while not specifically identifying the Revetment as a non-

[4] The BLNR makes the audacious assertion in a heading that nonconforming uses cannot be maintained in the Conservation district (AB at 23), but the BLNR says nothing to support that conclusory allegation in its brief. This is because the law is clear that nonconforming use must be allowed to continue, including in the Conservation district. *See* Haw. Rev. Stat. § 183C-4(b) and -5 (expressly permitting nonconforming uses to continue in the Conservation district).

conforming use, the application describes all the factual underpinnings for such determination, including but not limited to stating that the Revetment was constructed around the time the Daileys' home was built and mauka of the shoreline at the time (ROA Vol. 403 Doc. 69 at Ex. A-5 p. 4).

The unexplained, unauthenticated hearsay regarding the City's 1992 citation, a citation which was not introduced into evidence and on which no action was ever taken by the City, does not prove the Revetment was not legal at the time it was constructed. The record is devoid of any explanation by a competent witness what this citation meant or even to what boulders it refers. It is entirely possible if not probable that this citation referred to the boulders that indisputably were put near the Revetment by the Daileys' neighbors, Mokuleia Beach Colony, in the late 1980s (ROA Vol. 404 Doc. 96 (FOF 50) p.10). There is nothing to support the BLNR's "inference" that this citation meant that the City did not consider the Revetment to be a legally existing structure and to render its decision based on that inference. The fact that the City abandoned the violation is evidence that there was no violation at all, or the City would have pursued it.

This is not an instance of an agency weighing the evidence, but rather of the agency wholly disregarding competent evidence without any analysis or findings to support its refusal to acknowledge the same. In the face of this first-hand eyewitness testimony of Elizabeth Dailey (ROA Vol. 403 Doc. 68 pp.2-5 ¶¶ 5-7), supported by numerous other witnesses[5] and even the admissions of the DLNR's own director[6] that the Revetment was constructed outside the Conservation district, it was clear error and arbitrary and capricious for the BLNR to find that the

---

[5] ROA Vol. 403 Doc. 68 pp.2-5 ¶¶ 5-8 (Michael Dailey); ROA Vol. 404 Doc. 80 pp. 1-2 ¶¶ 3-4 (William Paty); ROA Vol. 403 Doc. 64 pp.1-2 ¶¶ 2-3 (Don Rohrbach).

[6] ROA Vol. 403 Doc. 69 at Ex. A-18 p.2; ROA Vol. 403 Doc. 63 p.3 ¶ 10; ROA Vol. 404 Doc. 99 pp.11:16-22, 27:4-29:4, and 32:21-33:5.

Revetment was not a non-conforming use when the shoreline allegedly moved inland 40 years later.

Lastly, the BLNR perpetuates and compounds its errors by claiming that a minimal amount of grout and slight changes in the restacked stones of the Revetment created a "new" (not "repaired") structure and forgoing any cost analysis. The BLNR merely concluded that the Revetment work made a "hybrid" seawall/revetment based on the DLNR labeling it as such. Decision and Order, ROA Vol. 404 Doc. 96 (FOF 65, FOF 67, and COLs 12-15) pp.12,18. It did not undertake the analysis required under Haw. Rev. Stat. § 205A-44(b) to determine if the use was "enlarged" nor did conclude that the Revetment's functioning had in any way changed, because there was no evidence in the record to support such conclusions. The BLNR does not do so in its Answering Brief, continuing to focus instead on the label that the Revetment had "changed" and introducing a completely new and irrelevant analysis on changed uses. Its analysis remains perfunctory and superficial, and thus not in compliance with the law or the BLNR's own regulations, because the BLNR erroneously concluded that the Revetment was not a nonconforming use at the time of the repairs. The BLNR argument on the point (AB 21-24) merely reiterates its flawed analysis of nonconforming use and the evidentiary burdens it should have imposed in the contested case, coupled with (1) citations to several cases devoid of any analysis of how they apply to this case, (2) the misstatement that the Daileys did not justify the basis for their repairs (*see* OB 7-9, 26-30), and (3) a number of bald, conclusory allegations raising the specter of public safety concerns with absolutely no citation to the record or authority to support these allegations.

Adding to this, the BLNR offers no response to POE five, that the BLNR's draconian remedy of removing the Revetment was arbitrary and capricious. Ordering removal was not the only course of action available to the BLNR upon finding, albeit erroneously, that a violation

existed.[7] The BLNR could have ordered that the Daileys be treated like their neighbors, and to purchase an easement for any portion of the structure at issue that extended into the Conservation district. *See* OB at 31. The BLNR did not give any consideration to, let alone analyze, the potential for significant adverse effects to the Daileys' property, the surrounding properties and the Mokuleia beach from creating at least a gap if not a long expanse of unprotected shoreline at the Property. Ordering removal of the Revetment, under these circumstances, is in no way justified.

D. CONCLUSION

The BLNR's Decision and Order is fatally flawed, misapplying the evidentiary burdens, misconstruing how and when jurisdiction must be established to sustain a claim for violation of Conservation district regulations, and misinterpreting the laws on nonconforming use. The BLNR cannot remedy these failings by rewriting its findings and conclusions post-hoc. Even if permitted, the record on a whole supports dismissal of the violation action. At the very least, the Decision and Order must be modified to allow the Daileys to keep and maintain the Revetment.

DATED: Honolulu, Hawaii, December 22, 2014.

DAMON KEY LEONG KUPCHAK HASTERT

GREGORY W. KUGLE
BETHANY C.K. ACE

Attorneys for Appellants
ELIZABETH DAILEY AND MICHAEL DAILEY

[7] In *Morgan v. Planning Dept., County of Kauai*, 101 Haw. 173, 190, 86 P.3d 982, 999 (2004), the Court considered ordering removal of the seawall in question "harsh." The Court upheld the planning commission giving the landowner options to either remove the seawall or to repair a portion of the seawall and to alter a portion of the seawall (to match and comply with the terms of the SMA permit). The court found that "The alternative would have been to revoke Morgan's SMA Use permit and require complete removal of the seawall. The alternative would be harsh without providing Morgan a reasonable opportunity to rectify the problem." (Emphasis added).

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

ELIZABETH DAILEY AND MICHAEL DAILEY, Appellants, vs. DEPARTMENT OF LAND AND NATURAL RESOURCES; BOARD OF LAND AND NATURAL RESOURCES, Appellees.	CIVIL NO. 14-1-1541-07 (Agency Appeal) **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 to their last known address as follows:

WILLIAM J. AILA, CHAIR
Department of Land and Natural Resources
Board of Land and Natural Resources
1151 Punchbowl Street
Honolulu, Hawaii 96813

RUSSELL SUZUKI, ESQ.
ROBYN CHUN, ESQ.
Administrative Division
Hale 'Auhau
425 Queen Street
Honolulu, Hawai'i 96813
Counsel for OCCL

COLIN LAU, ESQ.
Land Transportation Division
Kekuanao'a Building
465 South King Street, Room 300
Honolulu, HI 96813
Counsel for the Tribunal

DATED: Honolulu, Hawaii, December 22, 2014.

DAMON KEY LEONG KUPCHAK HASTERT

GREGORY W. KUGLE
BETHANY C.K. ACE
Attorneys for Appellants
ELIZABETH DAILEY and MICHAEL DAILEY