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2007 JUN -4 P 3:43

DEPT. OF LAND &  
NATURAL RESOURCES  
STATE OF HAWAII

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Attorneys for Petitioners

Elizabeth M. Dailey and Michael K. Dailey

STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
OFFICE OF CONSERVATION AND COASTAL LANDS  
Honolulu, Hawaii

Board of Land and Natural Resources  
Honolulu, Hawaii  
State of Hawaii

REGARDING: Conservation District Enforcement File No. OA-07-31  
Regarding Alleged Unauthorized Repair/Reconstruction  
of a Boulder Retention Within the Conservation District  
Located at Mokuleia, Island of Oahu (TMK: (1)6-8-003:018)

BY: Elizabeth M. Dailey, Michael K. Dailey

TMK: (1) 6-8-003:018

AREA OF USE: Approximately 3,600 square feet

AREA OF PARCEL: Approximately 3,600 square feet

LOCATION: 68-611 Farrington Way  
Mokuleia, Waialua, Island of Oahu;  
TMK: (1)6-8-003:018

SUBZONE: Resource

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PETITION FOR CONTESTED CASE HEARING

1. Name: Elizabeth M. Dailey, Michael K. Dailey  
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5. Subject Matter: Conservation District Enforcement File No. OA-07-31  
Regarding Alleged Unauthorized Repair/Reconstruction  
of a Boulder Retention Within the Conservation District  
Located at Mokuleia, Island of Oahu (TMK: (1)6-8-003:018)
  
6. Date of Public Hearing/Board Meeting:  

May 25, 2007
  
7. Legal authority under which hearing, proceeding or action is being made:  

Article XI, Section 1 of the Hawaii State Constitution, and  
in this specific case, Chapters 183C, Hawaii Revised Statutes,  
and Title 13-5 of the Administrative Rules.
  
8. Nature of your specific legal interest in the above matter, including tax map key of  
property affected:  

Elizabeth M. Dailey and Michael K. Dailey (collectively the  
"Daileys") own the subject property located at 68-611 Farrington  
Highway, Mokuleia, Waialua, Island of Oahu (TMK: (1) 6-8-  
003:018, and are the respondent in the above referenced alleged  
violation matter, OA-07-31. Additionally, Elizabeth M. Dailey

resides at the house on the subject property and is adversely impacted by the Board's ruling by, among other things, potential loss of her home and property.

9. The specific disagreement, denial, or grievance with the above matter:

The Daileys disagree with and deny the Board of Land and Natural Resources' ruling at the Board of Land and Natural Resources, Land Board hearing conducted on May 25, 2007.

10. Outline of specific issues to be raised:

- A. Whether the Department of Land and Natural Resources has jurisdiction over the subject matter of the alleged violation.
- B. Whether the construction/repair of the shore protection structure constitutes an unauthorized land use.
- C. Whether the Board of Land and Natural Resources erred in denying the Daileys' request to dismiss the alleged violations.
- D. Whether the Board of Land and Natural Resources erred in denying the Daileys' request for a temporary variance or emergency permit.

11. Outline of basic facts:

This case arises out of the need to protect and maintain Mrs. Dailey's home, which she has lived in since 1965. Mrs. Dailey, who is 87 years old, has lived in the house on the subject property since 1965, raised her children in this home, and continues to live there. Shortly after the home was built, a rock revetment was constructed along the shoreline to protect the home from erosion. The revetment functioned properly for over thirty years without incident. During the 2004/2005 winter, as a result of erosion and the construction of the adjoining seawall at the Mokuleia Beach Colony, the existing revetment began to fail. Several of the boulders supporting the revetment became loose, and several coconut trees began to collapse. On January 14, 2005, DLNR staff initiated Enforcement File No. OA-05-38 as several of the rocks from the revetment had begun to collapse and were now on the beach. The Notice and Order noted that the rock revetment was "beginning to fail due to wave scour and presents a significant safety hazard to the public." OCCL further noted that it did not have any records of when the rock revetment was built, or whether a permit existed for the revetment.

On March 17, 2005, Michael C. Carroll, on behalf of the Daileys, met with OCCL staff to discuss the Notice and Order. At this meeting, OCCL staff requested that the Daileys survey the property and to see if there was any information as to the date the rock revetment was built, and whether a permit was issued for the structure. After this meeting, the Daileys reviewed all their personal files regarding the home and were unable to locate any information as to when

the rock revetment was built. This process was especially difficult given the fact that Fred Dailey, the person who constructed the wall is now deceased. As with OCCL, the Daileys were further unable to locate any correspondence, permits, or applications with regards to the rock revetment. The Daileys did, however, retain R.M. Towill Corporation to conduct a survey of the Property to determine the current location of the shoreline. On May 17, 2005, R.M. Towill conducted a survey of the Property to identify the current location of the shoreline on the Property in relation to the rock revetment. Based on the survey conducted on May 17, 2005, it appears that due to wave impact the past winter, a small portion of the rock revetment located on the East side of the property was now located makai of the shoreline. See Exhibit 2, at Exhibit D. It appears, however, that when the revetment was built, it was built entirely behind the shoreline.

