

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

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

Attorney for Appellants
ELIZABETH DAILEY
AND MICHAEL DAILEY

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

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.

FIRST CIRCUIT COURT
STATE OF HAWAII
2015 MAR 20 AM 9:50

F. OTAKE
CLERK

2015 MAR 23 P 1:28
LAND/TRANS. DIV.
DEPARTMENT OF
ATTORNEY GENERAL

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 to prove by a preponderance of the evidence that the original structure was not nonconforming.

IS/RAN

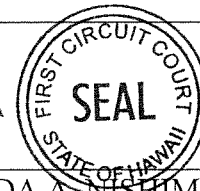
respective burdens of proof with regard to producing evidence and persuasion in accordance with Haw. Rev. Stat. § 91-10 and, if the structure is found to have the status of a nonconforming use in the Conservation District, whether subsequent actions were in conformance therewith;

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



THE HONORABLE RHONDA A. NISHIMURA

APPROVED AS TO FORM:

ROBYN B. CHUN
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

Elizabeth Dailey, et al. v. Department of Land and Natural Resources, et al., Civil No. 14-1-1541-07,
Circuit Court of the First Circuit, ORDER REMANDING PROCEEDINGS TO AMEND FINDINGS OF
FACT, CONCLUSIONS OF LAW AND DECISION AND ORDER