

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

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ELIZABETH DAILEY, et al.,)	
	Plaintiffs,)	
v.)	Civil No.
)	14-1-1541 (RAN)
DEPARTMENT OF LAND AND NATURAL)	
RESOURCES, et al.,)	
	Defendants.)	
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TRANSCRIPT OF PROCEEDINGS

before the HONORABLE RHONDA NISHIMURA Judge, Tenth Division, presiding, on Friday, January 23, 2015.

ORAL ARGUMENT

APPEARANCES:

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For the Plaintiffs

COLIN LAU, ESQ.
For the Board of Land and
Natural Resources

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Natural Resources

REPORTED BY:
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STATE OF HAWAI'I

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1 a joinder to the Board's?

2 MS. CHUN: That's correct, Your Honor.

3 THE COURT: Thank you. All right.

4 Mr. Kugle, you have the floor, and so that
5 I just want to make sure in terms of your agency appeal,
6 are you challenging certain findings, to wit: 41 to 48,
7 52 to 74, and certain conclusions, for example, 3 to 7,
8 9, 10, 15 to 28, 29, 33, 34 to 42 as well as the
9 decision and order?

10 MR. KUGLE: That's correct, Your Honor.

11 THE COURT: Thank you. Now under
12 91-14 G, you understand that the Court's judicial review
13 is constrained by those particular subsections?

14 MR. KUGLE: I do, Your Honor, 91-14, yes.

15 THE COURT: So in particular, do we need to
16 go through all of them? For example, has there been a
17 violation of certain Constitutional statutory
18 provisions, due process of law, other error, clearly
19 erroneous in view of the reliable, probative,
20 substantial evidence, arbitrary exercise of discretion,
21 et cetera. So we have all these subsections.

22 MR. KUGLE: We do, Your Honor, and in our
23 opening brief, we tried to characterize the particular
24 arguments and issues and where they fall in the
25 91-14 G categories.

1 There are certain procedural errors which I
2 will go through and describe, and those would fall under
3 the errors of law and procedure prongs. There are
4 factual issues which I will describe which are under
5 the probative, reliable, substantial evidence inquiry,
6 and there's also an arbitrary and capricious penalty
7 that was imposed that then falls under that final
8 category.

9 So I will -- my intent this morning was not
10 to repeat everything in the briefs, but to kind of hit
11 the highlights, because I know that this Court does read
12 everything.

13 THE COURT: As much as I can.

14 MR. KUGLE: Thank you.

15 And I would like to have the opportunity --

16 THE COURT: This is something that occurred
17 a while ago. I mean, the initial inquiry is to when was
18 the original revetment, r-e-v-e-t-m-e-n-t -- I had to
19 look it up in the dictionary -- built or constructed?

20 MR. KUGLE: That really is the heart of the
21 issue.

22 THE COURT: 'Cause I think there's some
23 aerial maps, and they had some kind of -- it wasn't a
24 particular year. It was between, like, 1960 something
25 through, like, 1980, something of that nature.

1 MR. KUGLE: That's correct, Your Honor.

2 If I could -- and that's outside of my
3 presentation. But the DLNR itself came up with two
4 aerial photographs, one in 1967, and then one in 1980.
5 And '67 there was no seawall, which isn't really a
6 disputed fact.

7 In 1980 -- and I'm sorry, I misspoke.
8 Revetment is the term that you used, and that's the
9 correct term, and if I misspeak, I mean revetment.

10 The revetment was present by 1980, and that
11 was from the DLNR's own aerial records and research.
12 There was a host of more evidence put on, and that would
13 lead me right into my presentation this morning about
14 when this wall -- sorry, revetment was actually built.

15 THE COURT: And also secondarily of equal
16 importance, at the time that this revetment was
17 originally built, where was it built? Was it within the
18 shoreline setback? Was it within the State land
19 conservation?

20 MR. KUGLE: That is the other issue that
21 was of great concern to the Department, to the Land
22 Board, or the BLNR, and was something that was decided
23 and there was evidence.

24 And also I think, I'm going to characterize
25 some things as undisputed, and I think that's apparent

1 both from the BLNR's decision and order, from the
2 answering briefs that were filed, and I think they will
3 probably concede that that material is undisputed, so
4 I'll get into my presentation.

5 The case is about a rock revetment that was
6 built 45 years ago in early 1970. When it was built, it
7 was undisputedly built outside of the conservation
8 district on private property and beyond the jurisdiction
9 of the Department of Land and Natural Resources.

10 THE COURT: There's no dispute as to that?

11 MR. KUGLE: I don't think there is a
12 dispute, even the letter from Sam Lemmo, who is with the
13 Department of Land and Natural Resources, and it's
14 referenced in the briefs. But it happened to be a
15 letter dated September 19, 2008 stated:

16 "OCCL, which is the enforcement arm of
17 DLNR, OCCL closed this case as the offending rocks were
18 removed from the shoreline, and it appeared that the
19 revetment was originally constructed landward of the
20 shoreline while under the City's jurisdiction".

21 But that's exactly the point. What
22 happened is over the years as erosion occurred out there
23 on the beach at Mokuleia, the revetment didn't move
24 toward the ocean, the ocean moved toward the revetment.

25 And so you get to the point in 2011 when

1 the State finally certifies the shoreline there, and
2 that certification, the State, the DLNR places the
3 entirety of the revetment within the conservation
4 district.

5 THE COURT: And that was in or around
6 September 2011, where the shoreline survey was
7 certified?

8 MR. KUGLE: Correct.

9 That -- and as the BLNR decision and order
10 points out, that certification was good for one year.
11 It has since expired, but that was the most recent
12 official determination of where that shoreline occurred.

13 THE COURT: Had there been any other
14 shoreline survey certification prior to 2011?

15 MR. KUGLE: There were surveys performed by
16 the property owner.

17 THE COURT: And that was in 2005.

18 MR. KUGLE: There were two, I believe.
19 There was one in 2005 and one in 2007.

20 In addition, there was a land court map
21 with a 1975 land court map, and that was Dailey
22 Exhibit A-1, and that land court map showed two
23 shorelines, a 1965 shoreline and a 1975 shoreline.

24 And so those were not shorelines that were
25 determined under the current shoreline certification

1 procedures, but they appear, you know, on the land court
2 map.

3 So I think it's important to put this thing
4 into context, which is, this revetment was built there
5 45 years ago, and the shoreline came to it, at least
6 allegedly, not the other way around.

7 So I want to talk about the Land Board's
8 errors, and theses have been briefed, but I want to
9 summarize a few of them.

10 Probably the critical one, because it
11 affected everything else that appears in the decision
12 and order and everything else that happened --

13 THE COURT: Was it nonconforming?

14 MR. KUGLE: Well, no before that is burden
15 of proof. This is a procedural issue, and I will get to
16 the nonconforming. Yes, you're right, that really gets
17 to the heart of it. But I have to explain the burden of
18 proof issue, because --

19 THE COURT: Well, when you speak as to the
20 burden of proof issue, at what point in time, at what
21 juncture?

22 MR. KUGLE: When the DLNR, Department of
23 Land and Natural Resources began its enforcement case
24 calling Mr. Dailey and Mrs. Dailey before the Land Board
25 in 2007, and that's the proceeding that went through the

1 contested case and that we're here on now.

2 Burden of proof, this is a conservation
3 district enforcement action which alleged that the
4 Daileys had violated several laws.

5 Now, we don't challenge portions of the
6 BLNR decision and order that say that the DLNR couldn't
7 enforce certain provisions, that's true.

8 But it did also allege that they had
9 violated the conservation district statute
10 Chapter 183 C and the regulations thereunder. So the
11 DLNR was bringing an enforcement case.

