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Attorneys for Petitioner/Appellee
Department of Land and Natural Resources,
Office of Conservation and Coastal Lands

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

In The Matter of a Contested Case to
Appeal The Board of Land and Natural
Resources' Finding of Violation for
Unauthorized Repair And
Reconstruction of a Boulder
Revetment At Mokuleia, District of
Waialua, Oahu,
TMK: (1) 6-8-003:018

DLNR File No. OA-07-06

PETITIONER/APPELLEE
DEPARTMENT OF LAND AND
NATURAL RESOURCES/OFFICE OF
CONSERVATION AND COASTAL
LANDS' EXCEPTIONS TO THE
BOARD OF LAND AND NATURAL
RESOURCES' PROPOSED REVISED
FINDINGS OF FACT, CONCLUSIONS
OF LAW & DECISION AND ORDER
ON REMAND; CERTIFICATE OF
SERVICE

Oral Argument

Date: May 26, 2017

Time: 8:00 a.m.

PETITIONER/APPELLEE DEPARTMENT OF
LAND AND NATURAL RESOURCES/OFFICE
OF CONSERVATION AND COASTAL LANDS'
EXCEPTIONS TO THE BOARD OF LAND AND NATURAL
RESOURCES' PROPOSED REVISED FINDINGS OF FACT,
CONCLUSIONS OF LAW & DECISION AND ORDER ON REMAND

Pursuant to Haw. Admin. R. § 13-1-42 and Amended Minute Order Number 22 dated March 30, 2017, Petitioner/Appellee Department of Land and Natural Resources/Office of Conservation and Coastal Lands (“DLNR”) submits its exceptions to the Board of Land and Natural Resources’ Proposed Revised Findings of Fact, Conclusion of Law & Decision and Order on Remand (“Proposed Decision on Remand”). DLNR takes exception to the Proposed Decision on Remand with respect to OCCL/DLNR’s burden to prove not nonconforming use. While the Board of Land and Natural Resources’ (“Board”) is confined to the Court’s Order Remanding Proceedings to Amend Findings of Fact, Conclusions of Law and Decision and Order (“Remand Order”), the conclusions of law pertaining to the parties’ respective burdens of proof (set forth below) need to be revised so that the Board’s decision is clear and supported by the applicable law.

As the Board notes at the outset of the Proposed Decision on Remand (at p. 1), the Court remanded this case in part “for amended Findings of Fact, Conclusions of Law and Decision and Order . . . regarding whether the DLNR can meet its initial burden to prove by a preponderance of the evidence that the original structure was not nonconforming.” Respectfully, the Court’s conclusion that it was DLNR’s burden to prove that the Dailey’s original rock structure was not nonconforming is without legal support.

There is no statute or rule that requires that a party – not the Daileys or DLNR -- prove that the structure is **not** nonconforming. To the contrary, pursuant to Haw. Admin. R. § 13-5-37 (1994) and Haw. Admin. R.

§ 13-5-7(f) (2011), the “burden of proof to establish that the land use or structure is legally nonconforming shall be on the applicant.” See Proposed Decision, Conclusion of Law, ¶ 50 at 50.

Here, there can be no dispute that the Daileys were the applicant on the conservation district use application (“CDUA”) and it was therefore their burden to prove by a preponderance of the evidence that their rock structure was legally nonconforming as part of their application. See Haw. Admin. R. § 13-5-35 (1994) (for emergency permits, “if there is a question regarding legality, the burden of proof shall be upon the applicant”); Haw. Admin. R. § 13-5-35(c) (2011) (if there is a question regarding legality of a land use structure, the burden of proof shall be on the applicant). Subsequently, as the Board has properly concluded, when the Daileys claimed legal nonconforming use as an affirmative defense to DLNR’s enforcement action, they had the burden of proving their rock structure was a nonconforming use. HAR 13-5-37(a)(1994). See *City of Tucson v. Clear Channel Outdoor, Inc.*, 181 P.3d 219 (Ariz. 2008); *Fiano, et al. v. Monahan*, 205 A.2d 183 (Conn. 1964). In reviewing the Daileys’ CDUA and in bringing this enforcement action, DLNR did not have the burden to prove that the Daileys’ rock structure was not nonconforming.

