BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI‘I

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 Mokulē‘ia, District of Waialua, O‘ahu, TMK: (1) 6-8-003:018	OCCL/DLNR File No. OA-07-06

Board of Land and Natural Resources’ Proposed

Revised Findings of Fact, Conclusions of Law, &

Decision and Order:

On Remand

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INTRODUCTION

On March 20, 2015, in the agency appeal to the Circuit Court of the First Circuit in Civil No. 14-1-1541-07, the court issued its "Order Remanding Proceedings to Amend Findings of Fact, Conclusions of Law and Decision and Order" including the following:

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 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 the DLNR can meet its initial burden to prove by a preponderance of the evidence that the original structure was not nonconforming.

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 respective burdens of proof with regard to producing evidence and persuasion in accordance with Haw. Rev. Stat. (H.R.S.) § 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.

On remand, the hearings officer made amended Findings of Fact ("FOF"), Conclusions of Law ("COL"), and Decision and Order ("D&O"). The Daileys submitted written exceptions, and

DLNR submitted a memorandum in support of the hearings officer's amended FOF, COL, and D&O. The parties orally argued before the Board of Land and Natural Resources ("BLNR" or "Board") on August 28, 2015.

After thorough and independent review of the evidence in the record in this action and reviewing the submittals of the parties, the Board submits the following proposed FOF, COL, and D&O. With due respect to the Board's capable and experienced hearings officer, the Board finds it necessary to modify the hearings officer's amended FOF, COL, and D&O after considering the exceptions and memorandum, and after thoroughly reviewing the evidence in the case.

The Board may modify the hearings officer's proposed decision and render a decision. H.R.S. § 91-12, Hawaii Administrative Rules (H.A.R.) § 13-1-45. The Board also believes that because this proposed decision differs substantially from the proposed decision submitted to the parties earlier, and due to changes in the Hawaii Administrative Rules discussed in conclusions of law below, they should have the opportunity under H.R.S. § 91-11 to submit exceptions to this new proposed decision, and oral argument to the Board.

If any statement denominated a COL is more properly considered a FOF, then it should be treated as an FOF; and conversely, if any statement denominated as a FOF is more properly considered a COL, then it should be treated as a COL.

Proposed FOF not incorporated in this Decision and Order have been excluded because they may be duplicative, not relevant, not material, taken out of context, contrary (in whole or in part) to the found facts, an opinion (in whole or in part), contradicted by other evidence, or contrary to law. Proposed FOF that have been incorporated may have minor modifications or corrections that do not substantially alter the meaning of the original findings.

I. FINDINGS OF FACT[1]

[1] References to the record are enclosed in parentheses, followed by a party's proposed Finding of Fact ("FOF"), if accepted. "Exh." refers to exhibits accompanying written or oral testimony, followed by the exhibit number and

A. Sequence of Events Regarding Violation Allegations

1. On December 29, 2004, after receiving complaints regarding unstable rocks along the Mokule'ia (O'ahu) shoreline of Petitioners' (Michael Dailey and Elizabeth Dailey--the "Daileys") property, posing a hazard and blocking pedestrian access, the Department of Land and Natural Resources' Office of Conservation and Coastal Lands ("OCCL/DLNR") conducted a site inspection and noted that large portions of a rock pile revetment[2] were scoured by wave energy, and the structural integrity of the revetment was compromised. Rocks had dislodged from the revetment and rolled down onto the beach. (Exh. B-7[3], p. 2) [Daileys FOF 6; OCCL/DLNR FOF 15-16].

2. On February 7, 2005, the landowners, Michael Dailey and his mother, Elizabeth Dailey, were sent and received a Notice and Order dated January 14, 2005, of the presence of an unauthorized shoreline structure that was beginning to fail due to wave scour and recommended its removal. A second Notice and Order dated March 2, 2005, was issued on March 4, 2005, as the condition of the revetment had worsened since the previous site inspection. (Exhs. B-1, B-2, B-7, p. 2) [Daileys FOF 6; OCCL/DLNR FOF 17-19].

3. In the January 14, 2005 Notice and Order, OCCL/DLNR further noted that it had no record authorizing the placement of the structure, that its staff had confirmed that the City and County of Honolulu ("C&C") Department of Planning and Permitting ("DPP") had no records of approval for the structure. Historic photographs showed no revetment in 1967, and the revetment in 1986. An OCCL staff member superimposed an approximate 1975 shoreline boundary line on a photo of the revetment in December 2004 and concluded that much of the revetment, as it

page or table number, if necessary. Written testimony is referred to as follows: name of the witness, the type of written testimony, and the page number or paragraph ("¶") of that testimony. "WDT" means written direct testimony or witness statement. Oral testimony is referred to as follows: name of the witness, transcript ("Tr."), and the page number and line ("l.") where appropriate.

[2] "Revetment" is not defined in state conservation district rules but taken in pari materia per Hawaii Revised Statutes (H.R.S.) § 1-16, is found and defined in Hawaii Administrative Rules (H.A.R.) § 13-222-2 as "a sloping facing of stone, concrete, blocks or other similar material built to protect the e[m]bankment or shore against erosion by wave action or current."

[3] Exh. B-7 is a copy of the May 26, 2007 Land Board submittal. Color copies of the internal exhibits to Exh. B-7 have been stipulated into evidence by the parties pursuant to the remand order. The stipulation was filed on June 25, 2015 at the same time as the Hearings Officer's proposed findings.

existed then, would have been makai of the shoreline. (Exh. B-1, pp. 1-2, figures 2-3. But see FOF 76-115 infra).

4. On March 15, 2005, correspondence was received by OCCL/DLNR from the Daileys' attorney at the time, stating that the partial failure of the rock pile revetment appeared to be endangering the home on the property and that no action had been taken because the homeowner was not sure what action could be taken. The correspondence also stated that the Daileys would work as quickly as possible to obtain the necessary permits for repairing the revetment. (Exh. B-7, p. 2).

5. After meeting with the Daileys' attorney on March 17, 2005, OCCL/DLNR requested a survey of the property and evidence of when the rock pile revetment was constructed. (Exh. B-7, p. 2).

6. On May 17, 2005, the Daileys' surveyor reported that, due to wave impact the previous winter, a portion of the rock pile revetment was now located makai of the shoreline. (Exh. A-5, pp. 4-5).

7. On August 22, 2005, an emergency permit conservation district use application ("CDUA") was received by OCCL/DLNR from the Daileys to repair the failed structure and to remove those portions that were encroaching on state land. (Exh. B-7, p. 2).

a. The Daileys' CDUA stated that it would "restore the rock revetment to its condition as existed prior to the damage. The repairs will not result in more than a twenty percent increase in the footprint of the damaged structure." (Exh. A-5, p. 5).

b. OCCL/DLNR rejected the application to repair the structure, because OCCL/DLNR had no evidence the structure was legal or nonconforming and also believed the structure was not authorized by any government agency. In response to the CDUA, OCCL/DLNR staff also noted that the C&C's DPP stated to OCCL/DLNR in a letter of November 5, 2005 (No. 2005/ELOG-2469) that the boulder revetment was illegal and the Daileys had been cited in 1992 (No. BV-92-

06-004) for the unauthorized placement of boulders in the shoreline setback area. The 1992 violation had been referred to C&C's Division of Land Utilization, but for unknown reasons, it had never been pursued. (Exhs. A-15, p. 2; B-1, pp. 1-2; B-7, pp. 2-3) [Daileys FOF 8; OCCL/DLNR FOF 22-23].

8. On December 20, 2005, OCCL/DLNR informed the applicant that: 1) it could not support the granting of an after-the-fact permit, because the revetment clearly has had and will continue to have a negative impact on the shoreline through the loss of beach area and accelerated erosion fronting the structure; 2) there was no clearly demonstrated "emergency" present for the land owner, because the erosion rate did not pose a significant immediate erosion threat to the dwelling; 3) the unstable nature of the structure was perceived by OCCL/DLNR to be a significant safety issue to the general public traversing the area and [consequently removal rather than preservation of the shoreline structure] could be considered "emergency" in nature; and 4) the loss of land through erosion was a secondary concern to OCCL/DLNR, which has a primary function of protecting and preserving the public beach area for future generations. (Exh. A-6, p. 2) [Daileys FOF 9].

9. In the same December 20, 2005 letter, OCCL/DLNR also stated that "(i)t is clear that the structure was built sometime between 1969 and 1988[4] and thus NOT eligible for state non-conforming status, however, it is unclear if the structure was placed within the conservation district at the time of construction." (Exh. A-6, p. l).

10. OCCL/DLNR further determined that: 1) it could not process the emergency permit request, because the legality of the structure had to be resolved before any requests for land use approval were processed by OCCL/DLNR; 2) the pending conservation district violation case was being withdrawn and would be closed upon removal of the portions of the structure that were encroaching onto state lands as mapped in the May 2005 survey map included in the Daileys' August 2005 CDUA submittal (*supra*, FOF 6); and 3) once the encroaching portions of the revetment were removed from the conservation district, it should be replaced with a new engineered revetment located as far mauka as possible and designed to enhance public access

[4] OCCL/DLNR had previously estimated that the structure had been built between 1967 and 1986, *supra*, FOF 3.

along the structure with a public easement along a clear walkway, conducted in conjunction with relocating the dwelling landward to allow for more accommodation space for the beach. (Exh. A-6, pp. 1, 3) [Daileys FOF 9].

11. The case was eventually closed. Although OCCL/DLNR believed that the structure was unauthorized, it could not determine exactly when or where the structure had been built in relation to the shoreline. Based on aerial photographs, it was believed that it had been built between 1967 and 1986. (Exh. B-7, p. 3) [Daileys FOF 3g, 28; OCCL/DLNR FOF 24, 27].

12. In December 2006, the violation case was re-opened after numerous complaints were received that construction on the shoreline structure was continuing, and on December 23, 2006 a Notice and Order was delivered to Michael Dailey by a Conservation Enforcement Officer for "unauthorized placement of rocks as part of a repair effort to an existing unauthorized revetment." The Notice and Order stated that "[y]ou are hereby ordered to cease any further activity on the subject premises. Should you fail to cease such illegal activity immediately, you will be subject to fines up to $2,000 per day pursuant to Chapter 13-5, H.A.R., in addition to administrative costs incurred by the Department." (Exhs. B-5; B-7, p. 3) [OCCL/DLNR FOF 31, 33].

13. Site inspections by a Conservation Enforcement Officer on December 28, 2006, and OCCL/DLNR staff on December 29, 2006, noted active work was still being conducted on the shoreline structure. On December 28, 2006, conversation with the workers at the Daileys' property indicated that the Notice and Order to cease construction was known to the workers, as an individual stated that the owner told them he (the owner) was being fined anyway, so go ahead with the construction. On December 29, 2006, conversation with the workers at the Daileys' property indicated that it was known that the continued work was subject to daily fines. (Exh. B-7, p. 3, exhibits 12-13) [OCCL/DLNR FOF 32, 35].

14. On February 16, 2007, Department of Accounting and General Services ("DAGS") Survey Division Staff conducted a site inspection to investigate improvements relative to what was previously submitted to OCCL/DLNR by the landowners' surveyor. Measurements

indicated that improvements fell along or slightly seaward of what was mapped as the former shoreline (*supra*, FOF 6, 10), and it was noted that unauthorized sand bags littered the beach, sunken areas were developing within the fill materials mauka of the unauthorized structure, and large sections of a newly built wall were failing due to scouring and wave overtopping. (Exh. B-7, pp. 3-4).

15. The evidence of wave overtopping, scour, debris and sandbag failure observed in the February 16, 2007 site inspection showed that the highest wash of the waves was mauka of the newly built wall, *supra*, FOF 14. (Exh. B-7, p. 6).

16. On February 21, 2007, a site inspection by a Conservation Enforcement Officer noted work being conducted to stabilize palms along the wall and the retrieval of boulders that had rolled off the wall toward the sea. (Exh. B-7, p. 4) [OCCL/DLNR FOF 34].

17. On May 22, 2007, the Daileys' consultant conducted a site visit to assess the present condition of the shoreline at the Daileys' and adjacent properties. Her description of the current structure was as follows:

> The existing shore protection structure is a seawall comprised of very large boulders with a concrete cap. Boulders had been previously placed on the shoreline in the form of a revetment. These boulders were re-used to build the existing seawall, and a few boulders are still situated along the seaward base of the wall. The boulders also remain along a short reach between the property's seawall and the Mokuleia Beach Colony ("Colony") seawall. The seawall has a curved flank section at the east end of the property. The top elevation of the wall is estimated to be about +10 to +12 feet MLLW. The sand elevation along the base of the seawall is estimated to vary between +3 to +5 feet MLLW (*emphasis added*). (Elaine Tamaye, Exh. A-11, p. 1).

18. At the Board of Land and Natural Resources' ("Board") meeting on May 25, 2007, OCCL/DLNR stated that: 1) the Board had jurisdiction over land lying makai of the shoreline (the conservation district) pursuant to H.R.S. § 205A-1; 2) there was sufficient cause to bring the matter to the Board since it was evident that portions of the structure were within the conservation district pursuant to H.A.R. § 15-15-20 (Standards for determining "C" conservation district boundaries); 3) the Board may undertake enforcement actions on unauthorized artificial

shoreline structures even without benefit of a shoreline delineation in order to uphold the directives of H.R.S. § 205A-43.6(a), which requires the landowner in violation to either remove the structure or correct the problem; and 4) "[t]herefore the Board, under [§ 205A-43.6] (c), may assert its authority to compel the removal of the structure or correct the problem in order to protect the coastal resources and uphold the directives of Chapter 205A, H.R.S." (Exh. B-7, pp. 4, 7) [OCCL/DLNR FOF 43].

19. OCCL/DLNR recommended that the Daileys: 1) be found to have violated H.R.S. Chapter 183C and H.A.R. Chapter 13-5 and to have allowed the unauthorized repair/reconstruction of a revetment/seawall and failing to cease and desist after written notification on at least three occasions; 2) be fined $10,000 (an $8,000 total for the four conservation district violations and an additional $2,000 for administrative costs); and 3) remove the unauthorized improvements within sixty days of the Board's action. (Exh. B-7, p. 8) [OCCL/DLNR FOF 44-45].