12 Now, HRS 91-10 5, which is Hawaii
13 Administrative Procedures Act speaks to the burden of
14 proof, and it states:

15 The party initiating the proceeding shall
16 have the burden of proof, including the burden of
17 producing evidence, as well as the burden of persuasion.

18 And, of course, the Land Board's own
19 regulations mimic that statute, as they must, which is
20 Hawaii Administrative Rule 13-1-35 K, which states, and
21 I quote:

22 "In the case on alleged violations of law,
23 the Department, meaning Department of Land and Natural
24 Resources, the Department shall have the burden of
25 proof, including the burden of producing evidence, as

1 well as the burden of persuasion".

2 Now, the problem here is that the BLNR did
3 not apply this burden of proof in this case.

4 THE COURT: And that's in reference to the
5 OCCL enforcement action?

6 MR. KUGLE: That is correct.

7 Nowhere in the decision and order itself
8 will you see any reference to either the HAPA statute,
9 91-10 5, or that particular administrative regulation,
10 let alone any conclusion by the Land Board that the DLNR
11 actually sustained its burden of proof and burden of
12 persuasion. Those are not mentioned at all.

13 Instead, what the BLNR did was it reversed
14 the burden of proof, and it required the Daileys to
15 prove why they didn't violate the law. Nowhere,
16 probably, is this more apparent than in
17 Conclusion of Law 9 B on page 17 of the decision and
18 order where the BLNR states:

19 The Daileys provided no evidence, either to
20 rebut the City and County, Department of Planning and
21 Permitting's documentation that they had been found in
22 violation for unauthorized placement of boulders without
23 approvals in 1992, or to reconcile this violation with
24 their claim that the structure had been built prior to
25 June 22, 1970.

1 Now, I will come back to that so-called
2 evidence and deal with that a little bit later in my
3 presentation, but the point is, the Land Board said the
4 Daileys had to come in and rebut all this stuff. They
5 had to prove a negative, and that is the flipping of the
6 burden of proof, and you see it throughout the decision
7 and order of which we say the deck was stacked against
8 the Daileys.

9 In their answering brief, the BLNR cites
10 the *Shearl* decision which is a North Carolina case that
11 suggests that the burden of proof that a structure is a
12 in nonconforming use is somewhat like an affirmative
13 defense in civil case, such that once the DLNR sustains
14 its own burden of proof and persuasion in presenting its
15 violation case, then the burden to prove nonconforming
16 use is like an affirmative defense, and it rests upon,
17 in this case, the Daileys.

18 Well, let's set aside for the moment that
19 that *Shearl* decision, nor any decision like it has been
20 adopted by the Hawaii Appellate Courts, but let's assume
21 it applies.

22 That *Shearl* case is actually very
23 instructive because it's very like the situation that
24 occurred here. In *Shearl* the Court said that the zoning
25 agency in North Carolina had not even sustained its own

1 burden of proof, let alone getting on to whether the
2 nonconforming use defense was established. And the
3 reason why that was, again very like this case, is that
4 the zoning agency had lost the zoning map that shows
5 where the setback line is.

6 So there was -- that map was not in
7 evidence. It was not before the agencies or the courts,
8 which created a big problem, and that's why the Court
9 reversed.

10 In this case the BLNR made much of this
11 alleged violation or notice of violation that was
12 supposedly issued by the City in 1992.

13 However, they cannot point to anywhere in
14 the record 'causes it doesn't exist, that this violation
15 was put into evidence. Doesn't exist. There was no
16 evidence before the Land Board from a City official
17 testifying about issuing a violation, let alone why that
18 violation was never pursued by the City if it was, in
19 fact, issued.

20 The only evidence that's in the record
21 before the Land Board comes from one paragraph in a DLNR
22 staff report to the Land Board, in which DLNR employee
23 Tiger Mills writes that, The City has no record of
24 approval for the revetment, in that, in 1992, the City
25 issued a violation for placement of boulders in the

1 shoreline setback area. But for unknown reasons, the
2 City did not pursue the violation with an enforcement
3 action.

4 So that's just a DLNR employee putting that
5 into a report. We don't know where it came from.
6 Miss Mills didn't testify. Mr. Lemmo didn't explain
7 that. There is no violation, just a reference that
8 there was one. Now, and I say that's very similar to
9 *Shearl*, and that's a problem.

10 So let me turn my argument to -- and so
11 that's the burden of proof issue. It was flipped, and
12 the Land Board gave no application or consequence to
13 HAPA and its own regulations on that.

14 Let me turn to nonconforming use because
15 that really is the heart of the case, although this
16 Court can reverse it simply for changing the burden of
17 proof improperly.

18 HRS Section 183 C governs the BLNR. It
19 defines nonconforming use at 183 C as "The lawful use of
20 any building, premises or land for any trade industry or
21 residence or other purpose which is the same and not
22 greater than that substantially established prior to
23 October 1, 1964, excuse me, or prior to the inclusion of
24 the building, premises or land within the conservation
25 district. That's our situation.

1 It also goes on to say -- this is the
2 Statute 183 C goes on to say:

3 No use, except a nonconforming use, as
4 defined in 183 C 5 shall be made in the conservation
5 district, unless the use is in accordance with the
6 zoning rule.

7 And then 183 C 5 goes on to talk again,
8 gives that same definition of nonconforming use, says:

9 Neither this Chapter nor any rules adopted
10 hereunder shall prohibit the continuance of the lawful
11 use of a building, premises or land prior to '64, or at
12 the time under which a rule was adopted takes effect.

13 And it goes on to say, and I think this is
14 important too: "All such existing uses shall be
15 nonconforming uses".

16 So setting aside the distinction of whether
17 lawful use, which is used in that section, is the same
18 as existing use or not, greater minds may differ. We
19 don't have to focus on that because the point is,
20 ultimately the point will be, What is a lawful use at
21 the time the land became included in the conservation
22 district?

23 The DLNR regulations mimic the statute.
24 HAR 13-5-1, the definition section, both defines
25 nonconforming use, and it also importantly defines the

1 repair and maintenance of nonconforming uses with
2 reference to a 50 percent replacement value.

3 This is also the same thing that's then
4 found later in the regulations on nonconforming use,
5 HAR 13-5-7, which says, This Chapter shall not prohibit
6 the continuance of repair and maintenance of
7 nonconforming land uses and structures, and then has
8 several more subsections thereafter.

9 Now, let's assume for argument's sake, as
10 the BLNR decided, that the Daileys did actually have
11 this burden of proof. In this case they easily met that
12 burden of proof, and I'll explain why, and, in fact,
13 there was no evidence to the contrary. So this is that
14 Section of 91-14 that you asked about dealing with
15 substantial, reliable and probative evidence.

16 Now, as I said, it's undisputed, and I
17 think that when the Land Board argues, they will concede
18 that it was built outside, either that or Mr. Lemmo's
19 letter was incorrect, and all the other evidence that
20 was put on, outlined in the opening brief, and I can
21 cover it, but I'm going to skip over that 'cause we
22 briefed it, establishes that it was built outside the
23 conservation district and in early 1970.

24 So HRS 183 C-2 N-5, those are the
25 Conservation District Statutes say that the use must

1 either be a lawful use or an existing use at the time
2 the land was included in the conservation district.

3 As I said, I'm not sure what the
4 distinction between lawful and existing is, and I don't
5 think we need to get into it. Specifically because the
6 ICA decision in the *Waikiki Marketplace*, which both
7 sides have briefed for you, is, I contend, exactly on
8 point in this case. The Land Board disagrees.