While the Board must comply with the Remand Order, the Proposed Decision on Remand needs to be clarified so that it does not suggest or support the erroneous legal conclusion that it was DLNR’s burden to prove that the Daileys’ rock structure was not nonconforming. The Conclusions of

Law that need to be clarified are set out below (text to be added is underlined and deletions are bracketed):

22. On remand, the Circuit Court of the First Circuit instructed the hearings officer and the Board to determine whether OCCL/DLNR can meet “its initial burden to prove by a preponderance of the evidence that the original structure was not nonconforming.”

at p. 45

22a. The Board has found no authority (and neither of the parties cites to authority) to support the legal conclusion that OCCL/DLNR had the initial burden to prove by a preponderance of the evidence that the Dailey’s original rock structure was not nonconforming. However, to comply with the Order on Remand, the Board assumes that OCCL/DLNR had the burden to prove the structure was not nonconforming and reviewed the record to determine whether OCCL/DLNR met its burden of proof.

at p. 45

23. Assuming OCCL/DLNR had the burden to prove that the original rock revetment was ‘not nonconforming’, OCCL/DLNR would have had to prove either that: (1) it was completed in the shoreline setback area after June 22, 1970 without the required variance; or (2) it was originally built, at least in part, in the conservation district. (There are other ways a structure can be not nonconforming, but these are the only possibilities supported by evidence in this record.)

at p. 45

27. Assuming OCCL/DLNR had the burden of proof, OCCL/DLNR [has] did not, however, [proven] prove a post-June 22, 1970 date of completion. OCCL/DLNR had no positive evidence on this point, except that it was not there in 1967, and from the Fraser testimony, it had been completed by 1978. (FOF 73).

at p. 46

30. Assuming OCCL/DLNR had the burden of proof, OCCL/DLNR[’s] cannot meet that burden of proving that the original revetment was completed after June 22, 1970 [cannot be met] solely by rebutting contrary testimony.

at p. 46

40. The remaining conclusions of law, and decision and order are based on the above conclusions of law that assume for purposes of this remand that OCCL/DLNR had the burden of proof and that OCCL/DLNR did not [has not met its burden to] prove that the original revetment was not nonconforming, and therefore, in this enforcement proceeding, it must be treated as nonconforming according to the court's remand order.

at p. 48

41. The violation notice served in late 2006 was not for the Daileys having the original revetment. OCCL/DLNR had dismissed the earlier December 2004 citation for the revetment because [OCCL/DLNR could not prove, at the time, that the revetment was not nonconforming] it could not be determined at that time that the revetment was nonconforming. (FOF 11, Exh. B-4)

at p. 48

As noted at the outset, DLNR takes exception to the foregoing conclusions to the extent that they are premised on the Court's incorrect legal conclusion and directive. DLNR's proposed revisions clarify that in complying with the Remand Order, the Board assumes (but does not concur with) the Court's erroneous conclusion concerning DLNR's burden of proving not nonconforming use solely for purposes of the remand.

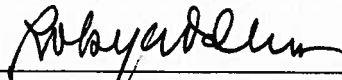
This enforcement action arises out of the violation notice that DLNR served on the Daileys for violations they committed in 2006 and 2007 – not for their original rock structure. See Proposed Decision on Remand, Conclusion of Law ¶ 41 at 48; ¶ 42 at 49. DLNR had the burden of proving the Daileys' violations by a preponderance of the evidence (Haw. Rev. Stat. § 91-10(5); Haw. Admin. R. § 13-1-35(k)) and DLNR met its burden of proof. See Proposed Decision and Order, ¶2 at 67 (DLNR met its burden of proving by a

preponderance of the evidence that the Daileys violated H.R.S. § 183C-4(b) and H.A.R. § 13-5-30(b)(1994) by the construction work performed on the original loose rock revetment that resulted in a new and unauthorized structure).

In defense to DLNR's enforcement action, the Daileys argued that the rock structure was a legal nonconforming use of the Conservation District. It was therefore the Dailey's burden to prove nonconforming use and they failed to do so. See Proposed Decision and Order, Conclusions of Law, ¶ 34 at 47; ¶ 64 at 52 citing *City of Tucson*, 181 P.3d 219, 231 (Ariz. 2008).

For the foregoing reasons, DLNR respectfully urges the Board to clarify the proposed Decisions and Order as set forth above.

DATED: Honolulu, Hawai'i, May 2, 2017.



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CERTIFICATE OF SERVICE

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The undersigned hereby certifies that a copy of the foregoing document filed in the above case was duly served on the following parties at their last known addresses via hand-delivery or U.S. mail, postage prepaid as shown below:

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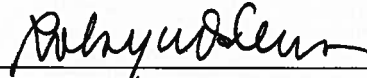
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DATED: Honolulu, Hawai'i, May 2, 2017.



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