20. On May 29, 2007, OCCL/DLNR notified the Daileys that the Board had approved OCCL/DLNR's recommendation and that the Daileys' oral request for a contested case was noted.[5] (Exh. B-8) [Daileys FOF 27; OCCL/DLNR FOF 48].

21. On June 4, 2007, the Board received the Daileys' written Petition for a Contested Case. (Exh. B-9) [Daileys FOF 27].

22. On July 25, 2007, Lawrence Miike was appointed hearings officer. (Minute Order #1).

23. On October 11, 2007, a hearing on standing and a scheduling meeting were held. In addition to the Daileys and OCCL/DLNR, Mokuleia Beach Colony ("Colony") had also applied to be a party "as an immediately adjacent property owner and as otherwise permitted by law." (Minute Order #2).

[5] This FOF, COL, and D&O is based entirely on the results of the contested case hearing, de novo, not influenced by the May 2007 decision.

24. At the October 11, 2007 hearing on standing, the Daileys and OCCL/DLNR were granted standing and the Colony withdrew its application. (Minute Order #3).

25. At the October 11, 2007 hearing on standing, counsel for the Daileys and OCCL/DLNR had agreed to have further discussions before the contested case proceedings were scheduled. And after the standing hearing, the Colony had re-applied to be a party. Scheduling of the hearing on standing and contested case proceedings were deferred until they were announced through a Minute Order. (Minute Order #4).

26. The hearing on standing and meeting to schedule the contested case proceedings were held on November 28, 2007, but at the request of the Daileys and agreement of OCCL/DLNR, both the contested case proceedings and hearing on standing were stayed until further notice. (Minute Order #6).

27. On July 24, 2008, the Daileys submitted to the C&C's DPP, the Draft Environmental Assessment for a Shoreline Setback Variance ("SSV") Application for a Seawall, and on June 30, 2009, the Daileys submitted their SSV application. (Letter to the Hearings Officer from Michael C. Carroll, then attorney for the Daileys, October 14, 2009).

28. On April 23, 2010, C&C's DPP:

a. Stated that most of the revetment--approximately 147 feet of a shoreline boulder structure--was reconstructed into a grouted seawall ranging in height from two to six feet above the beach, with a two- to three-foot wide concrete cap (Exh. A-15, p. 2.);

b. Stated that a better solution than the seawall proposed by the applicant was a sloping revetment, because it would cause less beach loss, and that there was enough room to build such a revetment except right in front of the Dailey home (Id., pp. 8-9);

c. Denied the request to allow a two-tiered seawall in the shoreline setback area by adding another tier to an existing unauthorized seawall and boulder structure (revetment);

d. Approved a SSV to allow a seawall and/or revetment, built steeper near the dwelling, where there was less room, but more sloping elsewhere (Id., p. 11);

e. Provided that the "replacement structure should be located mauka (landward) of the existing seawall/revetment and outside the Conservation District" (Id.); and

f. Required the Daileys to submit a current certified shoreline survey, landward of which the new structure shall be constructed, with no part of the structure constructed in the conservation district. (Id.) [OCCL/DLNR FOF 61-63].

29. According to the Daileys' coastal engineer, a properly designed revetment (a 1-to-2 slope) requires a 30-foot horizontal footprint given the 12-foot crest elevation and 3 feet below mean sea level toe (foundation). (Exh. A-15 at pp. 8-9).

30. On December 7, 2010, Michael C. Carroll and A. Bernard Bays, of Bays Deaver Lung Rose & Holma, withdrew as counsel for the Daileys. ("Notice of Withdrawal of Counsel for Petitioners Elizabeth M. Dailey and Michael K. Dailey," December 7, 2010).

31. On September 15, 2011, the shoreline was certified by the Chairperson as being mauka of the rock structure, thereby placing the entire new wall, as well as the remainder of the rock revetment, in the conservation district. (Exh. B-10) [OCCL/DLNR FOF 53].

32. On April 1, 2013, a status conference was held, at which time the Daileys were requested to provide a status report. (Minute Order #7).

33. On May 3, 2013, Gregory W. Kugle, of Damon Key Leong Kupchak Hastert, informed the Hearings Officer that he now represented the Daileys. (Letter to the Hearings Officer from Gregory W. Kugle, May 3, 2013).

34. On May 3, 2013, the Daileys submitted a status report identifying a meeting to be held on May 8, 2013, between attorneys for the Daileys and the adjoining Colony with the following objectives: 1) to reach an agreement on the interface between the Daileys' approved SSV revetment and the Colony's seawall, in which case a revised building plan would be submitted to

C&C's DPP within 30 days of the agreement; or 2) if no agreement could be reached, the Daileys would request a meeting with OCCL/DLNR to discuss an acceptable alternative that would allow implementation of the SSV to the extent practicable. (Status Report to the Hearings Officer, from Gregory W. Kugle, Damon Key Leong Kupchak Hastert, attorney for the Daileys, May 3, 2013).

35. A status and prehearing conference was held on June 24, 2013, at which time it was reported that no agreement could be reached between the Daileys and the adjoining Colony, and it was agreed that the contested case hearing would proceed. The date for the evidentiary hearing was established as September 25 and 26, 2013. (Minute Orders #8 and #9).

36. In the Notice of Hearing, OCCL/DLNR alleged that the landowner has not removed the unauthorized structure or obtained a permit to repair it in violation of H.A.R. Chapter 13-5, H.R.S. Chapter 183C, H.R.S. Chapter 205A, Coastal Zone Management, and more specifically, H.R.S. § 205A-43.6. (Minute Order #11).

37. In their Petition for Contested Case Hearing, the Daileys had raised the following issues: 1) whether OCCL/DLNR has jurisdiction over the subject matter of the alleged violation; 2) whether the construction/repair of the shore protection structure constitutes an unauthorized land use; 3) whether the Board erred in denying the Daileys' request to dismiss the alleged violations; and 4) whether the Board erred in denying the Daileys' request for a temporary variance or emergency permit. (Minute Order #11).

38. On August 19, 2013, a hearing was held on OCCL/DLNR's motion to quash a Subpoena Duces Tecum and to strike the Notice of Taking Deposition Upon Written Questions that was served on the custodian of records for OCCL/DLNR by the Daileys. The motion to quash and to strike the notice were granted by the Hearings Officer, who concluded that records maintained at OCCL/DLNR are public and reviewable by the Daileys and that subpoenas can be requested for witnesses to appear at the evidentiary hearing. ("Hearing on Respondent Department of Land and Natural Resources, Office of Conservation and Coastal Lands' Motion to Quash Subpoena

Duces Tecum and to Strike Notice of Taking Deposition Upon Written Questions," August 23, 2013).

39. At the August 19, 2013 hearing, a revised schedule was established for the contested case's evidentiary hearing, setting October 15 and 16, 2013 as the dates. (Minute Order #12).

40. On August 22, 2013, a site visit was conducted at the Daileys' property. (Minute Order #10).

41. On September 16, 2013, the shoreline certification (*supra*, FOF 31) expired. (Bolander, Tr. at 115-116).

42. On October 8, 2013, a hearing on three motions was held:

a. Daileys' motion to dismiss for lack of enforcement jurisdiction;

b. OCCL/DLNR's motion in limine (for an order precluding the Daileys from presenting any evidence or argument pertaining to the CDUA that they submitted to OCCL/DLNR in 2005); and

c. OCCL/DLNR's motion to add witnesses, or, in the alternative, to extend the deadline for filing witness statements.

Daileys' motion to dismiss was denied without prejudice; OCCL/DLNR's motion in limine was denied; and OCCL/DLNR's motion to add witnesses or to extend the deadline was denied but not summarily prohibited during the evidentiary hearing. ("Order Regarding Hearing on Motions," Minute Order #14).

43. The evidentiary hearing before Hearings Officer Lawrence Miike began and concluded on October 15, 2013. The Daileys were represented by counsel Gregory Kugle, and OCCL/DLNR was represented by Deputy Attorney General Robyn Chun.

44. On December 6, 2013, the parties submitted their proposed FOF, COL, and D&O to the Hearings Officer. (Minute Order #15).

45. On December 18, 2013, the Hearings Officer submitted his proposed FOF, COL, and D&O to the Board. (Minute Order #16).

46. On June 13, 2014, the Board issued its decision.

47. On March 20, 2015, the Circuit Court of the First Circuit issued its "Order Remanding Proceedings to Amend Findings of Fact, Conclusions of Law and Decision and Order."

48. On June 25, 2015, the Hearings Officer submitted his revised proposed FOF, COL, and D&O: On Remand to the Board. A "Stipulation to Substitute Contested Case Record Black and White Photographs with Color Photographs of Original May 25, 2007 Board Submittal, Exhibit "A," and Order" signed by the parties and Hearings Officer was also filed on June 25, 2015 for inclusion into the case record.

49. On June 26, 2015, the Board by minute order issued an "Order Adopting Hearing Officer's Proposed Findings of Fact, Conclusions of Law, & Decision and Order: On Remand" and set a deadline for exceptions and hearing for oral argument on any exceptions filed. (Minute Order #20).

50. On August 28, 2015, counsel for the Daileys and for OCCL/DLNR gave oral arguments to the Board on exceptions taken by the Daileys on the Hearings Officer's revised FOF, COL, and D&O: On Remand.

B. Description of the Site and Construction of the Colony Wall

51. The Colony's and Daileys' properties are on a reef "headland" that protrudes seaward from shore, with embayments situated eastward and westward. (Exh. A-11, p. 2.) There is a sand beach fronting the Daileys' property. The beach is wider on the adjacent property to the east, where there is no seawall, and narrower in front of the adjacent Colony seawall to the west. (Exh. B-4).

52. The house located on the Daileys' property was constructed in 1965 by Michael Dailey's parents, Fred and Elizabeth Dailey. According to Michael Dailey's testimony, the house was approximately 40' from the shoreline at that time. (Michael Dailey, WDT, p. 2;[6] Elizabeth Dailey, WDT, ¶¶ 2-3; Exh. A-15, p. 8.) [Daileys FOF 2.] Currently, the wall of the house is about 23' from the certified shoreline at its closest point. (Based on scaling from Exh. "6" contained in Exh. B-7. Ex. A-15, the shoreline setback variance, gives a 28' figure, but this does not appear to be correct.)

53. The beach was also much wider than currently. At that time, none of the neighboring properties to the west, including the adjacent Colony property, had rock seawalls or revetments, although the Colony had a small wooden seawall a few years before a big storm in 1969. (Michael Dailey, WDT, pp. 2-3; Elizabeth Dailey, WDT, ¶ 4; Exh. A-2).

54. Over the decades since the rock pile structure was built, the beach in front of the Daileys' house eroded such that the shoreline and the ocean moved gradually inland. (Elizabeth Dailey, WDT, ¶ 8; Michael Dailey, WDT, pp. 4-5).

55. Michael Dailey stated that an aerial photograph from 1967 shows the vegetation line to be approximately 30-40 feet from the rear of the house and that the rock structure is now approximately 20 feet from the rear of the house, confirming, in his opinion, that the rocks were placed mauka of the 1967 vegetation line. Based on a Land Court map (Exh. A-1 and A-1a), he concluded that the 1975 shoreline was significantly mauka/inland of the 1965 boundary, leading him to observe that considerable erosion must have occurred between the date of the enactment of the conservation district provisions in 1964, and 1975; and if the rock revetment had been placed on or near the shoreline as it existed in 1965—i.e., on or near the conservation district—then these maps would not show such significant erosion by 1975. Michael Dailey believed that the shoreline shown on the 1975 Land Court Map was the shoreline as it existed in 1975. (Michael Dailey, WDT, pp. 4-5. This is not correct. As discussed in FOF 77-104, infra, this was

[6] While Michael Dailey's WDT is numbered by paragraphs, there are several instances of duplicated paragraph numbers. Thus, for his testimony statements are referenced by page numbers.

actually the shoreline as of May 1964. The actual date of the shoreline that Michael Dailey called the "1965 shoreline" is not apparent from the record.

56. On December 1-4, 1969, an extreme storm/high surf event damaged the Daileys' and Colony's properties, flooding the Daileys' house and the front row of the Colony units and washing away the Colony's wooden seawall. (Michael Dailey, WDT, ¶ 5; Elizabeth Dailey, WDT, ¶ 5). No evidence was produced which indicated the event was a tsunami or hurricane.

57. In 1978, when William Fraser and his wife first saw the Daileys' and Colony's properties, the loose rock revetment was already located in front of the Daileys' property. The Frasers bought their Colony property in 1979. (Fraser, Tr. at pp. 146, 158).

58. In 1983-1984, after the Colony decided to build a seawall or revetment, they were advised by an expert that they should not do what the Daileys had done and stack loose rocks on top of the sand. (William Fraser, WDT, October 14, 2013, ¶ 5).

59. In 1985, the Colony received approval from the C&C for a shoreline protection structure within the shoreline setback area, and in 1987 it received approval of a revision to its 1985 variance. OCCL/DLNR certified the shoreline on June 28, 1989, with the proposed structure being above the debris lines as of April 22, 1985 and June 13, 1989. The Colony then built its current seawall in 1989. (Exh. A-16; Fraser, WDT, ¶ 8).

60. In 1989, the rock pile structure placed by the Daileys was on the eastern side of the Colony's seawall. It was only loose rocks piled along the shoreline of the Daileys' property, with a gap of five to six feet between the pile of rocks and the Colony's seawall. After the Colony completed its seawall, it placed boulders between its seawall and the Daileys' pile of rocks in anticipation of the Daileys building their seawall to join the Colony's. (Fraser, WDT, ¶¶ 8, 11-16; Fraser, Tr. at pp. 148, 151-154, 167-168).

61. The Colony's permit called for a 15-foot return at both ends, but after conversations with Fred Dailey, the Colony understood that it was his intention to connect the end of his planned

seawall on the Colony's side of his property with the Colony's seawall. Therefore, the Colony did not build the return on that end of its seawall. (Exh. A-16; Fraser, WDT, ¶¶ 9-10).