9 That -- what the ICA does there, clearly,
10 first it's applying a zoning code provision from
11 Honolulu on nonconforming uses which has identical
12 language to Chapter 183 C and the Conservation District
13 Regulations. It talks about use -- lawful uses and
14 structures that were in existence prior to the effective
15 date, in essence. So it's the same operative language,
16 even though it's a different law.

17 So the Intermediate Court of Appeals
18 explains what lawful use means in the context of a
19 nonconforming use, and it said, What is lawful means
20 whether the use was lawful under the zoning code in
21 effect at the time the use was made, which basically
22 means that it was not prohibited.

23 In the *Waikiki Marketplace* case, the City
24 argued, Well, you don't have a building permit -- oh, I
25 should step back.

1 That case involved the construction of a
2 storage structure within an area that became a
3 side yard setback. At the time it was built, there was
4 no side yard setback requirements. Later, the zoning
5 code was changed to put a side yard setback in.
6 Violation was issued for the structure which now sat in
7 the setback area, very similar to our case.

8 The ICA expressly rejected the notion that
9 a property owner had to produce things like building
10 permits or other documentations to establish that that
11 use was lawful. You only look at the zoning code or the
12 land use law in effect at the time the thing was built.

13 And I think also importantly, the ICA said
14 that these rights, these nonconforming rights, these
15 vested rights are Constitutional property interests of
16 the owner that have to be protected, and that's very
17 important. That goes to that separate provision of
18 91-14 that talks about Constitutional rights.

19 But in this case, the nonconforming
20 provisions were put into both Chapter 183 C and the DLNR
21 regulations to protect those very rights.

22 THE COURT: Well, assuming arguendo that
23 for purposes of this argument that the proper burden
24 should be placed upon the Board or the Department,
25 burden of proof, burden of persuasion, that there was an

1 OCCL violation, let's say assuming that.

2 But let's go on further, that nevertheless,
3 you've met your particular burden that this was a
4 nonconforming structure.

5 MR. KUGLE: Mm-hm.

6 THE COURT: Subsequent to that, we know
7 that there was damage, boulders got dislodged, et
8 cetera, that went onto the State land. It was removed.
9 That there was work done, to wit: Grout, a cement cap
10 or something for portions of the wall which exceeded the
11 height of the original revetment. How does that play?
12 Does it become a hybrid seawall, a new seawall,
13 something that exceeded what's allowed?

14 MR. KUGLE: That's an appropriate question,
15 and I was about to get to that, so I'll just take that
16 up right now.

17 The answer to all of this, which is also
18 the answer to the nonconforming use, which is found in a
19 separate statute, HRS 205 A 40 through 49, which is the
20 City's -- the statute that authorizes the City to have
21 its shoreline area regulation, shoreline setback and
22 everything else.

23 And I just want to note, it's in the
24 briefs, and I think your question just went to that very
25 point, and it says that you don't need a variance to

1 build something in the shoreline area if it was
2 completed prior to June 22, 1970.

3 And so that's where the Land Board really
4 make made a mistake by saying, Well, you didn't prove
5 what else was required. We don't have to. The very
6 statute that creates land use regulation excludes
7 anything done at the date that this revetment was done.

8 So to answer your point, we get on to it.
9 Assuming it was nonconforming, what allowed us to make
10 repairs to it? First, you can look at that statute, the
11 Coastal Zone Management Act and the shoreline area
12 provisions 205 A 44 B specifically states that those
13 structures that are in that list and that either have a
14 variance or don't need a variance may be repaired but
15 may not be enlarged in the shoreline area without a
16 variance. So that's one law that authorizes the repair.

17 That's not the only law, and importantly,
18 it is the DLNR's own regulations that authorize repair
19 and maintenance.

20 13-5-1 states, Repair and maintenance
21 means: Land uses and activities necessary and
22 incidental for the continued conduct of a use, whether
23 nonconforming or permitted, including repairs not
24 exceeding 50 percent of the replacement value of the
25 structure.

1 And then, of course, you go further into
2 the regulations, as I'm sure the Court has seen, and you
3 have why Administrative Regulation 13-5-7, which says:

4 This Chapter shall not prohibit the
5 continuance or repair and maintenance of nonconforming
6 land uses and structures as defined in this chapter.

7 Now, that section goes on to say that if
8 damage or destroyed by more than 50 percent of its
9 replacement time at the cost -- I'm sorry. Replacement
10 cost at the time of construction, it can't be
11 reconstructed, except in conformity with the
12 Conservation District Regulations.

13 Now, the only evidence before the BLNR, as
14 we pointed out in our briefs, involving cost and extent
15 of damage was the evidence that was put on by the
16 Daileys. It showed that the approximate repair value
17 that was done and was the basis of the citation was
18 \$50,000. And there were three estimates that came in
19 that determined that the approximate replacement cost
20 would have been \$300,000. Simple math will tell you
21 that's nowhere near the 50 percent requirement.

22 That is the only evidence, and it was put
23 in by the Daileys. The DLNR put in no evidence of its
24 own on replacement cost, and there was nothing to say
25 that you exceeded the 50 percent value, and therefore,

1 it couldn't be repaired except in compliance with the
2 regulations.

3 THE COURT: And that was the only evidence
4 regarding the replacement?

5 MR. KUGLE: Yes, yes.

6 Now, there was description, to your point,
7 there was evidence that characterized this as a new
8 seawall or as a change. I think that the actual term
9 used in the testimony about the height difference was
10 slightly different. There was also the testimony that
11 the footprint shrank. Everybody agreed it was in the
12 same general place, and it reused the same rocks.

13 And so these are the provisions that
14 expressly and very clearly allow repair and maintenance,
15 and it's obvious, if you didn't allow repair and
16 maintenance, that nonconforming use would quickly become
17 gone, and there is that catchall provision that says,
18 When it's destroyed by more than 50 percent, can't
19 rebuild it except in compliance.

20 THE COURT: How about for certain evidence
21 or testimony that was brought forth that with respect to
22 the structure that is there now, part of it is in the
23 shoreline setback, part of it is in the conservation.

24 MR. KUGLE: There most certainly was
25 testimony by DLNR employees and others who had gone out

1 fairly recently, 2011, after 2007 in addition, and said
2 that based on what they'd seen about where water flows,
3 that this would now be put in to the conservation
4 district, some or all because water flows through it.

5 I mean, that's actually very good
6 indication that this thing was in the same place as it
7 was, and it's operating same way it always was. Water
8 nowadays flows to it or through it.

9 In 2011 the State certified that shoreline
10 as, At the upper reaches of the wash, the waves were
11 through the revetment. That gets back to the original
12 point that the shoreline has moved, and at least as
13 to -- as of 2011, which was four years after they issued
14 the violation, they put this entire structure within the
15 conservation district or most of it. I'm not sure if
16 some was outside of conservation and, therefore, within
17 the City jurisdiction, but most of it had been placed in
18 the 2011 shoreline certification.

19 THE COURT: At the get-go, it's your
20 procedural argument, which is of primary importance,
21 that the burden was upon the Department, the Board,
22 burden of proof, burden of persuasion, to a
23 preponderance that there was a violation --

24 MR. KUGLE: Mm-hm.

25 THE COURT: -- and they had not met their

1 burden, and it improperly shifted to the Daileys?

2 MR. KUGLE: Yes.

3 THE COURT: Even assuming that the Daileys
4 did bring forth evidence that the original revetment was
5 a nonconforming use or structure --

6 MR. KUGLE: Mm-hm.

7 THE COURT: -- and that the subsequent
8 repair that was done is also not in violation.

9 MR. KUGLE: Well, and that's correct, Your
10 Honor. I say that the regulations explicitly recognize,
11 and the statute, the shoreline setback statute and the
12 DLNR regulations specifically recognize that repair and
13 maintenance can occur. And in this case it did.