On June 17, 2005, the Daileys submitted the survey map and photographs prepared by R.M. Towill to OCCL. On June 27, 2005, OCCL responded to this correspondence, and observed that it appears that a small portion of the rock revetment is now located makai of the shoreline. OCCL did not, and has never disputed that the May 17, 2005 survey accurately located the shoreline on the property. OCCL further observed that the "stability of the structure" was an "immediate concern" and encouraged 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."

In response to this request, on August 22, 2005, the Daileys submitted a Conservation District Use Application (CDUA) Emergency Permit. The application noted that the rock revetment was damaged during the winter of 2004/2005, and requested that the revetment be restored to the "same condition" as existed prior to the damage. DLNR did not approve the Daileys' application for an emergency permit to repair the revetment. DLNR staff did, however, request that the Daileys remove the rocks that had fallen onto the beach and to reorient the rocks on the revetment. The Daileys complied with this request, and the enforcement file was closed with no incident.

This past winter, the revetment began to fail again. Trees again began to lean over and start to collapse into the ocean, and rocks became unstable and threatened to collapse. Additionally, several pronounced cracks developed in the home and foundation of Mrs. Dailey's home, threatening the integrity and stability of the home. With no alternative, and as a large winter swell was approaching that threatened to completely destroy the wall and Mrs. Dailey's home, the Daileys did the only reasonable thing. The Daileys repaired and stabilized the rock revetment to its current condition to protect Mrs. Dailey's home. All work performed by the Daileys was done behind the shoreline.

In response to the emergency repairs performed by the Daileys, DLNR initiated the present enforcement file. This matter came before the Board on April 27, 2007. At the meeting, the Daileys requested a 30 day continuance in order to retain an engineer to evaluate the condition of the shoreline structure and to develop practical recommendations that would meet all parties' concerns.

On May 22, 2007, Elaine E. Tamaye, a coastal engineer, conducted a site visit of the Dailey property to evaluate the condition of the wall and to propose a practical solution. In her report, Ms. Tamaye concludes that the existing seawall has “no effect on the existing littoral processes” at the site, and that the seawall is “functionally consistent with adjacent existing seawalls” along the coast. Additionally, Ms. Tamaye states in her report:

It is obvious that removing the seawall at this time, without replacing it with another shore protection structure, will result in catastrophic damage to the existing dwelling on the property. The dwelling is situated about 20 feet from the edge of the seawall, and is a slab-on-grade structure, with brick/CMU exterior walls. The foundation of the dwelling has already experienced differential settling, as is evidenced by cracks in the exterior walls that have been patched with sealant. Removal of the existing seawall with no retaining structure to support the foundation of the dwelling will lead to substantial structural damage to the dwelling as the shoreline embankment collapses and is eroded by winter storm waves. As it will take at least a year or longer to obtain permits for the shore protection structure (or replacement structure), the existing seawall must be left in place to maintain habitability of the dwelling. If the existing seawall and boulders are completely removed, continuing erosion will also likely impact the Colony property by causing flanking of their seawall.

Ms. Tamaye concludes her report by recommending that the Daileys engineer a properly permitted seawall.

The Daileys provided copies of Ms. Tamaye’s report along with other pertinent information to the Board at the May 25, 2007. At the hearing, the Board agreed to extend the deadline under which the rock revetment was to be removed to one hundred eighty (180) days to allow the Daileys time to go through the process of permitting a shoreline protection structure with the County of Honolulu. The Board, however, assessed fines in the amount of \$10,000, plus \$2,000 per day in the event of failure of the landowner to comply with the order.

12. The relief or remedy to which you seek or deem yourself entitled:

The Daileys respectfully request that this enforcement file be dismissed and all fines and orders be reversed.

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The above-named person hereby requests and petitions the Board of Land and Natural Resources for a Contested Case Hearing in the matter described above.

DATED: Honolulu, Hawaii, June 4, 2007.



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A. BERNARD BAYS  
MICHAEL C. CARROLL

Attorneys for Petitioners  
Elizabeth M. Dailey and Michael K. Dailey