C. Findings of Fact Regarding When Original Revetment Was Built

62. In this case, the original rock revetment would have been nonconforming if it had been: (1) built in the shoreline setback area (immediately mauka of the conservation district) and (2) completed before June 22, 1970.[7] It is also possible for it to be nonconforming if built before October 1, 1964 in the conservation district (makai of the shoreline), but the revetment was definitely built after 1964. If it had been built in the conservation district after 1964 it would not be nonconforming. If the original rock revetment had been completed before June 22, 1970, in the shoreline setback area, entirely outside the conservation district, but came into the conservation district because of the mauka movement of the shoreline, it would be nonconforming.

63. The Daileys assert that the revetment is nonconforming. (Elizabeth Dailey and Michael Dailey's Responsive Brief, September 24, 2013, p. 9).

64. Elizabeth Dailey stated that "(m)y husband constructed the rock revetment in 1970 following the December 1-4, 1969 flooding, in the form and in the location suggested by Mr. Paty." (Elizabeth Dailey, WDT, 09/19/2013, ¶ 7.)

a. Michael Dailey made the same statement: "(m)y father constructed the rock revetment in 1970 following the December 1-4, 1969 flooding, in the form and in the location suggested by Mr. Paty." (Michael Dailey, WDT, 09/23/2013.)

b. On cross-examination, Michael Dailey testified as follows:

> Q Now, you also state in your declaration that this loose rock revetment is the pile of rocks that were placed there in 1970, and specifically in the first half of 1970 as I understand; is that correct?
>
> A Well, I just said that it was there when I came home. You know, beyond that I don't know. And that would be summertime.
>
> Q When you came home?

[7] June 22, 1970, was the effective date of Act 136, SLH 1970, requiring a shoreline setback variance for structures completed in the shoreline setback area after that date.

A Yeah.
Q So sometime during the course of 1970?
A The first half, so I would assume that would put it somewhere in the first half of the year.
Q But you don't know that?
A No.
Q It's just when you came home?
A It was there, they were.
Q The rocks?
A Yeah.
Q So it could have been January for all you know, could have been --
A Yeah, could have been June, could have been any time.
(Michael Dailey, Tr. at 182-183[8]).

65. Mr. Rohrbach had not identified a specific date nor even a year in his Declaration: "Following the 1969 flood/wave damage, Fred Dailey placed large boulders and rocks on his property to protect against future such events." (Don Rohrbach, WDT, 09/21/2013, ¶ 3).

66. Mr. Paty stated that "(f)ollowing the extreme surf event (of December 1969), I spoke with my friend, Fred Dailey, who lived in Mokuleia, about protecting his house with a loose rock revetment located on his property, above the shoreline and the beach. It is my understanding that Fred Dailey constructed such a revetment." (William Paty, WDT, October 9, 2013, ¶ 3).

67. The attachment accompanying Mr. Paty's Declaration contains no reference to when Fred Dailey might have put down the loose rock revetment.

68. The Daileys reviewed all their personal files regarding the house and were unable to locate any information as to when the rock pile structure was built. As with OCCL/DLNR, the Daileys were further unable to locate any correspondence, permits, or applications with regard to the rock structure. (Michael Dailey, WDT, p. 4; Exh. A-5, p. 4).

69. The testimony above firmly establishes that the Dailey loose rock revetment was built sometime after the December 1969 storm event, but does not establish whether or not it was built prior to June 22, 1970. (FOF 64-66)

[8]Michael Dailey is identified incorrectly as "William Dailey" in the Transcript. (Tr., pp. 3, 173.)

70. Due to the passage of time and the death of Fred Dailey, the failure of the Daileys to produce records showing the date of construction of the loose rock revetment does not create an inference that such records exist and are unfavorable to the Daileys.

71. The absence of a building permit for the loose rock revetment does not create an inference that it was built illegally because the testimony indicates that building permits were typically not issued for such structures. (Dolan Eversole, Tr. at 100, ll. 9-10).

72. The Hearings Officer found testimony of the Daileys regarding the date of construction to not be credible, largely based on the fact that the Daileys had previously stated (in their 2005 emergency CDUA) that their "house was built in 1965 by Fred Dailey, who is now deceased" and that the rock revetment was built around that time to protect the house from high winter surf. (Exh. A-5, p. 4).

73. OCCL/DLNR offered no evidence to prove the date the loose rock revetment was built, except for an aerial photograph showing that it was not there in 1967 and the Fraser testimony that it had been built by 1978. (Exh. B-7, p. 3; Fraser, Tr. at 146, 158).

74. Given the type of construction, it is plausible that if the building of the revetment began sometime after December 4, 1969, it could have been completed by the end of the first half of 1970.

75. Because the "first half" of 1970 ends on June 30, Michael Dailey's testimony that when he returned in the "first half" of 1970 the revetment had been completed, does not conclusively establish a pre-June 22 date.

D. Findings of Fact Whether Original Revetment Was Constructed Makai of the Shoreline

76. A second possibility that would make the loose rock revetment not nonconforming was that it was constructed in whole or in part makai of the shoreline.

77. Four maps in the record potentially have information about the location of the shoreline in the first half of 1970, and information for determining whether the seawall construction in late 2006-early 2007 occurred makai of the shoreline as it existed at that time (2006-2007). They will be referred to below as "Land Court Map 6" (Exhs. A-1 and A-1a); "2005 Map" (labeled as "Exhibit 6" contained in Exh. B-7); "2007 Map" (Exh. A-12); and "2011 Certified Map" (Exh. B-10).

78. Land Court Map 6 was approved by the Judge of the Land Court on January 10, 1975. It shows two shorelines. There is a notation written next to the two lines depicted: "Boundary follows along high water mark at seashore (vegetation line)." The arrow from this notation pointing to the outer (makai) line has been cross-hatched out. The shoreline indicated by that arrow has also been cross-hatched out. The inner (mauka) shoreline is evidently the shoreline indicated on this map. (Exhs. A-1 and A-1a).

79. For reasons that will be explained more fully in FOF 90-104, this inner, mauka shoreline represents the shoreline as of May 18,1964. This shoreline will hereafter be referred to as either the "Map 6 shoreline" or the "May 1964 shoreline." The outer, cross-hatched shoreline is an older shoreline whose date of survey is not apparent in the current record. In the vicinity of the Dailey property, Lot 6-A, the two shorelines are about 51' apart at the east (polo field) end of the property, and 70' apart at the west (Mokuleia Beach Colony) end of the property. (Distances from measurements given on Land Court Map 6) (Id.).

80. The Daileys submitted a blown-up portion of Land Court Map 6 that included the Daileys' property, as Exh. "A-1a". On this, the Daileys have placed an arrow next to the outer shoreline, labeled, "Verified by State Surveyor July 1965 and filed in Land Court. This was also the line used in 1964 to determine State Land Use". The Daileys have also labeled the arrow to the mauka inner line: "Map amended January 1975 and certified by the Land Court Judge". To the extent that these labels imply that one shoreline was mapped in 1965 and the other in 1975, this is not correct. (Exh. A-1a; FOF 90-104, infra).

81. The 2005 Map, dated May 17, 2005, was prepared by Ryan Suzuki, a surveyor hired by the Daileys, after the original notice of violation.[9] (Labelled as "Exhibit 6" in Exh. B-7). It shows the Map 6 shoreline, which is labeled "Boundary follows along highwater mark at seashore as shown on Map 6 (vegetation line)." (Id.).

82. This map also shows a second shoreline, mauka of the Map 6 shoreline, labeled "Shoreline follows edge of vegetation line as located on May 17, 2005." (Id.).

83. This 2005 Map is also the first map in the record to show the location of the revetment, labeled "Boulders". The May 17, 2005 shoreline is located along the mauka edge of the boulders, as can be determined from (1) the fact that this is what the pointers on the map indicate—the pointer on the right is more clear (Id.), (2) photos in evidence showing that the vegetation line was, in fact, the mauka edge of the boulders (see photos dated December 2005 in "Exhibit 5" contained within Exh. B-7, showing no vegetation on boulders), and (3) this same surveyor, in the 2007 Map, described the shoreline along the top edge of the boulders, except where it had been altered by the seawall construction. (Exh. A-12).

84. The makai edge of the boulders is very close to the Map 6 shoreline. ("Exhibit 6" in Exh. B-7). There is a small area on the east end where the boulders extend makai of that shoreline, perhaps 3' - 4', and a small area in the center of the revetment where the boulders are 1' - 2' inland of the Map 6 shoreline. This map was not submitted for certification.

85. The 2007 Map, dated July 3, 2007, was prepared by Ryan Suzuki, the Daileys' surveyor who also did the 2005 Map. It also shows the Map 6 shoreline. It has a second, mauka shoreline labeled "Shoreline follows edge of highwater mark as located on July 3, 2007, as evidenced by the top bank of boulders and the bottom of CRM Wall." (Exh. A-12).

86. The 2007 Map was done after the Daileys built the new seawall in early 2007. The inner 2007 shoreline on this 2007 Map is basically the same as the 2005 Map on the roughly 45'

[9] The 2005 Map included in Exh. B-7 has a handwritten notation "Not to Scale." This was apparently written by OCCL staff. In all respects that can be compared with the 2007 Map prepared by this same surveyor, it appears to be to scale.

section of the revetment on the west (Colony) end, but jogs makai about 4' in the remaining area. In this area, the map shows the shoreline along the makai face of the CRM wall built by the Daileys in 2006-2007. (Id.).

87. The 2007 Map shoreline is makai of the 2005 Map shoreline by about 4' where the seawall was built, because that is the approximate thickness of the CRM wall built over the former boulders. It also shows the makai edge of the boulders, in almost the same location as the 2005 Map, with very slight differences. (Id.).

88. The 2007 Map was submitted to DLNR for certification but rejected. (Exh. A-13).

89. The 2011 Certified Map, was done in the presence of Michael Dailey, by a surveyor hired by the Daileys, with input from a technical advisor (Bohlander) to OCCL/DLNR and the state surveyor during the certification process. (Bohlander, Tr. at 112-115).

90. The 2011 Certified Map shows the same Map 6 shoreline as all the other maps, but this line is labeled **"Boundary follows along highwater mark at seashore (vegetation line) as of May 18, 1964."** (Exh. B-10) (emphasis added).

91. The 2011 Certified Map also has a second, more mauka shoreline, labeled "Shoreline follows along vegetation line as located on Sept. 15, 2011." This latter shoreline, dated Sept. 15, 2011, is the only certified shoreline done on the property. (Id.).

92. In the roughly 45' section of the revetment near the Colony, where the revetment was not changed by the construction project in 2006-2007, the 2011 certified shoreline is almost the same as the mauka shorelines shown on the 2005 Map and 2007 Map. The 2011 certified shoreline differs from the shoreline proposed in the 2007 Map in that the 2011 certified shoreline follows along the mauka edge of the CRM wall, not the makai edge, so it is roughly 4' mauka of the shoreline proposed by the 2007 Map. (Exhs. B-7(in "Exhibit 6"), A-12, B-10).

93. The 2011 Certified Map also certified the shoreline on the adjacent property to the east, which is also owned by Michael Dailey, as Lot 60 of Map 12, which the legend to the 2011 Certified Map identified as part of Land Court Application 1810. (Exh. B-10). The 2011 Certified Map also shows two shorelines fronting the makai portion of Lot 60. One is labeled "Shoreline follows along highwater mark at seashore (vegetation line) as of January 24, 1975". The other is labeled "Shoreline follows along debris and/or vegetation line as certified on November 12, 2002". The May 18, 1964 shoreline is not labeled on Lot 60 on the 2011 Certified Map. (Id.).

94. In testimony, Michael Dailey referred to the outer shoreline on the Land Court Map 6 as being the 1965 shoreline, and the inner shoreline as being the 1975 shoreline. He referred to the distance between the two as evidence of erosion during that time period. (Michael Dailey, WDT, pp. 4-5). While there was very probably erosion between 1965 and 1975, the record does not show that one shoreline was mapped around 1965 and the other around 1975. (See supra, FOF 79, 80).

95. It is evident from the title and legend to Land Court Map 6 that it was done to subdivide Lot 6-A from a larger Lot 6. (Exh. A-1). The subdivision was approved by the Land Court Judge on Jan. 10, 1975 per the Registrar of the Land Court. (Id.). It is also apparent that this subdivision had been pending for some time, from the following entry on the map:

> "I hereby certify that the map hereon being a subdivision of Lots 4 and 6 as shown on Map 2 of Land Court Application 1810 (NOW PENDING) as herein entitled, has been examined and checked as to form and mathematical correctness and found to be in accord. Honolulu, Hawaii, July 8, 1965, /s/James M. Dunn, State Land Surveyor". (Id.).

96. It is also evident that the outer crosshatched shoreline on Land Court Map 6 represented a former Land Court boundary, which was later replaced by the inner (mauka) Map 6 shoreline, because the areas of the lots have been revised downward. Lot 6-A, the subject of this violation notice, had its area revised downward by 0.251 acres, which is consistent with losing 51' - 70' of depth along the ocean frontage of the property. (The ocean frontage is about 192' on a curve, 180' on a straight line.). (Exhs. A-1, A-1a).

97. Land Court Map 6 also bears the notation "Map as shown hereon has been amended by Order of the Judge of the Land Court dated January 6, 1975. Honolulu, Hawaii, January 6, 1975, /s/Kazutaka Saiki, State Land Surveyor". (Exh. A-1).

98. There is nothing in the record to indicate whether Land Court practice in 1975 would have required a more contemporaneous survey than a May 18, 1964 survey to establish the shoreline boundary shown in the map amended by the Land Court judge on Jan. 6, 1975.

99. Land Court Map 6 itself bears the date "May 18, 1964", immediately to the left of the surveyor's stamp, and has a handwritten entry "filed July 13, 1964". (Id.).

100. On Land Court Map 6, there is an entry indicating that it had been checked to form and mathematical correctness on July 8, 1965. It would have been necessary to check the mathematical correctness to revise the areas of the lots because of erosion from the prior shoreline. This is a further indication that the inner shoreline on Map 6 was mapped before July 1965. (Id.).