14 Now, I -- I understand the DLNR's position
15 to be maybe -- or I should say the Land Board's position
16 in its opening brief that, Well, that repair needed a
17 permit even if the original structure was there.

18 That's not what the Land Board decision and
19 order says, and it sure doesn't identify which
20 particular provision in here requires, and what permit
21 would have been required for that repair.

22 THE COURT: That goes in to my next
23 follow-up question. When I look at the decision and
24 order, there seems to be an allowance for the Daileys to
25 apply for SSV, that's a shoreline setback variance, and

1 I believe the deadline is mid-June of this year, that if
2 they don't put in an application, the structure comes
3 down. If they put in an application by the deadline and
4 it's not approved, structure comes down; correct?

5 MR. KUGLE: That is correct.

6 In other words, it provides a kind of a
7 scale, Okay, go to the City and see if they'll give you
8 permission. And what I should make clear so that this
9 is in context, what that means is that the Land Board
10 can say, All those rocks that are there today must come
11 out and be removed, and then they can be put back if the
12 City says they can be put back somewhere inland, mauka,
13 above the shoreline, but not below the shoreline.

14 What that is, in effect, doing is actually
15 applying the 50 percent rule without ever proving 50
16 percent, because what they're saying is, We are going to
17 require that you remove this structure and move it
18 outside of the conservation district, i.e., in
19 compliance with the conservation rules, without ever
20 having proved it was damaged more than 50 percent, and
21 that's simply unfair, and I think that gets into my
22 final argument that I wanted to explain here.

23 THE COURT: About the arbitrary, capricious
24 nature.

25 MR. KUGLE: Exactly, exactly.

1 This decision does two things. It imposes
2 a fine, presumably, for doing repair work without a
3 permit. But then it lumps on and says, This 200 foot
4 revetment that indisputably was there, albeit changed,
5 I'll give you that. Their contention is some parts of
6 it were changed or repaired, but indisputably there
7 from 1970, 45 years, all has to come out, and has to do
8 so within this one year or this two year, and maybe the
9 City will give you permission to do something or maybe
10 not. It's also undisputed in the record and evidence
11 that Miss Dailey's house will collapse without
12 protection there of some sort.

13 So that's what gets me to the arbitrary and
14 capricious.

15 THE COURT: You mention about these three
16 other situations, and in looking at the answering brief,
17 to the extent that you're talking about disparit
18 treatment, that you have not brought forth sufficient
19 evidence, in terms of similarity, in terms of what
20 happened to these other three neighbors or property
21 owners.

22 MR. KUGLE: Yes.

23 Those three situations, and the Land
24 Board -- or the DLNR recommendations with respect to
25 those and the Land Board rulings with respect to those

1 are in the record.

2 What happened with those is, there were
3 walls that were built without City approval, without
4 State approval, but were built sometime a long time ago,
5 and these people went and got after-the-fact City
6 approvals for those walls, and then the State determined
7 that by granting an easement, it would overlook any
8 portion of those pre-existing seawalls or
9 revetments, whatever they are, that encroached into
10 State land because parts of them still come out into the
11 ocean.

12 And so what the DLNR, and it takes Land
13 Board approval, so what the Land Board did in those
14 instances is say, We will grant you an easement which
15 will allow those pre-existing walls or the portions of
16 those walls, the footings, the rubble that goes out into
17 the water, whatever the case may be, we'll give you an
18 easement to allow that to remain. Typically it's at 50
19 or 60 year increments these days, that certainly -- the
20 Land Board's done that for other neighbors. They didn't
21 do it for Mr. Dailey, and we argue that should have been
22 done.

23 THE COURT: So, in other words, these were
24 issued after-the-fact variances and in connection
25 thereto, the State did issue easements or did grant them

1 easements?

2 MR. KUGLE: For the portions of -- so the
3 variance was issued by the City, but portions of those
4 pre-existing walls were outside of the City's
5 jurisdiction, i.e., past the shoreline in the ocean, and
6 the -- or BLNR granted easements allowing those portions
7 that encroached onto State land to remain.

8 And remember, all this was private land and
9 became State land only by movement of the shoreline the
10 Daileys lost.

11 THE COURT: And are they within the same
12 vicinity?

13 MR. KUGLE: They are. I believe it's about
14 three or four doors down, yes, as you -- just for the
15 Court's reference --

16 THE COURT: Well, I'm familiar with the
17 polo field.

18 MR. KUGLE: And the Daily property is also
19 adjacent to the polo field, and then as you proceed out
20 toward Kaena Point, you round the tip, and that's where
21 these other properties are located.

22 THE COURT: And they were all built when?
23 Do you know? Are we talking about in or around the
24 time?

25 MR. KUGLE: My recollection was '70s

1 or '80s. They were built --

2 THE COURT: After?

3 MR. KUGLE: They were built after 'cause
4 those homes weren't -- I don't think were there back
5 in '70 or '60s when the Daileys' house was built in '65
6 or when the rocks, but I don't know the precise dates.

7 Suffice to say, the City granted the
8 after-the-fact variance, and then the State said, Well,
9 it's legitimized through the City activity, so we'll
10 grant an easement to allow that portion of it. That's
11 in our jurisdiction to remain.

12 And I want to stress two things also about
13 the fact that, yes, the Land Board had alternatives, but
14 it's appropriate to put this in context.

15 The Land Board is saying, Remove the entire
16 200 feet, not just the portion that was repaired, but
17 all of it. And that is a remedy that the Hawaii Supreme
18 Court said is "harsh" in the *Morgan* case.

19 Now, the *Morgan* case, and that's briefed in
20 the answering reply briefs, is procedurally and
21 factually very different. Kauai Planning Commission
22 granting a shoreline setback variance to allow a
23 revetment. What was built was not a revetment, it was a
24 seawall. Neighbors complained, and so the
25 Kauai Planning Commission required changes to be made to

1 the seawall.

2 And the Hawaii Supreme Court said that in
3 some respects they had exceeded the grounds of
4 jurisdiction in doing so, in other respects they hadn't.

5 But they specifically pointed out that
6 actually requiring removal of the seawall would have
7 been a harsh result, and that was not imposed nor
8 authorized, and that's very telling.

9 The other case cited in the answering brief
10 which is, and again, this deals with nonconformities,
11 again from Arizona, *City of Tuscon versus Clear Channel*,
12 and the issue in that case was whether some billboards
13 that had been either built or repaired or expanded after
14 regulations come into place limiting those repairs,
15 whether they all had to be removed.

16 And the Court said, No, equity is involved,
17 and we look at a fair solution. So in some cases they
18 said, We're not going to require removal when it may
19 have been located 7 feet on one side or another side of
20 where it should have been. We're not going to require a
21 new billboard when all you did was put a new face on
22 existing billboard.

23 I think that case really isn't on point for
24 a whole lot of reasons, but that's what it shows. I
25 mean, the --

1 THE COURT: You need to wrap up, Mr. Kugle.

2 MR. KUGLE: Yes. It's arbitrary and
3 capricious to require that the entire revetment be
4 removed. I'll answer any further of the Court's
5 questions, and I'd love a chance to respond. Thank you.

6 THE COURT: Mr. Lau, burden of proof and
7 persuasion for the OCCL enforcement action.

8 MR. LAU: Yes, Your Honor. It's very
9 difficult for me to follow Mr. Kugle. He argued very
10 well.

11 With regard to the burden of proof and
12 persuasion, he is correct that in an enforcement action
13 it is upon the DLNR to meet the burden of proof and
14 persuasion.