101. The most reasonable inference from the above evidence and findings is that the surveyor, in preparing the 2011 shoreline certification, researched the prior shoreline surveys and correctly determined that the inner (mauka) shoreline on Land Court Map 6 was actually mapped as of May 18, 1964. This is exactly what the 2011 Map says—that this line represents the "**highwater mark at seashore (vegetation line) as of May 18, 1964."** (emphasis added). (Exh. B-10).

102. Some testimony also indicates that the Land Court Map 6 property boundary line may have depicted the May 18, 1964 shoreline. (Exh. A-14, Bohlander, Tr. at 124-126.). As will be discussed infra, in COL 36, the fact that Land Court Map 6 gave this line as the Land Court boundary of the Daileys' property by order of the Land Court in 1975 is not conclusive evidence that the shoreline was along this line in 1975.

103. Although the 2011 Certified Map appears to show that the shoreline was certified on the adjacent parcel to the east on January 24, 1975, this line is not shown on Lot 6-A, where the

Daileys' home is. (Exh. B-10). This is also after the date of the Land Court Judge's amendment of Land Court Map 6 (Jan. 6, 1975), so this indicates that the January 24, 1975 certification was not the source of the line that is described here as the "Map 6 shoreline" or the "May 1964 shoreline". (Exhs. A-1, A-1a, B-10).

104. The May 1964 shoreline on Land Court Map 6 (and on the 2005, 2007, and 2011 Certified Maps) is the best evidence in the record for the location of the shoreline as of May 1964. (Exhs. A-1, B-7(in "Exhibit 6"), A-12, B-10).

105. Historical evidence includes Michael Dailey's statement that in December of 1969 "an unusual and significant extreme storm/high surf event" caused damage to the Colony property including washing away a wooden seawall and surf flooding the front row of units. The "surf and storm surge broke windows in [the Daileys'] house, and the ocean and sand and debris flowed through our house, causing significant damage." Michael Dailey, WDT at 3; Don Rohrbach, WDT at 1-2.

106. The loose rock revetment was laid down in about the same location as it is shown in the 2005 Map:

a. The revetment functioned well until the winter of 2004-2005. (Exh. A-15 at 2).

b. There were no problems for 35 years (Michael Dailey, Tr. at p. 175, ll. 1-2), until some rocks rolled down on the beach in 2005. (Id., ll. 16-17).

c. It does not appear that the 2005 Map shows stray rocks which may have fallen from the face of the revetment near the Colony because the makai edge of the boulders is shown as a straight line. ("Exhibit 6" in Exh. B-7).

d. Photos taken of the west (Colony) end of the revetment in the late 1980's, attached to Fraser's written testimony, appear very similar to a photo taken in December 2004. (Fraser, WDT, p. 2, 4, re: attached photos on p. 5 taken circa 1989; "Exhibit 5" in Exh. B-7, top photo).

107. The 2005 Map shows the toe of the rock revetment located exactly along the May 1964 shoreline on the west (Colony) end makai of the Daileys' property, very slightly inland of the

May 1964 shoreline in the middle and makai of the Daileys' property (by scaling the map, 1' - 2' inland), and slightly seaward of the May 1964 shoreline at the east makai end (by scaling the map, 3' - 4' seaward) of the Daileys' property. ("Exhibit 6" in Exh. B-7). This would indicate that if the rocks were laid down in 1970 exactly where they were shown on the 2005 Map, they crossed makai of the shoreline on the east end, and that if there had been even a few feet of erosion between May 1964 and when the rocks were laid down, they would have been laid down makai of the shoreline. [10]

108. It is possible that the boulders seaward of the May 1964 shoreline shown on the east end of the property in the 2005 Map had moved seaward of the location that they were originally placed because of scour. (Bohlander, Tr. at 126). For that reason, the fact that these boulders were makai of the shoreline when mapped in 2005 and 2007, standing alone, cannot be taken as conclusive evidence that they were originally placed makai of the May 1964 shoreline. (Id., Tr. at 125-126).

109. In 2011, Bohlander also observed scour and rock movement in the rock pile revetment makai at the Colony end of the Daileys' property because it was subject to high wave energy. He surmised that if the rock pile structure had the same form in 2007, that it would be subject to the same wave forces. (Id. at 130-131).

110. The 2011 Certified Map no longer shows the revetment as a continuous structure. Rather, it maps a few scattered boulders, mostly at the west (Colony) end. (Exh. B-10). This map was made after the Daileys had moved many of the rocks to build the seawall. (See FOF 17).

111. The extremely high waves of December, 1969 probably caused some erosion. (FOF 56).

[10] The 2007 Map is not being relied upon for the location of the toe of the revetment because it shows almost exactly the same boulders as the 2005 Map, even though other evidence shows that most of the boulders makai of the seawall were moved mauka to build the seawall. (Exh. A-15 at p.2; see also 2011 Map). Possibly the surveyor did not re-map the boulders in the 2005 Map as they were indicated in the 2005 Map.

112. The entire coastal area including the Daileys' property has been undergoing net long-term erosion over the past 50 years. (Exh. A-15 at p. 7).

113. OCCL estimated the long-term erosion rate of the shoreline fronting the Dailey property to be 0.3'/yr. ("Exhibit 7" included in Exh. B-7 at 2). This cannot be interpreted to mean, however, that for any set period, for example, 1964-1970, the erosion was the number of years times 0.3'. This long-term rate can be expected to vary in different time periods and may be affected by factors including severity of seasonal waves and weather events.

114. There is a strong possibility that the shoreline may have eroded enough between May 1964 and the first half of 1970 so that at least a portion of the rock revetment was laid down makai of the shoreline, because it was apparently laid down so close to the 1964 shoreline. The evidence on this point, however, is not enough to make a definite conclusion. The actual location of the shoreline in 1970 is uncertain, and it is possible that the makai edge as mapped in 2005 includes some rocks that migrated seaward since 1970. (FOF 106-109).

115. "Exhibit 2" contained in Exh. B-1 are photographs of the loose rock revetment upon which coastal specialist Dolan Eversole drew a line as a rough approximation of the shoreline as it existed in 1975 relative to coconut trees. (See Eversole, Tr. at 93-94, c.f. "Exhibit 5" in Exh. B-7). Eversole states that the line is based on a survey map but did not recall the specific source, and because his interpretation is to a ground photograph rather than a map, it cannot be given weight as an accurate depiction of the 1975 shoreline location relative to the rock revetment.

E. The New Seawall Was Built in the Conservation District in 2006-2007

116. The 2005 Map showed the entire boulder revetment being makai of the shoreline. (FOF 83).

117. As can be seen from comparing the 2005 Map with the 2007 Map and the 2011 Certified Map, the seawall built by the Daileys was built on the old rock revetment, and hence makai of the shoreline as established by the 2005 Map, and hence in the conservation district. (Exhs. B-7

(in “Exhibit 6”), A-12, and B-10). This can be seen by scaling various points on each map to known features such as the Dailey home. (Id.).

118. At the east end of the Dailey property, the rock revetment had extended about 8' inland from the May 1964 shoreline. (Scaling from the 2005 Map in Exh. B-7). The surveyor had shown the distance from the mauka corner of the Dailey property to the May 1964 shoreline as 335.0' on the 2005 Map. The corresponding distance to the seaward face of the seawall in the 2007 Map is 330.90'. Thus, the seawall covers about 4' of the old rock revetment at this point. (Id.).

119. Given the scale of the maps, it is possible that a small portion of the seawall was built just mauka of the revetment, but it is obvious from the maps that the bulk of the seawall was built on the former rock revetment and makai of the shoreline at the time. (Exhs. B-7, A-12, B-10).

120. Photographs in Exh. B-7 also show how the seawall was built on the rock revetment. (Exhs. 10-17 in Exh. B-7. Photos show a progression of construction, with dates from Dec. 23, 2006 to Feb. 16, 2007.).

121. Dolan Eversole, who had been to the site in late 2004, testified that “in late 2006 there appeared to be new construction on top of—in the same location of where the original structure was located, but it had been reconfigured somewhat, same rocks, but restacked and in a slightly different configuration. A much more vertical configuration, and then a new concrete wall built on top of that.” (Tr. at 107, see also Tr. at 88, 90).

122. Observations on Feb. 16, 2007, also establish that the highest wash of the waves was mauka of the new seawall, and hence, the seawall was built makai of the shoreline. (FOF 15).

123. Although the 2007 Map showed the shoreline along the seaward face of the CRM wall, this was rejected by the state [surveyor]. (Bohlander, Tr. at 123, Exh. A-13.) The evidence does not show that the shoreline actually moved seaward about 4' between the time of the 2005 Map

and the 2007 Map. Rather, the Daileys' surveyor, in making the 2007 Map, chose to use the seaward face of the seawall.

124. The 2011 Certified Map is also evidence that the entire seawall was built makai of the shoreline as it existed just before the seawall was built. The coastal specialist who accompanied the surveyors on the site makes it clear that despite the existence of the seawall, observations of the wash of the waves made it clear that the "vast majority of the structure" was makai of the shoreline. (See generally Bohlander, Tr. at 133-135).

125. While Bohlander's observations were made in 2011, they validate similar observations made by OCCL in February 2007. (FOF 15).

126. In addition, Bohlander's observations were made in the summer, and the highest wash of the waves in this area is likely to occur in the winter. The sand beach fronting the seawall is wider in the summer than in the winter. (Bohlander, Tr. at 141-142).

127. It is not important to determine exactly when the entire revetment came within the conservation district because it was entirely within the conservation district by May 2005 at the latest, before the violation occurred in the late 2006-early 2007. (FOF 116-126).

F. The New Seawall is an Entirely Different Type of Structure than the Loose Rock Revetment

128. The new seawall is an entirely different structure than the former loose rock revetment. The former rock revetment was a gradually sloping pile of boulders, loosely stacked, that varied in width from about 20' at the west (Colony) end to about 10' at the east (polo field) end. ("Exhibit 6" in Exh. B-7, Exh. A-12 - Scaling from 2005 Map and 2007 Map, respectively, also the 2007 Map depicts a 22.50' distance from the top edge of the boulders to the 1964 shoreline at the west end, from which perhaps 2' - 3' must be subtracted because of the gap between the toe of the revetment and the 1964 shoreline).

129. The work done in 2006-2007 did not constitute a repair or reconstruction of the original loose rock revetment. It constituted the construction of a new seawall, partially grouted, much steeper than the old revetment. (Comparison of photos of old revetment in Exh. B-7 with new seawall; Eversole, Tr. at 107).

130. The new seawall was built on top of some of the old boulders. (Eversole, Tr. at 90, 107, see also photos in Exh. B-7; FOF 116-126).

131. The Daileys' coastal engineer estimated the top elevation of the seawall to be about +10 to +12 feet MLLW, while the elevation of the sand along the base of the seawall was estimated to vary between +3 to +5 feet MLLW. (Elaine Tamaye, Exh. A-11 at p. 1).

132. The top 3' - 4' of the structure is now grouted and solid. (Bohlander, Tr. at 141).

133. The seawall, standing on the old revetment, is substantially taller than the old rock revetment. See photos in Exhs. 14-16 contained in Exh. B-7, especially photo showing the seawall chest-high to a man standing on the loose boulder revetment in Exh. 14, and photos showing the seawall above the grade of the Daileys' yard in Exhs. 15 & 16. Compare top (March, 2007) and bottom (December, 2004) photos on p. 1 of "Exhibit 3" in Exh. B-7, showing rock revetment below Daileys' yard, with December, 2004 photos in "Exhibit 5" also within Exh. B-7, showing loose boulder revetment "3' - 5'" below yard due to scour; photos of Daileys' western makai property circa 1989 (p. 5) attached to Fraser written testimony show the same. See also FOF 121: after restacking, boulders had a "much more vertical configuration" than the old revetment "and then a new concrete wall built on top of that".)

134. In stacking the same rocks pulled back from the beach, because the construction of the seawall resulted in a substantially more vertical configuration (FOF 17 and FOF 121), and did not move the rocks significantly mauka (FOF 117-118), the only place for the same rocks to go was up.

135. The near-vertical, partially grouted seawall will tend to cause more erosion of the beach than the sloping loose rock revetment that it replaced. "The rough and porous surface [of a revetment] and flatter slope absorb and dissipate wave energy more efficiently than vertical walls, reducing wave reflection, run-up, and overtopping. As such, there is a greater chance of sand accumulation seaward of the structure." (Exh. A-15 at 9; see also Bohlander, Tr. at 142-144).

136. Coastal geologist Bohlander testified that the worst structure for causing loss of sand would be a vertical seawall, the least would be a "rock pile" like the Daileys' original revetment. Bohlander, Tr. at 144.

137. Seawalls damage beaches. (Lemmo, Tr. at p. 77, ll. 12-13).

138. A seawall tends to impound the sand mauka of the wall, preventing it from replenishing the beach. Bohlander, Tr. at 143-144.

139. The new structure is somewhat porous at the base, where the seawall is built on loose boulders. This allows some wave energy to get through, and some sand to leak out at the toe of the structure, causing soil liquefaction mauka of the boulders and cavities to form. (Bohlander, Tr. at 133-135, WDT at p. 3; Eversole, Tr. at 89; photos in Exhs. 14-16 in Exh. B-7).

140. The work done in late 2006-early 2007 did not change roughly 45' of the old revetment at the west end near the Colony seawall. This portion remained as a sloping revetment of loose rocks. (Exh. A-15 at 2).

141. FOF 141-144 demonstrate that the structure built in 2006-2007 is defined as a different type of structure than existed before, and it was generally called a "seawall" rather than a "revetment", "loose rock revetment", or "loose rock pile", by observers in this case, including the Daileys' consultants:

a. Michael Dailey described the original structure as a "loose rock revetment". (Michael Dailey, WDT, pp. 3-4).

b. The Daileys' neighbor, William Fraser, stated that he was told that the Daileys "stack(ed) loose rocks on top of the sand". (Fraser, WDT, p. 2, and p. 5 of photos).

c. Lemmo does not consider the original structure as a revetment but just a pile of rocks. "(A) revetment is an uncemented structure, but the rocks are placed strategically so they're locked into place, and it's very well engineered." (Lemmo, Tr. at 81).

d. Eversole hesitated to call the original structure a revetment and referred to it as a "rock structure". (Eversole, Tr. at 90).