15 In our answering brief, we pointed to facts
16 which were stipulated to evidence, testimony that was
17 adduced during the contested case.

18 THE COURT: Well, in terms of the
19 revetment, was there any dispute as to when it -- in or
20 around the time it was built?

21 MR. LAU: I think there was basically a
22 ballpark figure, and if you believe the petitioners'
23 dates that it was built somewhere between 1969 and 1970.

24 THE COURT: Early 1970, I think something
25 about the fact that the son returned back from military

1 school.

2 MR. LAU: Right, something to that effect,
3 that's correct. It still would not have met the
4 nonconforming use --

5 THE COURT: At that time.

6 MR. LAU: Right.

7 THE COURT: Why?

8 MR. LAU: Under 13-5-7.

9 THE COURT: Well, at the time it was
10 constructed, the revetment.

11 MR. LAU: Right.

12 THE COURT: Was it within the shoreline
13 setback? Was it in the conservation?

14 MR. LAU: It was definitely within the
15 shoreline -- it was not in the conservation district,
16 let's put it that way.

17 THE COURT: Okay. Why was it not
18 nonconforming? It's always unusual to use a double
19 negative.

20 MR. LAU: Yeah, I'm struggling with that
21 too, Your Honor. Basically, they would have to show
22 that --

23 THE COURT: No, remember now, burden of
24 proof.

25 MR. LAU: Okay, yes.

1 It's not the State's burden of proof to
2 prove that --

3 THE COURT: The structure was not a
4 nonconforming.

5 MR. LAU: Right.

6 THE COURT: Why?

7 MR. LAU: Because that, in the State's
8 opinion, is basically an affirmative defense. That if
9 the State can prove that it's an unauthorized land use
10 within the conservation district, that it would then
11 flip to the petitioners or the landowners to prove that
12 it was a nonconforming use.

13 THE COURT: Looking at the HER and HRS
14 provision, everything follows from the original thought
15 in terms of when it was originally built, the revetment,
16 was it a nonconforming? Because if you look at what
17 occurred afterwards, there's different provisions, like,
18 if something was initially nonconforming, there's
19 certain provisions regarding replacement cost, repair
20 and maintenance. If it's not, then something else
21 occurs.

22 MR. LAU: Right.

23 THE COURT: So in terms of the enforcement
24 action for OCCL, don't we have to start with the initial
25 premise as to whether or not the original structure, the

1 revetment, was it a conforming structure use, or was it
2 not a nonconforming use or structure?

3 MR. LAU: Right, um, I guess the response
4 that I have to that is, you're correct that OCCL is
5 looking at it with the eye towards, Is this a
6 nonconforming use with regard to conservation
7 district --

8 THE COURT: At what point in time?

9 MR. LAU: -- laws and statute -- I'm
10 talking about specifically in 2006.

11 THE COURT: Okay, but when it was
12 originally built, was there any dispute, because I don't
13 think there was any countervailing evidence of a
14 preponderance of the evidence type of standard, that it
15 was not a nonconforming use or structure when it was
16 originally built, to wit: The revetment, that it was
17 within the shoreline setback.

18 In other words, it was not in the
19 conservation district or state.

20 MR. LAU: Okay.

21 THE COURT: So at the point in time that it
22 was built, the revetment.

23 MR. LAU: In terms of shoreline setback
24 law, Your Honor, is that what you're asking?

25 THE COURT: Correct.

1 MR. LAU: Right.

2 THE COURT: There was no violation.

3 MR. LAU: I guess we concede that there was
4 no indication that it wasn't nonconforming terms.

5 THE COURT: So, in other words, in terms of
6 OCCL you're looking from 2007?

7 MS. CHUN: Right.

8 THE COURT: What was done regarding the
9 repair and maintenance, et cetera.

10 MR. LAU: Absolutely.

11 THE COURT: Go ahead.

12 MR. LAU: And that's the strongest case for
13 DLNR. It's that there is this structure which the State
14 is positing entered, so to speak, the conservation
15 district because of erosion, and that as a result, it
16 was in violation to the extent that changes were made to
17 it.

18 There's no evidence that petitioners ever
19 said that this structure was a grouted structure.

20 THE COURT: Let's say, assuming
21 hypothetical and bear with me.

22 MR. LAU: Okay.

23 THE COURT: No repairs, no grouting, no
24 cement cap, and it was just original, yeah? Would it
25 still be in violation?

1 MR. LAU: Okay --

2 THE COURT: Even though it's now, as you
3 said, the wall didn't move, the revetment didn't move
4 but the shoreline moved.

5 MR. LAU: Your hypothetical, the wall does
6 not change, I mean.

7 THE COURT: Nothing changes.

8 MR. LAU: Nothing happens to this.

9 THE COURT: Correct.

10 MR. LAU: Okay.

11 THE COURT: But now in 2007, it's now
12 within the conservation district.

13 MR. LAU: I would have to concede that it
14 would be nonconforming, to the extent that it was a
15 legal structure --

16 THE COURT: Back then.

17 MR. LAU: -- at the time, yes.

18 THE COURT: Okay. Go ahead.

19 MR. LAU: But that's not the case in these
20 facts.

21 THE COURT: Because they put in the grout,
22 the cement -- what is it called, a cement cap or cement
23 topping or something?

24 MR. LAU: It's basically cement, and these
25 boulders which were loose were falling into the beach.

1 So, to begin with, if they say they're not
2 under the jurisdiction, the conservation district, the
3 fact that it is -- these boulders are falling into the
4 conservation district, that alone would be an indication
5 that they're under that jurisdiction.

6 THE COURT: And it does pose a hazard.

7 MR. LAU: Absolutely.

8 Further, when they do the grouting, there
9 was some indication that there were sunken areas behind
10 the structure, so waves were actually overtopping, going
11 through the structure, because it's a porous structure
12 being that it wasn't grouted originally.

13 THE COURT: That's why it was a revetment.

14 MR. LAU: Absolutely. You got that
15 definition right. And as a result, some of this
16 backfill material was washing into the ocean.

17 So to the extent that it was grouted,
18 boulders were falling, material was washing into the
19 ocean, it was under the jurisdiction of OCCL.

20 THE COURT: So now I've seen photographs of
21 this hybrid, because part of it is still original, it's
22 still a revetment, or has it all been capped?

23 MR. LAU: My understanding is that it has.

24 THE COURT: The whole -- because the
25 footprint has not moved basically.

1 MR. LAU: Well, I think we could have some
2 kind of dispute as to that.

3 THE COURT: Because for me it's hard to
4 fathom that footprint, the whole 300 feet would have
5 moved. Original footprint is still there?

6 MS. CHUN: No.

7 MR. LAU: The testimony of the witnesses at
8 the contested case were that this thing was on a
9 different footprint. It was taller. It was more dense,
10 to the extent that it was grouted, and it was, as a
11 result, in a slightly different configuration than
12 original.

13 THE COURT: But did it move one foot back,
14 one foot forward?

15 MR. LAU: Well, let me explore that with
16 you, Your Honor. You're saying that if this structure
17 had never moved at all, and boulders had never fallen
18 off, then it might have been a nonconforming structure
19 that would be legal.

20 THE COURT: Even if it's in the State land?

21 MR. LAU: Right, perhaps. But maybe that's
22 the difference between that and the *Waikiki Marketplace*
23 *Investment* case, because now it is on State land in the
24 view of the law, according to
25 *Diamond versus Daubin* (phonetic).

1 So there's indication, historical evidence
2 that this -- this wall, which may have started outside
3 the conservation district, now is well within the
4 conservation district.