142. In contrast, by 2007, the loose rocks were restacked and built into a "new vertical stem seawall" on top of the rock revetment, which Eversole referred to as a "hybrid wall". (Id.).

143. Three months after OCCL/DLNR staff observed work on the structure, the Daileys' coastal engineering expert described the current shoreline structure on the Daileys' property on May 22, 2007 as a "seawall comprised of very large boulders with a concrete cap" and that the boulders previously placed on the shoreline as a revetment were "re-used to build the existing seawall." (*supra*, FOF 17; stipulation, see Elaine Tamaye, Tr. at 196, 198).

144. The Daileys' SSV described its request as adding a second tier to the face of its existing seawall. (Exh. A-15, Exh. "C"). The C&C's DPP described the existing seawall as "a grouted seawall ranging in height from two to six feet above the beach, with a two- to three-foot wide concrete cap." (Exh. A-15, p. 2).

G. Neither Party Proved the "Replacement Cost" of the Original Rock Revetment

145. Michael Dailey described construction in late 2006 – early 2007 as having "consisted of retrieving and stacking of the rocks back to the original location/footprint of the revetment, and in some areas pulling the rocks further landward than their original footprint by more vertical stacking, and capping the structure with grout to insure its structural integrity", and costing $50,000. Completely removing and reconstructing the revetment seawall was estimated as well

as in excess of $300,000. The 45' at the western edge of the property adjacent to the Colony's property was not grouted or restacked and remains as loose boulders, as it was more stable and not in direct proximity to the Daileys' house. (Michael Dailey, WDT, p. 7-8; Exhs. A-7, A-8; Harvey Hida, WDT, p. 2.) [Daileys FOF 20].

146. For the purposes of H.A.R. § 13-5-37(d)(1994)[11], the "replacement cost" of a nonconforming structure can be significant:

> (d) If a nonconforming structure is destroyed by any means to an extent of more than fifty per cent of its replacement cost at the time of destruction, it shall not be reconstructed except in conformity with the provisions of this chapter.

147. The Daileys offered evidence about the cost of the work done in 2006-2007 intended to bring their project under the scope of this clause. (Michael Dailey, WDT, p. 8 ("The revetment was not damaged or destroyed to a degree greater than 50% of its replacement cost"); Harvey Hida, WDT, p. 2; Exhs. A-7, A-8).

148. The evidence presented does not satisfy this clause because: (1) the work done was not a reconstruction of the original nonconforming rock revetment. It was a new seawall. (2) The costs given were: actual cost of $50,000 to move boulders and build the seawall in late 2006-early 2007, and in excess of $300,000 to build a proposed engineered seawall. (Michael Dailey WDT, p. 8). Neither figure is the replacement cost of the original revetment.

149. The Daileys assert construction costs of $50,000, and completely removing and reconstructing the revetment seawall was estimated as well as in excess of $300,000, *supra*, FOF 148. However:

a. The $50,000 was not for restacking the loose rock pile, but for "design, planning, and permits for repairing a damaged seawall", and that "(c)onstruction of a seawall can be $1,000 to $1,500 per linear foot." (Exh. A-7.)

b. The cost "in excess of $300,000" was not for replacing the loose rock pile without exceeding the size, height, or density at the time of its inclusion into the conservation district (H.A.R. § 13-5-37(e)), but either:

[11] See COL 2.

i. the cost "to construct a new seawall (by) ... remov(ing) the existing seawall and rebuild(ing) it mauka of the certified shoreline," consisting of: 1) removing and hauling away ten tall coconut trees behind the old seawall; 2) planning and engineering fees to acquire building permits; 3) Army Corp and DoH Clean Water and NPDES permit costs; and 4) labor, materials and equipment to remove the old seawall and to construct the new seawall structure authorized by the C&C's DPP (*supra*, FOF 28(d)), (Exh. A-8); or

ii. an estimate at 2007 costs to replace the rock revetment with the seawall structure authorized by the C&C's DPP (*supra*,), including re-using the existing rocks, would be $340,000, which was based upon 425 cubic yards CRM at $800/cu.yd (*emphases added*). (Hida, WDT, September 24, 2013, ¶ 3).

150. The replacement cost to rebuild the old rock revetment exactly as it had originally been laid down would obviously have been much less than the $300,000 - $340,000 estimated to build the seawall and revetment authorized by the SSV, but it is not possible on this record to estimate how much less.

H. OCCL/DLNR's Treatment of Three Other Mokulēʻia Property Owners Was Consistent with its Treatment of the Daileys

151. The Daileys introduced exhibits on three cases in Mokulēʻia asserting that:

> While the Daileys have been stuck in limbo, many of their neighbors have obtained easements from DLNR allowing pre-existing seawalls to remain in the Conservation District and on State land (Exs. A-21 through A-24). DLNR did not require those owners to remove their seawalls. While this alternative was available to DLNR to address the situation fronting the Dailey property, DLNR took a very different tact with the Daileys, pursuing them with fines and violations and seeking removal of some or all of the structure, despite conceding that the inhabited dwelling would be in imminent danger of collapse without shoreline protection (*see e.g.*, Exh. A-6). (Elizabeth Dailey and Michael Dailey's Responsive Brief, September 24, 2013, p. 8.)

152. The Daileys' assertion is incorrect that OCCL/DLNR had conceded that the dwelling would be in imminent danger without shoreline protection. To the contrary, OCCL/DLNR had

informed the Daileys in denying the emergency CDUA that there was no clearly demonstrated emergency present for the land owner, because the erosion rate did not pose a significant immediate erosion threat to the dwelling. (emphasis added, Exh. A-6, p. 2). OCCL/DLNR was not requiring the removal of the existing rock revetment aside from encroaching portions. Id. Because the standard of emergency did not appear to be met, OCCL was responding to the request for an emergency permit as recommendations to reconstruct the revetment. (Exh. A-6, p. 3).

153. The following FOF154-156 summarize the factual differences between the three other situations and the current one. None of the others involved the construction of a new seawall after the receipt of cease-and-desist orders.

154. The first was a July 21, 2004 recommendation to close a violation case, because all the recent work was done mauka of the existing walls and well within the property boundaries, and did not appear to be a conservation district violation or an encroachment. In addition, C&C's DPP was handling the case and would be enforcing Special Management Area ("SMA") and setback variance violations. (Exhs. A-19, A-20; Lemmo, Tr. at 72).

155. The second involved a January 24, 2013, Request to Resolve State Land Encroachment, in which on May 24, 2013, DLNR's Land Division recommended the grant of a Term, Non-Exclusive Easement for Seawall and Concrete Footing Purposes, and Issuance of a Management Right-of-Entry. The applicant was in the process of obtaining a shoreline certification, and during the survey process, portions of the seawall and concrete footing (264 square feet) were found to be makai of the shoreline. The entire seawall and concrete footing had originally been found to be mauka of the original shoreline and within the recorded boundary of the private property. OCCL/DLNR determined that the seawall was an authorized land use based on C&C's DPP's December 21, 2009, approval of a Shoreline Setback Variance (No. 2009/SV-10) for the subject seawall. OCCL/DLNR also found no discernible effect on beach and recreational resources nor on public access. OCCL/DLNR therefore did not ask for an after-the-fact conservation district use application, but stated it might reconsider if it found that the seawall

was built without permits within the conservation district after 1964. (Lemmo, Tr. at 65-69; Exhs. A-21, A-23).

156. The third involved a similar January 18, 2013 Request to Resolve State Land Encroachment, in which on May 24, 2013, DLNR's Land Division later recommended the grant of Two Term, Non-Exclusive Easement for Seawall and Rock Pile Purposes, and Issuance of Two Management Right-of-Entry Permits, which was granted. A survey to obtain a shoreline certification similarly had found that a portion of a seawall and seawall & rock pile (143 square feet and about 313 square feet, respectively) that was previously mauka of the shoreline was now makai of the shoreline. In this case, C&C had authorized both encroachments after-the-fact under its Emergency Repair Work and Shoreline Setback Variances (Nos. 2009/SV-12 and 2009/SV-13) dated March 13, 2012. OCCL/DLNR also found no discernible effect on beach and recreational resources nor on public access. (Lemmo, Tr. at 69-71; Exhs. A-22, A-24) [OCCL/DLNR FOF 56-60].

I. Findings Relevant to Remedy

157. The unpermitted seawall built in 2006-2007 would not function as a long-term protection for the Dailey home (apart from the question of its legality and effect on the beach.) Soil mauka of the seawall is showing liquefaction because the seawall is being undermined. (Bohlander, WDT at 3, Tr. at 132-134). "The applicant indicates that if the existing seawall is not allowed to be replaced, erosion would undermine the existing dwelling and could cause it to collapse onto the beach, creating a public hazard." (Exh. A-15 at 8).

158. Bohlander stated that he did not agree with the 2007 map placing the highwater mark at the bottom of the CRM wall and top of the boulders as the damaged portion of the revetment on the Colony side indicates the portion has been subject to high wave energy over the years, with waves washing into the toe of the structure. (Bohlander, Tr. at 130-131).

159. After the BLNR's initial decision upholding the violation, and the commencement of the contested case hearing, the contested case hearing was stayed while the Daileys pursued an

alternative solution. The stay lasted from November 2007 to June 2013. (Minute Order Nos. 6-8).

160. The Daileys' consultant basically concluded there were two alternatives for protecting the Daileys' home long-term. One was to build a proper revetment which needed a 30' wide base. FOF 29. The consultant rejected this option because there was not enough space for the footprint required by a proper revetment and retain the Daileys' home. (C&C's DPP, citing applicant Michael Dailey's consultant coastal engineer, says that there is, however, adequate room except "right in front" of the Daileys' home. (Exh. A-15 at 8-9)). The second was to build an engineered seawall outside the conservation district, but within the shoreline setback. This was the solution pursued by the Daileys during the stay of the contested case. (Exh. A-15 at 2).

161. The permitting for such a wall, if entirely outside of the conservation district, would have required a shoreline setback variance ("SSV") from the normal 40' setback requirement, but no conservation district use permit would be necessary since the new wall would be built entirely out of the conservation district. (Exh. A-15 at 8-10).

162. Michael Dailey applied for an SSV from the City and County of Honolulu. (Exh. A-15).

163. The SSV application used the 2007 Map as the basis for the shoreline, although that had been rejected by DLNR. (Exh. A-15 at 5).

164. The Dailey SSV application called for a two-tiered seawall, with a lower horizontal level that would provide a walking surface. (Exh. A-15 at 2).

165. On April 23, 2010, C&C's DPP:

a. Stated that a better solution than the seawall proposed by the applicant was a sloping revetment, because it would cause less beach loss, and that there was enough room to build such a revetment except right in front of the Dailey home (Id. at 8-9);

b. denied the request to allow a two-tiered seawall in the shoreline setback area by

adding another tier to an existing unauthorized seawall and boulder structure (revetment) (Id. at 11);

c. approved a SSV to allow a seawall and/or revetment, steeper near the dwelling, where there was less room, more sloping elsewhere (Id.);

d. provided that the "replacement structure should be located mauka (landward) of the existing seawall/revetment and outside the Conservation District" (Id. at 9).

166. The Daileys were required by the SSV to have a licensed engineer submit new plans for the revetment/seawall. (Id.).

167. The new seawall to be constructed in an area set back from the conservation district but encroaching within the shoreline area as approved by the SSV would have been a trapezoidal structure in cross-section, about 1.5' wide at the top, and, in the steeper section, about 10' wide at the bottom. The rejected 2-tiered structure at the makai boundary of the property would have been about 9.5' - 11.5' wide at the bottom. (Scaling from "Exhibit C", included within the shoreline setback variance, Exh. A-15, at 2, 11).

168. While the seawall allowed by the SSV could have used boulders from the old revetment, they would have been cemented together so that they could hold a much steeper profile than the old revetment. (Id.).

169. The SSV allowed a steep seawall only near the Dailey home, where there isn't enough space to build a revetment. On the remainder of the property, while the SSV decision seems to express a strong preference for an engineered revetment (Exh. A-15 at 8-9), it is not clear whether it actually requires the structure with the 30' base that the Daileys' engineer described. It requires that the seawall and/or revetment be "less steep" in the open areas not near the home. (Exh. A-15 at 11).

170. After the issuance of this SSV permit, the Daileys certified the shoreline with a surveyor they hired. The shoreline certification was done with input from OCCL/DLNR. The resulting shoreline certification is the 2011 Certified Map. (Bohlander, Tr. at 112-116).

171. The 2011 Certified Map differs from the 2007 Map primarily in that it certifies the shoreline at the mauka edge of the seawall rather than the makai edge. This is a difference of about 4'. In the 45' or so between the west end of the Dailey seawall and the east end of the Colony seawall, the 2007 Map and 2011 Certified Map are basically the same: the shoreline is at the mauka edge of the rock revetment. (FOF 86-92).

172. Michael Dailey testified that the 2011 shoreline certification made the idea of building a seawall outside the conservation district infeasible:

> We were looking like we were getting pretty close to the finish line. Then the—when the shoreline certification came in and it was behind the wall rather than in front of it when all the plans had been designed with the wall in front of it, so that it was back to the drawing board, redoing the plans, getting the extensions for the variances. And it also put the wall closer to my mother's house, which created some potential structural issues with her foundation.
>
> Still, we were still marching forward, and then we ran into a no go, which is that the state said that the land where the rocks are between our property and the Beach Colony, comes in about 20, 30 feet on the shoreline survey, and since it comes in 30—20, 30 feet on the shoreline survey, then that was state land, and the wall would have to come in behind it, which would put it behind the Beach Colony's wall and leave a very large gap, which would expose their wall and their property, and then eventually the water would wrap around and get ours too. So it would certainly not make it functional to put in a seawall like that.
>
> And at that point we had two options. And option one was to just tear down the existing wall and let erosion go for it and take my mother's house eventually, and/or were advised too that we really no other alternative but to do what we're doing now, go forward with the contested case hearing, and here we sit.

(Tr. at 177-178; see also Michael Dailey, WDT at 9-10).