5 THE COURT: So when you talk about the
6 OCCL enforcement action in 2007, you're saying that the
7 burden of proof and persuasion is upon the Daileys to
8 prove their affirmative defense?

9 In other words, it doesn't start with the
10 Department, but --

11 MR. LAU: No.

12 THE COURT: But -- I'm trying to --

13 MR. LAU: I'm sorry.

14 THE COURT: In terms of the burden of proof
15 and persuasion for the 2007.

16 MR. LAU: Okay. It really is on BLNR, and
17 once BLNR says -- has proof that it is a violation, then
18 it would switch over to the Daileys to prove that under
19 our administrative rules, that they have a nonconforming
20 use.

21 THE COURT: So when you say that there is a
22 violation, so are you looking that under the HER 13-5-7
23 the replacement cost, exceeding the height, density,
24 that portion?

25 I mean, when you talk about the violation,

1 there's several violation provisions.

2 MR. LAU: Right.

3 THE COURT: So you're saying that the
4 Department met its burden for the 2007 OCCL enforcement
5 action, to wit: There was a violation of which
6 particular subsections?

7 MR. LAU: To the extent that all that was
8 in the initial submittal of OCCL to the Board was
9 sustained by the hearing's officer and the Board, yes,
10 the Department has met its burden.

11 THE COURT: Okay. Now specifically are you
12 talking about the replacement cost? Are you talking
13 about the height, that it exceeded --

14 MR. LAU: No.

15 THE COURT: -- the height, that it's all in
16 now conservation land?

17 MR. LAU: The structure, the indication
18 that this structure was now what we're calling a hybrid
19 seawall, to the extent it was grouted, that these other
20 things like the sandbags were present, all these were an
21 unauthorized land use.

22 Where a land use is basically a structure
23 that's been left there for at least 30 days, and the
24 evidence from what I understand was adduced at the
25 contested case was, Here it was a violation of repair,

1 so to speak, that was characterized by the Daileys in
2 December of 2006, and this went all the way through
3 February, and I think it was, like, late February was
4 the last observation that was made -- that was adduced
5 at the contested case.

6 THE COURT: So, in other words, the work
7 that was done was unauthorized?

8 MR. LAU: Absolutely, Your Honor.

9 Let me point you to something.

10 THE COURT: Go ahead.

11 MR. LAU: You were talking about the
12 percentage of repair and the value of repair, but
13 there's also other subsections within 13-5-7.

14 THE COURT: So you're saying that because
15 of the work that was done was unauthorized.

16 MR. LAU: And it was subject to development
17 standards, according to 13-5-7 Subsection C, also
18 subject to requirements including counting, building
19 permits, shoreline setback, shoreline certification.

20 They're not to exceed the size, height and
21 density at the time that it was included in the
22 conservation district according to Subsection E.

23 So there were these other requirements
24 within 13-5-7 that were not met.

25 THE COURT: Now, I think at one point in

1 time they did apply for an SSV.

2 MR. LAU: Right.

3 THE COURT: And then there were certain
4 conditions imposed, but I guess I'm not sure what
5 happened. But now, in terms of looking at the decision
6 and order, they're now giving -- been given an
7 opportunity to apply for an SSV.

8 MR. LAU: Right.

9 THE COURT: And it's a June 2015 deadline.

10 MR. LAU: Right, right.

11 So based on all these violations that were
12 observed, if you look at it from the standpoint of, Can
13 we just go back to status quo? The answer is no,
14 because here is a structure that apparently is failing
15 from wave action, that boulders are falling.

16 Part of the calculus that both the hearings
17 officer and the Board went through were, Okay, which, if
18 you look at the credibility of witnesses, my
19 understanding that was made in the reply brief and there
20 is a citation to the record --

21 THE COURT: Now, in terms of the structure
22 that's now in place --

23 MR. LAU: Right.

24 THE COURT: -- or after what was done was
25 done, is it a better structure than the revetment?

1 'Cause I think because the problem was a
2 revetment, boulders were being dislodged. They were
3 rolling into State land. So what was done regarding
4 grouting, density, the capping, is it now a safer
5 structure?

6 MR. LAU: Um, I -- I'm not sure I'm
7 qualified to answer that question.

8 THE COURT: Neither am I. I'm just
9 throwing it out.

10 MR. LAU: Let me point you to something.
11 My understanding is that the witnesses from OCCL,
12 including somebody that was, I think some kind of
13 engineer type, indicated that in the area where the
14 Daileys live, it's, according to Coastal High Hazard
15 Ranking, it's a 6 on the scale of 1 to 7, 7 being the
16 most hazardous.

17 So it's definitely an area where I don't
18 know that even capping with grout would be sufficient to
19 have that structure be something that would be
20 considered safe in any shape or form.

21 THE COURT: So, in other words, if they had
22 not done any repairs and had just kept it original, as
23 an original revetment, and then there's no dispute that
24 when it was originally constructed, it was within the
25 shoreline, you know, it was not in the State land, it

1 was nonconforming, the original revetment.

2 So you're saying if they did nothing, it
3 would remain a nonconforming and would be allowed to be
4 in that appearance?

5 MR. LAU: In a perfect world where the
6 structure never fails, yes, but the structure was
7 failing and continues to fail.

8 THE COURT: Now in terms of the other three
9 situations that was pointed out by the Daileys,
10 neighbors or people that are living nearby, they did
11 receive an after-the-fact variance, and the State
12 granted an easement because their walls are in
13 conservation or in State land. Are you familiar with
14 those instances?

15 MR. LAU: Frankly, my understanding is that
16 this was explored at the hearing. I don't know the
17 specifics of the other cases to the extent that whether
18 these walls were a non-grouted revetment type of
19 structure. I don't know.

20 THE COURT: The specifics in terms of how
21 similar or dissimilar.

22 MR. LAU: But I understand -- I mean, I
23 don't know that this can be an equal protection
24 argument, I guess, is what we're getting at, or fair
25 treatment I supposes is what it would be.

1 To the extent that each structure is
2 considered, they would be looking at it from the, you
3 know, all of the circumstances present.

4 Generally speaking, the State's policy is
5 that they do not like armored structures in the
6 shoreline area. So that, generally speaking, unless it
7 was grandfathered in because they got a permit way back
8 when, such as the Mokuleia Beach Colony, which is the
9 neighbor of the Daileys, they basically cannot maintain
10 these kinds of structures because it affects all the
11 shoreline processes, including longshore transport of
12 sand, and it causes accelerated erosion and loss of
13 beach sand.

14 THE COURT: Okay. When we take a look in
15 terms of, and you brought up a good point, Mr. Lau,
16 regarding the risks and the benefits, because what the
17 State is seeking is removal the entire structure;
18 correct?

19 MR. LAU: Right.

20 THE COURT: Now, was there testimony with
21 respect to, you know, if the entire structure's removed,
22 would the Dailey's home be at risk?

23 MR. LAU: Um, I don't -- well, I think this
24 is putting the cart before the horse, because my
25 understanding was way back during the time that the

1 Daileys were originally cited with a notice and order,
2 so that --

3 THE COURT: Was that back in 1992 or
4 thereabouts?

5 MR. LAU: I think it was subsequent to
6 that.

7 THE COURT: Would it be before that?

8 MR. LAU: No. I think it was after that,
9 frankly, in maybe the early 2000s. I'm not sure, Your
10 Honor, let's leave it at that.

11 But my understanding was Sam Lemmo wrote a
12 letter to them, and he indicated in the letter that they
13 could leave the structure in place. They could look to
14 the City to build a structure that was set back
15 within --

16 THE COURT: More mauka.

17 MR. LAU: Right, and eventually the home
18 would probably have to be moved as well.

19 So under those circumstances, and to the
20 extent that this violation case was brought in 2007, and
21 the Daileys were given quite a bit of latitude to go
22 through the permitting process with the City to get
23 these permits and to do something about this, I think
24 the State was actually pretty fair about it.