173. From this statement, the Daileys were prepared to relocate the seawall closer to the house than planned in the original SSV application—about 4' closer according to the 2011 Certified Map than the 2007 Map-- but the issue of building a continuous connection to the Colony wall entirely mauka of the rock revetment was the final factor that made the shoreline setback project infeasible. (Michael Dailey, Tr. at 177-178).

174. There may also have been other issues with the Colony about the connection, although these are not clear on the record. (See Fraser, Tr. at 167-172).

175. This connection problem, as explained above, existed with the 2007 Map (and the 2005 Map); it did not arise from the 2011 shoreline certification. Even with the shoreline as given by the 2007 Map the Daileys could not have connected a seawall to the end of the Colony wall unless they either (1) crossed the conservation district, going makai of the shoreline, or (2) built a "return wall" on Colony property, extending inland roughly perpendicular to the Colony wall. (Exh. A-12, 2007 Map; Exh. B-7, "Exhibit 6" 2005 Map).

176. The Daileys' attorney blamed the difficulty in securing a workable SSV on the fact that OCCL/DLNR "refused to honor" the 2007 Map's shoreline determination in the 2011 shoreline certification. (Daileys' Responsive Brief, Sept. 24, 2013, at 7). If the 2007 Map's shoreline had been certified, the Daileys could have built the seawall about 4' further makai in front of their house than allowed under the 2011 Map. (FOF 171). But the connection problem with the Colony seawall still would have existed using the 2007 Map. (FOF 175). In any event, the 2011 certification was correct. (FOF 91-92, see generally Bohlander testimony).

177. The Daileys could have appealed the rejection of their 2007 Map for certification, and could have appealed the 2011 certification. H.A.R. § 13-222-26. They did not.

178. The end of the Colony's wall adjoining the Dailey property is being affected by erosion on the Daileys' side. (Bohlander, Tr. at 130-131).

179. In the Colony seawall's current condition it is probable that erosion in the area between the Daileys' property and Colony property will continue indefinitely. (Exh. A-15 at 8).

180. If the new seawall on the Daileys' property is removed and not replaced by some alternative, erosion will continue, and eventually, the Dailey home will be destroyed. (Id. at 9; Eversole, Tr. at 105-106).

181. The Daileys' property extends about 325' inland and would contain a feasible site for a future home that would not be threatened by erosion for many decades, even if there were no erosion control structure on the shoreline. (2005 Map, "Exhibit 6" in Exh. B-7, FOF 113).

182. If there were no erosion control structure and the Dailey home were removed, a beach would exist on the frontage of the Dailey property and would gradually migrate inland as erosion continued, as it has on the property to the east (Lot 60). (Exhs. A-6, p.2; A-15, p. 6, comments of OCCL).

183. If the existing rock revetment adjacent to the Colony property is not stabilized, removed, or replaced with a more suitable engineered structure, it may be a long-term hazard to the public use of the shoreline. (FOF 8).

184. To order the removal of only the new seawall, while allowing the boulders underneath to remain, is not a good solution for either the Daileys or the public. It would offer little protection to the Dailey home, expose a bank where the seawall had been removed, and leave an unstable rock pile on the public beach. (Exh. A-11, p. 2).

185. It appears that it would be feasible to build the seawall allowed by the SSV entirely on the Daileys' property mauka of the 2011 certified shoreline, given that the seawall is 10' wide at the base, which is its thickest part. (Scaling from "Exhibit C" included in Exh. A-15). The Dailey home is about 23' from the 2011 certified shoreline at its closest point (wall distance). (Exh. A-15 says 28', but this is in error, based on the scaling.). There is a slab that projects about 3' - 4' closer to the shoreline (scaling from the 2005 Map in "Exhibit 6" in Exh. B-7), but this still leaves 19' - 20' for a seawall at the narrowest gap between the house and shoreline.

186. While the Daileys may have originally expected to have had 3' - 4' extra to build the seawall they applied for in the SSV, because they wanted to use the shoreline in the 2007 Map, the two-tiered seawall they applied for was also wider at the base than the seawall approved by the SSV. (Scaling from "Exhibit C" in Exh. A-15).

187. There is adequate room to build the much wider engineered revetment described in the SSV, with a 30' wide base, entirely on the Dailey property, outside the conservation district, except “right in front” of the Dailey home. (Exh. A-15 at 9-10).

188. Construction of an erosion control structure similar to that allowed by the SSV would require removal of the existing boulders and grouted seawall built in 2006-2007, and excavation of some areas. (Exh. A-15).

189. If construction of an erosion control structure similar to that allowed by the SSV occurred, the interference to public use of the shoreline would be reduced if the removal of the boulders and construction of the new structure were done as a single project.

190. The construction that occurred in 2006-2007, which is the subject of the current enforcement action, was done in conscious disregard of the need for permits. (Eversole WDT, ¶¶ 10-11).

191. The Daileys have now had the benefit of any additional erosion control provided by the seawall built in late 2006-early 2007 for about ten years.

192. On December 5, 2011, the most recent version of H.A.R. chapter 13-5 conservation district rules adopted by DLNR became effective, amending and compiling the 1994 version applied in these proceedings. This enforcement action commenced prior to the effective date of the 2011 version and has been continuing since then.

II. CONCLUSIONS OF LAW

1. OCCL/DLNR has jurisdiction over the conservation district under H.R.S. chapter 183C. H.R.S. § 205-5(a). The conservation district means those lands within the various counties of the State bounded by the conservation district line, as established under provisions of Act 187, Session Laws of Hawaii 1961, and Act 205, Session Laws of Hawaii 1963, or future amendments thereto. H.R.S. § 183C-2.

2. Hawaii Administrative Rules (H.A.R.) chapter 13-5 (conservation district) implement H.R.S. chapter 183C.

a. The applicable version of H.A.R. chapter 13-5 in this enforcement action was adopted in 1994.

b. The current version of H.A.R. chapter 13-5 was amended and compiled on December 5, 2011.

3. The relevant statutory provisions have not changed between 2006 and the present.

4. The 2011 amendments for the relevant conservation district administrative rules primarily changed the nonconforming use provisions.

5. The Daileys were cited for this violation on Dec. 23, 2006, and the first procedural hearing in the contested case was held in October 2007. The contested case was stayed by agreement of the parties, however, until June 2013, while the Daileys sought a shoreline setback variance to allow a protective structure in the shoreline setback area, but outside the conservation district. The contested case resumed in June 2013. (See FOF 23-28, 35).

6. After the contested case resumed, it appears that the parties consistently used and referred to the rules as amended in 2011, as did the hearing officer's recommended decisions and the Board's prior decision.

7. To sustain a violation, however, the Daileys must be found to have violated the applicable rules in effect at the time of the alleged violation: the 1994 rules.

8. On the other hand, if the Daileys violated the 1994 rules, but their conduct would have been lawful under the 2011 rules, the Board would have to consider whether to dismiss the violation under equitable principles. For this reason, the following conclusions of law will analyze the case under both rules.

9. Although there are changes between the nonconforming use provisions in the 2011 rules compared to the 1994 rules, which are more fully described below, the sections of the rules actually cited by the parties and hearing officer in their briefs and recommended decisions are very similar. In addition, the differences between the two sets of rules does not suggest that the parties would have presented different evidence at the contested case hearing if they relied upon the 1994 rules: the types of evidence that would seem relevant would be the same under both sets of rules.

10. The resource subzone of the conservation district includes "[l]ands and state marine waters seaward of the upper reaches of the wash of waves, usually evidenced by the edge of vegetation or by the debris left by the wash of waves on shore to the extent of the State's jurisdiction, unless placed in a (P) or (L) subzone." H.A.R. § 13-5-13(b)(5)(1994).

11. The definition of "shoreline" applicable to a shoreline certification is "the upper reaches of the wash of the waves, other than storm and seismic waves, at high tide during the season of the year in which the highest wash of the waves occurs, usually evidenced by the edge of vegetation growth, or the upper limit of debris left by the wash of the waves." H.R.S. § 205A-1 (emphasis given).

12. Land uses in the conservation district shall not be undertaken in the conservation district unless provided in H.A.R. chapter 13-5. H.A.R. § 13-5-30(b)(1994). No land use in the conservation district except a nonconforming use as defined in H.R.S. § 183C-5 shall be made unless in accordance with a zoning rule. H.R.S. § 183C-4(b).

13. The definition of "land use" relevant to these proceedings was defined in H.A.R. § 13-5-2 (1994) as:

> (1) The placement or erection of any solid material on land if that material remains on the land more than fourteen days, or which causes a permanent change in the land area on which it occurs;
>
> …
>
> (4) The construction, reconstruction, demolition, or alteration of any structure, building, or facility on land.

14. H.R.S. § 183C-2 defines a nonconforming use as:

> the lawful use of any building, premises or land for any trade, industry, residence or other purposes which is the same as and no greater than that established prior to October 1, 1964, or prior to the inclusion of the building, premises, or land within the conservation district.

15. Continuance of a nonconforming land use in the conservation district, including repair of the use, is not prohibited by H.A.R. chapter 13-5, but is otherwise subject to regulation as stated in H.A.R. § 13-5-37(c)-(f)(1994), and portions of H.A.R. § 13-5-22(P-9)(1994). H.R.S. § 183C-5 ("any structures may be subject to conditions to ensure they are consistent with the surrounding environment").

16. "Revetment" is not defined in state conservation district laws but taken in pari materia with shoreline certification rules, is found and defined in H.A.R. § 13-222-2 as "a sloping facing of stone, concrete, blocks or other similar material built to protect the e[m]bankment or shore against erosion by wave action or current."[12]

17. "Seawall" is defined in H.A.R. § 13-222-2 as "a structure with a vertical face separating land and water areas, primarily designed to prevent erosion and other damage due to wave action."

18. The Daileys' original revetment was not built according to any H.A.R. § 13-5-30(b)(1994) approval or authorization from OCCL/DLNR (FOF 3), and unless nonconforming, became an unauthorized land use in the conservation district no later than May, 2005, when a shoreline survey showed it entirely within the conservation district. (FOF 116-126).

19. Unless authorized by the nonconforming use provisions in the statutes and rules, the Daileys' seawall built on the original revetment is an unauthorized land use in the conservation district.

[12] Additionally, the Coastal Zone Management H.R.S. chapter 205A, defines a shoreline setback "structure" as including "any portion of any building, pavement, road, … fence, groin, wall, or revetment."

20. The conservation district laws provide the following with respect to nonconforming uses:

[§183C-5] Nonconforming uses. Neither this chapter nor any rules adopted hereunder shall prohibit the continuance of the lawful use of any building, premises, or land for any trade, industrial, residential, or other purpose for which the building, premises, or land was used on October 1, 1964, or at the time any rule adopted under authority of this part takes effect. All such existing uses shall be nonconforming uses. Any land identified as a kuleana may be put to those uses which were historically, customarily, and actually found on the particular lot including, if applicable, the construction of a single family residence. Any structures may be subject to conditions to ensure they are consistent with the surrounding environment. [L 1994, c 270, pt of §1]

21. The nonconforming use definition contained in H.A.R. § 13-5-2, which includes the phrase, "or other purposes which is the same as and no greater than that established prior to October 1, 1964, or prior to the inclusion of the building premises, or land within the conservation district" was adopted and became effective on December 12, 1994.

A. OCCL/DLNR Has Not Proven the Original Revetment was Not Nonconforming

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."

23. 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.)

24. The possibility that the original revetment required a shoreline setback variance is significant because in that case, it would not be "lawful", and hence not entitled to nonconforming status. H.R.S. § 183C-2.

25. The evidence shows that, when built, the entire rock revetment was in the shoreline setback area, except for a portion that may have been in the conservation district. (See FOF 10-114.)

26. H.R.S. § 205A-43.6 (enforcement of shoreline setbacks) states in sections (b) and (c):

> (b) Where the shoreline is affected by an artificial structure that has not been authorized with government agency permits required by law, if any part of the structure is on private property, then for purposes of enforcement of this part, the structure shall be construed to be entirely within the shoreline area.
>
> (c) The authority of the board of land and natural resources to determine the shoreline and enforce rules established under chapter 183C shall not be diminished by an artificial structure in violation of this part.

This means that OCCL/DLNR is not divested of authority in cases where the shoreline (the makaimost delineation of the shoreline area defined in H.R.S. § 205A-41, with the maukamost portion of the shoreline area being the shoreline setback line) is affected by the presence of an artificial structure partially on private property (i.e., partially in the conservation district), where otherwise a structure completely on private property is under the jurisdiction of the City and County of Honolulu for purposes of enforcing shoreline setback.

27. OCCL/DLNR has not, however, proven 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).

28. The Daileys offered testimony that the wall was built sometime after the December 1969 storm, which was convincing, FOF 65-69, and that it was completed in the first half of 1970.

29. The Hearings Officer discredited the testimony of the Daileys regarding the 1970 date, largely because the Daileys had previously stated (in their 2005 emergency CDUA application) that it had been built around the time of construction of the house (1965). (FOF 72).

30. OCCL/DLNR's burden of proving that the original revetment was completed after June 22, 1970 cannot be met solely by rebutting contrary testimony.

31. The absence of a building permit for the revetment does not create an inference that it was built illegally because the testimony indicates that building permits were typically not issued for such structures. (FOF 71).

32. The fact that the Daileys could not produce any written records showing when the revetment had been built does not create an inference that those records would be unfavorable to their position, given the passage of time and the death of Fred Dailey. Dimmitt & Owens Financial, Inc. v. Superior Sports Products, Inc., 196 F.Supp.2d 731 (N.D. Ill. 2002)(presumption that such records would be unfavorable not applied, based on reasons they were not found); (FOF 70).

33. The DPP citation for a shoreline setback violation in 1992 cannot be given weight because the validity of the citation was never determined.

34. If the Daileys had the burden of proof to establish that the original rock revetment was nonconforming, they would have had to establish a completion date prior to June 22, 1970. Even disregarding doubts arising from inconsistent earlier statements which gave a clearly incorrect earlier date (FOF 72), the testimony at the contested case hearing that the revetment had been completed by the end of the first half of 1970 falls short of establishing a pre-June 22, 1970 date. (FOF 69). Thus, if the burden of proof were on the Daileys to prove a nonconforming use, they have not met this burden.

35. The evidence that the original rock revetment was built very close to the May 1964 shoreline and that enough erosion occurred between then and the time of construction, which was no earlier than the first half of 1970, creates a distinct possibility that at least part of the revetment encroached across the 1970 shoreline when built. On the other hand, there are indications that the toe of the revetment may have migrated seaward by the time it was first mapped in May 2005. (FOF 106-114).

36. The 1975 Land Court decree giving the shoreline by metes and bounds does not conclusively establish the shoreline at that location as of 1975, or any earlier or later date. The

shoreline boundary of Land Court property is subject to erosion. Hawaii County v. Sotomura, 55 Haw. 176, 180, 517 P.2d 57, 61 (1973). A decree establishing a shoreline boundary is prima facie evidence of the location of the shoreline, but may be rebutted by other evidence. Application of Sanborn, 57 Haw. 585, 590, 562 P.2d 771, 774 (1977). In this case, as well, it appears the 1975 decree was based on a 1964 survey. (FOF 94-104).

37. On balance, the evidence is too speculative to support an ultimate finding that the original revetment was partially built makai of the shoreline as it existed at that time, in the conservation district (FOF 114). In addition, it does not appear that OCCL/DLNR relied on this theory at the contested case hearing.

B. Even if the Original Revetment Was Nonconforming, the Construction of the New Seawall Was a Violation.

38. The court's remand order provided that the Board should determine "if the structure is found to have the status of a nonconforming use in the conservation district, whether subsequent actions were in conformance therewith."

39. Thus, given the above conclusions of law, the Board must analyze whether the Daileys' actions in late 2006 and early 2007 were permissible considering the old revetment as a lawful nonconforming structure.

40. The remaining conclusions of law, and decision and order, are based on the above conclusions of law that OCCL/DLNR 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.

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. (FOF 11).

42. The 2006 violation notice which is the subject of the current proceeding was for construction of a new seawall occurring at the end of 2006, which continued into early 2007. (FOF 12, Exh. B-7).

43. Land makai of the shoreline is in the conservation district and in the resource subzone. H.A.R. §§ 15-15-20(6), 13-5-13(b)(5)(1994), respectively.

44. The seawall was built in 2006-2007 entirely or almost entirely makai of the shoreline as it existed at the time, and therefore, in the conservation district. (FOF 116-126). OCCL/DLNR therefore had jurisdiction over the alleged violation. (COL 1).

45. "'Shoreline' means the upper reaches of the wash of the waves, other than storm and seismic waves, at the high tide during the season of the year in which the highest wash of the waves occurs, usually evidenced by the edge of vegetation growth, or the upper limit of debris left by the wash of the waves." H.R.S. § 205A-1.

46. H.R.S. § 183C-4(b) provides that "[n]o use except a nonconforming use as defined in section 183C-5, shall be made within the conservation district unless the use is in accordance with a zoning rule."

47. The parallel administrative rule, H.A.R. § 13-5-30(b)(1994), provided that:

"Unless provided in this chapter, land uses shall not be undertaken in the conservation district. The department shall regulate land uses in the conservation district by issuing one or more of the following approvals:

(1) Departmental permit (see section 13-5-33);
(2) Board permit (see section 13-5-34);
(3) Emergency permit (see section 13-5-35);
(4) Temporary variance (see section 13-5-36);
(5) Nonconforming uses (see section 13-5-37);
(6) Site plan approval (see section 13-5-38); or
(7) Management plan (see section 13-5-39)."

48. H.R.S. § 183C-2 defines "land use" as including: (1) The placement or erection of any solid material on land…" and "(4) The construction, reconstruction, demolition, or alteration of any structure, building, or facility on land."

49. The construction of the new seawall was a land use, done in the conservation district, without permits or approvals, and hence was a violation of the applicable administrative rules and statute, unless the work could have been done without permits under the "nonconforming" provisions of the rules, or otherwise are within the scope of work that can be done without permits. (COL 12-15).

50. H.A.R. § 13-5-37(a)(1994) provided that: "This chapter shall not prohibit the continuance of, or repair and maintenance, of nonconforming uses as defined in this chapter. The burden of proof to establish that the land use or structure is legally nonconforming shall be on the applicant."

51. The construction of the new seawall cannot be considered as mere continuance of, or repair and maintenance of the old revetment. Besides the physical differences described in FOF 128-139, these two structures have different names with different definitions. (See FOF 141-144). Even the Daileys' consultant used the different terms for the two structures. Id.

52. The Daileys did not simply repair their existing revetment. They removed most of the old revetment, and built a new seawall. These actions are not "repair and maintenance" under H.A.R. § 13-5-37(a)(1994). (FOF 128-144).

53. Even if the construction of the new seawall can be construed to be "repair and maintenance", its construction violated H.A.R. § 13-5-37(e)(1994). This rule provided that "[r]epairs or reconstruction of the nonconforming structure shall not exceed the size, height or density of the structure which existed immediately prior to October 1, 1964 or at its inclusion into the conservation district."

54. The old revetment was entirely within the conservation district by May 2005 at the very latest. (FOF 116-126).

55. The new seawall built in 2006-2007 exceeded the height of the revetment which had existed earlier, so the construction that occurred violated H.A.R. § 13-5-37(e)(1994). (FOF 130-134).

56. "Density" is not defined in the administrative rules. The American Heritage Dictionary, 2d College Ed. (2001) defines density, inter alia, as "6. Thickness of consistency; impenetrability."

57. In this case, the Daileys replaced a sloping revetment of loose rock, which allowed relatively free flow of water through the structure, with a near-vertical seawall grouted solid, much less penetrable to water, except at its boulder base. FOF 134-139. Given the purposes of the rule, in this context, the seawall represents an increase in density from the original revetment, and also violates H.A.R. § 13-5-37(e)(1994) because of this increase in density.

58. H.A.R. § 13-5-37(d)(1994) also did not permit the construction of the new seawall.

59. H.A.R. § 13-5-37(d)(1994) provided that "If a nonconforming structure is destroyed by any means to an extent of more than fifty per cent of its replacement cost at the time of destruction, it shall not be reconstructed except in conformity with the provisions of this chapter."

60. H.A.R. § 13-5-37(d)(1994) raises another burden-of-proof issue. It could either be OCCL/DLNR's burden to prove that the nonconforming structure had been destroyed to an extent of of more than fifty per cent of its replacement cost, or the Daileys' burden to prove, as an affirmative defense, that it had not been.

61. Where an agency brings an action seeking to enjoin alteration of a structure, the landowner claiming that it is nonconforming and that the work done is within a permitted "50%

of value" limit has the burden of proving the work is within that "50% of value" limit. City of Tucson v. Clear Channel Outdoor, Inc., 218 Ariz. 172, 184, 181 P.3d 219, 231 (Ariz. App. 2008); Fiano v. Monahan, 25 Conn.Supp. 363, 368, 205 A.2d 183, 185 (1964).

62. OCCL/DLNR did not prove that the old revetment was destroyed (through voluntary demolition) to more than 50% of its replacement value, and the Daileys did not prove that the destruction was less than 50% of its replacement value. (FOF 147-150).

63. If H.A.R. § 13-5-37(d)(1994) is viewed as a separate violation, apart from the other violations described above, then it would appear that OCCL/DLNR would have the burden of proving all the elements of this violation, including that the revetment had been destroyed to more than 50% of its replacement value. Thus, this subsection cannot be sustained as a separate violation.

64. On the other hand, if H.A.R. § 13-5-37(d)(1994) is viewed as a defense that the landowner can invoke that would negate other violations, it would follow that the landowner has the burden of proof. City of Tucson v. Clear Channel Outdoor, Inc., Id. The Daileys did not meet that burden.

65. In any case, H.A.R. § 13-5-37(d)(1994) does not mean that any reconstruction of a structure less than fifty per cent of its replacement cost is automatically authorized. To so interpret it would contradict H.A.R. § 13-5-37(e)(1994), which provided that "Repairs reconstruction of the nonconforming structure shall not exceed the size, height or density of the structure which existed immediately prior to October 1, 1964 or at its inclusion into the conservation district." It would make no sense to say in H.A.R. § 13-5-37(e)(1994) that repair or maintenance of a nonconforming structure cannot increase its size, height, or density, while interpreting H.A.R. § 13-5-37(d)(1994) to allow reconstruction of a nonconforming structure to any size, height, or density. In other words, the Daileys violated H.A.R. § 13-5-37(e)(1994), even if the work done was within the bounds permitted by H.A.R. § 13-5-37(d)(1994).

66. In addition, H.A.R. § 13-5-37(d)(1994) did not authorize the Daileys' actions because they did not "reconstruct" the old revetment. They dismantled the old revetment and built a new seawall on top of portions of the old revetment. (FOF 128-144).

67. Because H.A.R. § 13-5-37(1994) did not authorize the construction of the new seawall, other sections of the conservation district rules must be analyzed in order to determine whether they would independently allow this construction without a permit.

68. H.A.R. § 13-5-22(1994) was a general section identifying land uses consistent with the various subzones of the conservation district. The uses are typically labeled with an "A-", meaning that they can be done without any permits, "B-", meaning that they need a site plan approval, "C-", meaning that they need a departmental permit, and "D-", meaning that they need a permit from the board. See H.A.R. § 13-5-22(b)(1994).

69. Although H.A.R. § 13-5-22(1994) describes uses in the Protective subzone, it was made applicable to the Resource subzone by H.A.R. § 13-5-24(a)(1994).

70. H.A.R. § 13-5-22(P-9)(A-1)(1994) , "Structures, Existing", allowed the following without any DLNR or BLNR permit:

> Replacement or reconstruction of existing structures and facilities as identified in the exempt classes established in section 11-200-8, except as provided in section 13-5-37 where the new structure will be located approximately on the same site and will have substantially the same purpose, capacity, density, height, and dimensions as the structure replaced.

71. H.A.R. § 11-200-8, referenced in H.A.R. § 13-5-22(P-9)(A-1), is the administrative rule of the Office of Environmental Quality which establishes exempt classes of action that do not trigger an environmental assessment or environmental impact statement under Chapter 343, H.R.S.

72. None of the exempt classes seem relevant to the construction of the new seawall, except possibly H.A.R. § 11-200-8(a)(2): "reconstruction or replacement of existing structures and facilities where the new structure will be located approximately on the same site and will have

substantially the same purpose, capacity, density, height, and dimensions as the structure replaced." This basically repeats what H.A.R. § 13-5-22(p-9)(A-1) already says.

73. The clause "except as provided in section 13-5-37", which referred to nonconforming uses, either meant that (1) nonconforming uses were not governed by H.A.R. § 13-5-22(p-9)(A-1) at all(the stronger alternative), or (2) means that this subsection must be read in conjunction with limits given in H.A.R. § 13-5-37.

74. Even under the latter interpretation, H.A.R. § 13-5-22(P-9)(A-1) does not mean that a nonconforming use can be replaced or reconstructed without permits as long as it is "located approximately on the same site and will have substantially the same purpose, capacity, density, height, and dimensions as the structure replaced." Rather, this is subject to the limits of H.A.R. § 13-5-37, including the provision that reconstruction cannot occur without normal permits if the structure is destroyed to more than 50% of its replacement value, H.A.R. § 13-5-37(d), and that "[r]epair or maintenance of a nonconforming structure shall not exceed the size, height, or density of the structure" at the time it entered the conservation district, H.A.R. § 13-5-37(e).

75. If H.A.R. § 13-5-22(P-9)(A-1) is read separately from H.A.R. § 13-5-37 (e)(1994), it appears to be slightly more lenient because it includes the term "substantially" the same density, height, and dimensions, rather than it "shall not exceed the size, height, or density." H.A.R. § 13-5-37(e)(1994).

76. The construction of the new seawall does not qualify to be built without permits under H.A.R. § 13-5-22(P-9)(A-1)because it does not have "substantially the same…density, height, and dimensions as the structure replaced." The new seawall is significantly taller than the old revetment, has a substantially different density, and has substantially different dimensions (taller and steeper) than the old revetment. (See FOF 128-140).

77. The removal of the old revetment required a "C" permit from the chairperson of the BLNR under H.A.R. § 13-5-22(P-9)(C-1)(1994): "Demolition, removal, or alteration of existing structures, facilities and equipment." H.A.R. § 13-5-22(P-9)(C-1)(1994) does not have the

clause "except as provided in section 13-5-37" which occurs in H.A.R. § 13-5-22(P-9)(A-1)(1994), which indicates that it does include demolition of nonconforming uses.

78. Even if the construction of the new seawall were charitably construed as "alteration" of the old revetment, the Daileys did not obtain the required permit from the BLNR chairperson under H.A.R. § 13-5-22(P-9)(C-1)(1994).

79. The closest fit under the 1994 rules to the construction of the new seawall was H.A.R. § 13-5-23(L-5)(D-1)(1994): "seawalls, shoreline protection devices, and shoreline structures." This requires a conservation district use permit from the BLNR because it is a "D"-type activity.

80. Statutes and rules concerning nonconforming uses are strictly construed against the landowner's claim that changes to a nonconforming use are within the permitted bounds. Rotter v. Coconino County, 169 Ariz. 269, 275, 818 P.2d 704, 710 (1991.) The Board's interpretation of the rules, however, would be the same even without applying this principle of strict construction.

81. The purpose of the administrative rules also supports the interpretations given above. An agency's interpretation of its rules must be consistent with the overall purpose of the rules. Director, DLIR v. Permasteelisa Cladding Technologies, Ltd., 125 Haw. 223, 257 P.3d 236 (App. 2011).

82. H.A.R. § 13-5-1(1994) provided:

> The purpose of this chapter is to regulate land-use in the conservation district for the purpose of conserving, protecting, and preserving the important natural and cultural resources of the State through appropriate management and use to promote their long-term sustainability…

83. The seawall is likely to cause faster erosion of the public beach fronting the Dailey property than the revetment it replaced. Even though it is somewhat porous at the base, the vertical grouted wall will cause greater wave reflection, and loss of sand, than the former revetment. (FOF 135-139).