25 In terms of when this structure, the

1 revetment would be removed, that would be after they had
2 moved their house and built some other safety structure
3 further mauka of the shoreline.

4 THE COURT: Thank you, Mr. Lau.

5 Ms. Chun, I know you filed a joinder.

6 MS. CHUN: Yes, just briefly, Your Honor,
7 if I may address the Court's concern about the burdens
8 of proof.

9 When the Department of Land and Natural
10 Resources comes forward with an enforcement action for
11 an alleged violation, they do have the burden of proof
12 with regard to the alleged violations.

13 So to answer your question, with respect to
14 the violations that occurred in 2006 and 2007, certainly
15 it was the Department's burden to prove that those
16 violations had occurred, and there was evidence, and the
17 Department did prove by a preponderance of the evidence
18 through oral testimony and documentary evidence, in the
19 way of photographs that the Court may have seen, that
20 these violations did occur.

21 And that the wall, it really wasn't a wall.
22 That the loose rock structure was being overcome by the
23 waves and the break of the waves, given evidence of the
24 destruction of property behind or mauka of the wall.

25 THE COURT: So it was the revetment that

1 was failing?

2 MS. CHUN: Yes, it was, and it was not up
3 to the task.

4 With regard to the violation activity that
5 occurred and the construction of the hybrid wall, Your
6 Honor, it does not -- what was there in 2006 and 2007
7 were loosely scattered boulders that were lining the
8 boundary of the property and continued onto the sand,
9 the beach, that was there.

10 And it was the wave action that caused
11 these loose rocks, these boulders, to tumble further
12 into -- onto the sand and down to the beach creating a
13 hazard for people who were walking the beach.

14 When it was reconstructed, this hybrid
15 wall, took those rocks and moved them back into a
16 vertical position. So the footprint was not at all the
17 same. It was, as the Court was asking, moved back. All
18 of these rocks were moved back.

19 THE COURT: Moved mauka?

20 MS. CHUN: Mauka into a vertical structure.

21 When the rocks were loosely there, to get
22 across that portion of the beach at high tide, you would
23 have to climb over these rocks. When the hybrid wall
24 was constructed, they put on the top of that a cement
25 cap that is fairly level. It allows people to walk

1 along that in vertical way. It creates kind of a
2 footpath.

3 But the wall is not at all the same as
4 those loose rocks. As I've said, they moved all of
5 those rocks into a more vertical structure. They
6 grouted 4, approximately 4 feet along the top. They put
7 the cement cap on.

8 The rocks at the bottom, and these aren't
9 really rocks, these are boulders, are not grouted. So
10 when you say, Is this a safer wall, it is really, I
11 guess, up to dispute as to whether it's safer because
12 those rocks down at the bottom, those boulders are not
13 grouted together.

14 Nothing, I mean, they could dislodge. They
15 could become loose, and the testimony at the hearing was
16 that because they're porous and they're not grouted,
17 they allow the water to wash through them.

18 So, you know, you really -- I don't -- it
19 may take an engineer to answer the question as to
20 whether or not this is a safer wall. It is, I think, at
21 best, a matter of dispute.

22 THE COURT: But the structure that is there
23 right now, is it entirely within the conservation
24 district?

25 MS. CHUN: It is.

1 THE COURT: The entire structure?

2 MS. CHUN: It is. Water washes above mauka
3 of the wall, through the wall, mauka of the structure
4 and is causing scouring, wave overtopping. The
5 property behind mauka of the wall, there are sunken,
6 depressed areas where the water recedes. It pulls the
7 debris out.

8 I don't think it is disputable that this
9 structure now is in the conservation district, and it
10 has been for several years.

11 THE COURT: Are you familiar with the other
12 adjacent, well, maybe not right next door, but other
13 neighbors where they have similar walls or similar
14 structures, beach front?

15 MS. CHUN: I am not. The evidence was
16 simply documentary with regard to those properties, Your
17 Honor. They were identified by addresses, and there was
18 no other evidence presented about the walls that were
19 actually constructed.

20 THE COURT: And whether or not it's of a
21 similar location as the Daileys, and whether or not they
22 built their structure such that they received
23 after-the-fact variance and the State granted an
24 easement?

25 MS. CHUN: There was no testimony with

1 regard to their exact location.

2 The Daileys' property is uniquely situated
3 at what they called the tip of the headland there. So
4 it gets more direct wave action than other properties.
5 A lot of this depends, of course, on the time of year
6 and the tide.

7 But then, Your Honor, with regard to the
8 burden of proof, it then shifts to the applicant to
9 prove that the structure is legal. And it's not up to
10 the Department to show that this was not a nonconforming
11 use. It is entirely their burden.

12 And this is in Conclusion of Law 33 where
13 the Board specifically says that OCCL closed the
14 application at that time because it couldn't prove
15 exactly when and where the initial rock formation was
16 built, but it wasn't OCCL's burden in any event.

17 And that is correct, Your Honor. The
18 burden really resides with the petitioners to prove that
19 their structure was -- when initially built, was
20 entirely outside of the conservation district when it
21 was built, and --

22 THE COURT: So let's say assuming that, you
23 know, that they did meet that burden that this revetment
24 was built in early 1970, and that it was entirely within
25 the shoreline setback, what does that mean to what was

1 done subsequently in 2006, 2007?

2 MS. CHUN: Okay, but, Your Honor, your
3 question makes assumptions that are not proven in the
4 record.

5 The hearings officer and the Board did not
6 find that they had proved by a preponderance of the
7 evidence exactly when that wall was -- those rocks were
8 placed there. But there was, in fact, contradictory
9 evidence about when it was placed.

10 And even if uncontroverted evidence was
11 presented by Mr. Dailey himself about when he thought
12 the rocks were initially laid there, certainly the
13 hearings officer had every right, if not obligation, to
14 find that that testimony wasn't credible. It may have
15 been uncontroverted, but if not credible, then he could
16 find that the Daileys had not met their burden of proof.

17 THE COURT: I'll try to look through the
18 findings of fact, Ms. Chun, in terms of the credibility
19 issues, because I believe there was -- there's Elizabeth
20 Dailey's testimony, and there was the son who said he
21 returned from military school in about early 1970, and
22 the revetment was there.

23 So in terms of the opposite side, like
24 whether or not there was testimony that says, No, at
25 that point in time, the revetment was not there.

1 MS. CHUN: There was no affirmative
2 testimony that countered those declarations.

3 THE COURT: All right.

4 Brief rebuttal, Mr. Kugle, because I can
5 see my subsequent counsel for other matters.

6 MR. KUGLE: Your Honor, I really don't have
7 a whole lot to say, because I don't want to repeat
8 anything.

9 I think I'll just follow up on a few points
10 that you raised. You will go through those Findings of
11 Fact that are in there, and obviously, we disagree with
12 many, but you will not find one reference to a
13 credibility determination made by the Land Board or by
14 the hearings officer.

15 THE COURT: Saying that the declarations
16 that were submitted as to when the revetment was built
17 was in or around either late '69, but at the latest
18 would be early 1970 --

19 MR. KUGLE: Correct.

20 THE COURT: -- nothing to controvert, and
21 nothing to say that those declarations or those verbal
22 testimony was not credible?

23 MR. KUGLE: Correct. As you go through it,
24 you will not see -- we just heard a long discussion
25 about how the Department sustained its burden of proof

1 and things switched. But again, that's not anywhere in
2 the decision, so it's kind of recreating something that
3 the Land Board certainly didn't say.

4 The Land Board didn't say that DLNR met its
5 obligation under 91-10-5 or under Section 13-1-35 K,
6 there's nothing in there.

7 But there is certainly that reference where
8 they flip the burden of proof to us and say, you didn't
9 disprove all this stuff, and that's just -- it's junk to
10 begin with, and so that's really the problem, and that's
11 the point we want to stress.

12 THE COURT: As to your arbitrary and
13 capricious regarding the treatment given to neighbors
14 of -- 'cause I was looking at in terms of the findings
15 of fact, and there's not too much detail. I think it
16 was, like, 69, FOF 69 maybe A, B, C, something of that
17 nature, that dealt with those three other situations.

18 MR. KUGLE: Yeah. So the decision didn't
19 describe them, and we have the record citations to the
20 underlying approvals and documents.

21 What I have in front of me is the actual
22 exhibit numbers, and so our papers talk about the
23 information, but it's really --

24 THE COURT: Let me ask this. Are the
25 Daileys planning to submit an application for an SSV,

1 given that there's a mid-November 2015 deadline?

2 MR. KUGLE: Your Honor, at this point I
3 think that a decision hasn't been made. I mean, we are
4 in here asking that you reverse that Land Board decision
5 because we think it's wrong and inclusive of that
6 requirement.

7 The one thing that I think you don't get
8 the full flavor of from the briefs is that the -- and
9 both parties, it's in the answering brief, it's 23 feet.

10 The Board decision mentions that the house
11 sits 28 feet from the current shoreline, and I think
12 that's a typo, everybody agrees. I think the answering
13 brief in the footnote says it's 23 feet. Our evidence
14 said it's 23 feet at its largest.

15 But the point is, that a revetment of the
16 type that the City usually approves, you're talking
17 about 1-to-1 or 1-to-2 slope. You need footprint,
18 you're talking 40 feet inland, to build that kind of
19 revetment, and there's just not the space where that
20 house that was built, slab on grade, the family
21 residence sits, with respect to where the shoreline and
22 this, the current revetment are. So there are some
23 major logistic problems.

24 And again, just to set context, they did go
25 through the shoreline setback variance procedure.

1 The City said in 2010, Okay, we will let
2 you do a new -- we'll let you do a structure on either
3 side of the house where you have yard. It's got to be a
4 revetment. It can be a wall in front of the structure,
5 and they said, just don't put any of it in the
6 conservation district. That's why there exists that
7 shoreline certification, because everybody thought,
8 Okay, the prior shoreline surveys had drawn that line
9 more makai.

10 In 2011 the State said, No, guess what?
11 It's going to be at the back of these rocks, which means
12 everything comes out and moves back however many feet
13 will be necessary.

14 And I should say there's one other thing
15 which we didn't touch on today, the other practical
16 problem to that solution is the Mokuleia Beach Colony,
17 which is the adjacent property, that as a seawall that
18 was built with a permit and that matches up directly
19 with the unimproved area of this revetment, i.e., its
20 original location, and this is discussed in Land Board
21 Findings of Fact, I think it's No. 67, which talks about
22 that portion of the wall that was changed, that portion
23 that was not.

24 But if boulders come out and the City does
25 allow the Daileys to put in a wall, it's going to be set

1 back 15 to 20 feet with an open gap for the ocean to
2 come behind Mokuleia Beach Colony's wall. They're not
3 connected, and there was evidence put in about this.

4 They did not build the return on their wall
5 that the City required for, basically, lateral
6 protection is what a return is. In other words, during
7 the site inspection, we were all out there. It's
8 eroding today through these boulders because water
9 washes through them.

10 But when that stuff is not there, or if the
11 City allows us to build a wall that's setback some 20
12 feet from our neighbor's property, there's going to be a
13 gap that won't match up, and so those were some -- there
14 was much evidence about that, and that was a practical
15 issue that answers.

16 I think your question, we really haven't
17 decided what we'll do. We don't think that the Land
18 Board's decision was correct, which is why we're here in
19 Court, and how we deal with the Court's ruling, I think
20 is the next step for the Daileys and myself to talk
21 about.

22 THE COURT: All right. Thank you, all
23 sides, for the extensive argument, as well as the briefs
24 and the record that was submitted to the Court.

25 The Court has had a lot of education in

1 this respect regarding a revetment, regarding a hybrid
2 seawall.

3 In looking at the Findings of Fact,
4 Conclusions of Law decision and order, which was quite
5 exhaustive and extensive with respect to what was built,
6 the subsequent work that was done to this revetment, and
7 in terms of the permitting process which dated back to,
8 I think, there's some reference regarding 1992, and the
9 enforcement action was not pursued, in terms of aerial
10 surveys and maps, aerial maps and surveys that were
11 done, and that the shoreline certification was done in
12 September 2011.

13 But what is evident from the Court with
14 respect to the Findings of Fact, Conclusions of Law and
15 the burden of proof, the Court is going to remand it
16 back for amended FOF COL decision and order, to the
17 extent that it is the Board's burden with respect to the
18 initial nonconforming, to the extent that whether or not
19 the structure that was built late '60s, early '70s,
20 whether or not there was anything to controvert certain
21 testimony, declarations submitted by the appellants, to
22 wit: That the original structure, a revetment, was or
23 was not -- well, for the Board's purpose, to refute that
24 it was not a nonconforming, and that it was in
25 conservation land.

1 Because I don't think in any of the
2 findings of fact there was any credibility
3 determinations to say that these oral testimony, the
4 declarations submitted by appellants were not credible,
5 to say that the revetment that was built was a
6 nonconforming structure, was built within the shoreline
7 setback.

8 So to the extent that it affects any of the
9 Findings of Fact, Conclusions of Law, I'm not reopening
10 it for any kind of evidentiary or to open any kind of
11 hearing, but to allow the hearings officer, given the
12 Court's decision with respect to the burden of proof,
13 because apparently, and I agree with the appellant, that
14 the burden of proof improperly shifted, was placed upon
15 the Daileys to say that it was a nonconforming, as
16 opposed to the Board, 'cause apparently the Board and
17 Department's decision rested on what was done in 2006,
18 2007, as opposed to previously, was it a nonconforming
19 structure originally? If it was a nonconforming
20 structure, okay, then what happened subsequently?
21 Because in looking at some FOF and COL, it seems as
22 though there was a legal assumption that it's not a
23 nonconforming.

24 So not reopening it, just to allow the
25 hearings officer to submit amended FOF COL and see where

1 we go from there.

2 So for, who wishes to issue the order
3 regarding remand, and if it necessitates amending
4 certain FOF and COL, I'm assuming the process allows one
5 side or the other also to file exceptions. I think
6 that's usually the case; right?

7 So have the hearings officer do amended FOF
8 COL amended decision and order, and then one side or
9 the other need to file exceptions, and then we take it
10 from there.

11 Who wishes to do the order regarding
12 remand?

13 MS. CHUN: I will, Your Honor.

14 THE COURT: Thank you, Ms. Chun.

15 Court stands in recess.

16 (Proceedings concluded.)

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STATE OF HAWAII)
CITY AND COUNTY OF HONOLULU)
_____)

I, NIKKI BEAVER CHEANG, RPR, CRR, CSR-340, an
Official Court Reporter for the First Circuit Court,
State of Hawaii, hereby certify that the foregoing
comprises a full, true and correct transcription of my
stenographic notes taken in the above-entitled cause.

Dated this 23d day of January, 2015.

OFFICIAL COURT REPORTER

/s/ Nikki Beaver Cheang
NIKKI BEAVER CHEANG, CRR, CSR-340