84. It would not be consistent with the purpose of the conservation district rules to interpret them to allow the replacement of the revetment with a seawall than will accelerate the loss of the public beach, without any kind of permit process to mitigate that loss.

85. The area makai of the shoreline is in the public trust. Sanborn, supra at 586, 562 P.2d at 772. It is covered by the public trust doctrine. In re Water Use Permit Applications, 94 Haw. 97, 139, 9 P.3d 409, 451 (2000).

86. One of the Board's duties with respect to the public trust in the land makai of the shoreline is to prevent "substantial impairment" to the public resources located there. In re Water Use Permit Applications, 94 Haw. at 139. It would be inconsistent with the Board's duties under the public trust doctrine to interpret its rules and governing statutes in a way that allows the replacement of the revetment with a seawall than will accelerate the loss of the public beach, without any kind of permit process to mitigate those negative effects.

C. The Construction of the New Seawall Also Violated the 2011 Rules.

87. As explained in COL 8 above, it is also necessary to determine whether the seawall construction would have violated the 2011 rules.

88. COL 10-66 above apply to the analysis under both sets of rules, because this analysis is based upon statutes that have not changed, and/or administrative rules that did not materially change. H.A.R. § 13-5-37 was renumbered as § 13-5-7 in the new rules, but unchanged except for H.A.R. § 13-5-37(d). COL 90-96 analyze this difference.

89. H.A.R. § 13-5-7(d)(2011) provides that "If a nonconforming structure is damaged or destroyed by any means (including voluntary demolition) to an extent of more than fifty per cent of its replacement cost at the time of destruction, it shall not be reconstructed except in conformity with the provisions of this chapter, *except as provided under section 13-5-22(P-8)*." (Italicized section added in 2011.)

90. H.A.R. § 13-5-22(P-8)(2011) replaced the former H.A.R. § 13-5-22(P-9)(1994), with substantial changes from the former rule.

91. H.A.R. § 13-5-22(P-8)(A-1)(2011) allows, without any permit:

> "Minor repair, maintenance, and operation to an existing structure, facility, use, land, and equipment, whether it is nonconforming or permitted, that involves mostly cosmetic work or like-to-like replacement of component parts, and that results in negligible change to or impact to land, or a natural and cultural resource. Any repair, strengthening, reinforcement, and maintenance of a fishpond shall be in accordance with section 183-44 and 183B-2, HRS."

92. According to a definition in H.A.R. § 13-5-2 added in 2011, "'Minor repair' means routine work done to an existing structure, facility, use, land, and equipment, that involves mostly cosmetic work or like-to-like replacement of component parts, and that results in negligible change to or impact to land, or a natural and cultural resource."

93. The work done to construct the new seawall did not qualify as "minor repair, maintenance, and operation" because it did not involve "mostly cosmetic work or like-to-like replacement of component parts that results in negligible change to or impact to land, or a natural and cultural resource." (FOF 128-139).

94. The new seawall, therefore, is not within the scope of repairs allowed without permits under H.A.R. § 13-5-22(P-8)(A-1)(2011).

95. The remaining subsections in H.A.R. § 13-5-22(P-8)(2011) describe alterations to existing structures which, although potentially allowable, all require some approval from the department or board in the form of either a site plan approval from the DLNR, a permit from the chairperson, or a board permit. None of these approvals were obtained by the Daileys prior to the demolition of the revetment and construction of the seawall, and so even if the Daileys' actions fit these subsections, they would be violations of the rules.

96. The construction of the new seawall, because it was not authorized by H.A.R. § 13-5-7(2011), best fits H.A.R. § 13-5-22(P-15)(D-1)(2011): "Shoreline erosion control. Seawall,

revetment, groin, or other coastal erosion control structure or device…" This requires a permit from the BLNR.

97. H.A.R. § 13-5-6(d)(2011), provides that "No land use(s) shall be conducted in the conservation district unless a permit or approval is first obtained from the department or board." This subsection was added in 2011, hence, the Daileys cannot be found to have violated it if their actions are judged under the 1994 rules, but they did violate this if their actions are judged under the 2011 rules.

98. Under the 1994 rules, as explained in COL 47-51 above, the Daileys did violate H.A.R. § 13-5-30(b)(1994) which expresses the same basic concept as H.A.R. § 13-5-6(d)(2011).

99. H.A.R. § 13-5-30(b) was amended in 2011 to read as follows:

(b) Unless provided in this chapter, land uses shall not be undertaken in the conservation district. The department shall regulate land uses in the conservation district by issuing one or more of the following approvals:

(1) Departmental permit (see section 13-5-33);
(2) Board permit (see section 13-5-34);
(3) Emergency permit (see section 13-5-35);
(4) Temporary variance (see section 13-5-36);
[(5) Nonconforming uses (see section 13-5-37);]
5[(6)] Site plan approval (see section 13-5-38); or
6[(7)] Management plan or comprehensive management plan (see section 13-5-39).
(Deleted material is bracketed, new material is underscored.)

100. The change in 2011 seems more stylistic than substantive: the prior (1994) wording implied that the department actually issues approvals for nonconforming uses that qualify under H.A.R. § 13-5-37, which was not the case. Nonconforming uses were allowed, subject to the limits in H.A.R. § 13-5-37, as discussed above.

101. The Daileys violated H.A.R. § 13-5-30(b) under both the 1994 and 2011 rules.

102. The purpose of the rules given in H.A.R. § 13-5-1 is the same in the 1994 and 2011 rules.

103. The analysis of the interpretation of the rules given in COL 80-86 applies to the 2011 rules as well as to the 1994 rules.

104. Thus, under the 2011 rules, the removal of the old revetment and construction of the new seawall was not authorized by H.A.R. § 13-5-7, and violated H.A.R. §§ 13-5-7(e), 13-5-30(b), 13-5-6(d), and 13-5-22(P-15)(D-1), as well as H.R.S. § 183C-4(b).

D. OCCL/DLNR's Denial of the Daileys' 2005 Emergency Permit Request Is Irrelevant, and Was Proper in Any Case.

105. The Daileys attempt to excuse their conduct by arguing that their 2005 emergency permit request should have been granted. Even if the emergency permit had been improperly denied, it would not change the fact that the Daileys' construction of the seawall in late 2006-early 2007 was a violation. Normally, the fact that a governmental agency has denied a permit that it should have issued does not give the applicant license to then undertake the project without a permit, unless the applicant can show it didn't need a permit at all in the first place. That possibility has been rejected above. And the seawall built in late 2006-early 2007 was different from the structure applied for in the emergency permit. (Compare Exh. A-5 with FOF 128-139).

106. The Daileys also had the opportunity to apply for a CDUA through non-emergency procedures.

107. H.A.R. § 13-5-35(1994), Emergency Permits, allowed repair or rebuilding of certain structures on an expedited basis, see § 13-5-35(a) & (b)(1994), but this only applied to "land uses that have been established or are legally nonconforming. If there is a question regarding legality, the burden of proof shall be on the applicant." § 13-5-35(d) (1994). While the term "established" is not defined, it seems obvious that the right to rebuild or repair could only apply to legally established structures, and that the applicant had the burden of proof on this issue. This is a different question than who has the burden of proof in a violation case.

108. The Daileys' 2005 emergency CDUA did not contain enough information about the original construction of the revetment for OCCL/DLNR to treat it as a nonconforming structure. The Daileys, at that time, provided only the unsupported (and incorrect) statement that the

revetment had been built around the time of the house (1965). The testimony supporting a 1970 construction date was not presented until the contested case hearing. (Lemmo, Tr. at 82, l. 3-12).

109. H.A.R. § 13-5-35(c) also gave the department the discretion to have an emergency permit handled as a board permit under certain conditions, including "substantial change in the height the structure" or "where the department determines that a potential for substantial adverse environmental impact exists." The department made such findings in rejecting the emergency permit request, see FOF 8, so in any case, the emergency permit would have been processed as a permit which would have gone to the BLNR for final decision.

E. OCCL/DLNR's Treatment of the Daileys Was Consistent with its Treatment of Three Other Mokulē'ia Property Owners

110. The Daileys' circumstances were clearly distinguishable from the three cases they offered, and OCCL/DLNR applied the relevant laws in a reasonably consistent and appropriate manner in all four circumstances. Supra, FOF 153-156. OCCL/DLNR's actions were not arbitrary or capricious.

111. No evidence appears in the record that OCCL/DLNR's enforcement action was caused by improper motives.

F. OCCL/DLNR Gave Adequate Notice of the Laws Allegedly Violated

112. In its Bill of Particulars, OCCL/DLNR identified the laws that the Daileys were alleged to have violated:

(1) no use except a nonconforming use in the conservation district: H.R.S. § 183C-4(b);

(2) enforcement of shoreline setbacks: H.R.S. § 205A-43.6(a), (b);

(3) prohibitions: H.R.S. § 205A-44(b);

(4) penalties: H.A.R. §§ 13-5-6(c), (d);

(5) nonconforming uses and structures: H.A.R. § 13-5-7;

(6) permits: H.A.R. § 13-5-30(b); and

(7) emergency permits: H.A.R. § 13-5-35(d).

(OCCL/DLNR's "Bill of Particulars," p. 2, September 6, 2013).

113. H.R.S. Chapter 183C and H.A.R. Chapter 13-5 are the statutes and administrative rules governing conservation districts, the subject of this contested case.

114. OCCL/DLNR had no authority to enforce actions in the conservation district through the laws applicable to shoreline setbacks, which are under the jurisdiction of C&C's DPP.

115. Whether the original revetment had been a shoreline setback violation when built was relevant to determining whether it was "lawful", a necessary condition to being nonconforming, but even if a shoreline setback violation had been found, OCCL could not have taken enforcement action on that violation.

116. Despite this error in citing Chap. 205A in the Bill of Particulars, the Bill of Particulars identified the specific sections of H.R.S. Ch. 183C and H.A.R. Ch. 13-5 that the Daileys were alleged to have violated, *supra*, COL 9, 104.

117. As explained above in COL 97, the alleged violation of H.A.R. § 13-5-6(d)(2011) must be dismissed because this specific section was added in 2011.

118. Although the Bill of Particulars should have cited H.A.R. § 13-5-37(1994), rather than H.A.R. § 13-5-7(2011), these sections are similar enough that Petitioners had adequate notice of the charges being brought and the types of evidence that would be relevant.

119. Similarly, H.A.R. §§ 13-5-30(b)(1994) and 13-5-30(b)(2011) are similar enough that Petitioners had adequate notice of the charges being brought.

120. H.A.R. § 13-5-6(c), cited in the Bill of Particulars, is essentially the same in the 1994 and 2011 rules. The 2011 version, with language added in 2011 italicized, provides that "no permit shall be processed by the department *or board* until any violations pending against the subject parcel are resolved." It is not clear why the Bill of Particulars cited this subsection. The first

violation notice to the Daileys was dismissed in December 2005. There were no other violations pending when the Daileys built the illegal seawall. They were properly cited for that violation, and the Daileys did not apply for any DLNR permits after this second violation notice. This subsection is not relevant to any of the proposed findings of fact, conclusions of law, or decision and order.

121. H.A.R. § 13-5-35(d)(2011), listed in the Bill of Particulars, provides: "Repair and reconstruction of any structure or land use being investigated for possible violation of this chapter, or in situations in which fines for a violation have not been collected, shall not be processed until the violation is resolved." There is a slight difference between this section and its prior equivalent, H.A.R. § 13-5-35(e)(1994), but in any case, it is not clear why the Bill of Particulars cited this subsection, for the same reasons given in COL 120 for H.A.R. § 13-5-6(c)(2011), and neither it nor its 1994 equivalent are relied on for any part of these proposed findings of fact, conclusions of law, or decision and order, so the Daileys were not prejudiced by the fact that it was cited.

122. The Daileys had sufficient notice of the specific violations they were alleged to have violated in the Dec. 2006 violation notice, the May 25, 2007 staff submittal, and in the Bill of Particulars to prepare a factual and legal defense to the charges. Pilaa 400, LLC v. BLNR, 132 Haw. 247, 274, 320 P.3d 912, 939 (2014).

123. To the extent that the Daileys and/or OCCL/DLNR may have a right to further legal arguments based on the use of the 1994 rules rather than the 2011 rules, this shall be afforded by allowing them to file exceptions to these proposed findings of fact, conclusions of law, and decision and order, and allowing them additional oral argument before the Board, before a final decision is entered.

124. The illegal seawall has been in the conservation district since its construction in late 2006-early 2007 to the present time and is a continuing violation.

G. Conclusions of Law Related to Remedy

125. The Board should consider issues relating to a long-term erosion control structure in considering the remedies for a violation, especially in considering whether to allow an illegal structure to remain while the owner applies for a permit, either to allow the offending structure to remain after-the-fact, or to build some other structure.

126. When a structure has been built illegally in the conservation district, the proper remedy would normally include the removal of the structure, as well as fines and administrative costs.

127. Depending upon the facts and equities of the situation, after finding that building a structure was a violation, the Board could stay an order to remove the illegal structure pending the outcome of an after-the fact permitting process. In such a case, the violation is "resolved" pursuant to H.A.R. § 13-5-6(c)(2011), allowing the permit application to go forward, by the payment of the fine and the granting of time to submit permits. Unless the violation has been "resolved", the permit process in the conservation district cannot go forward. Id.

128. It would contradict the Board's governing statutes and rules (H.R.S. § 183C-4(b); H.A.R. § 13-5-6(d)(2011), and H.A.R. § 13-5-30(b)(both 1994 and 2011)), for it to allow a structure illegally built to remain permanently without obtaining the required permits. Thus, if a structure is allowed to remain after a violation while giving the owner a chance to apply for an after-the-fact permit, it would have to be removed if the after-the-fact permit is denied or if the owner does not pursue the permits.

129. The fact that an illegal structure already exists and has been temporarily allowed to remain should not be a factor in favor of approving the after-the-fact permit. To do so would encourage landowners to build illegal structures in the hope that: (1) they will not be caught, and (2) if they are, the authorities will give them favorable treatment in the permitting process.

130. The construction of the new seawall in late 2006-early 2007 was done in conscious disregard of the need for permits. (FOF 190).

131. The Board should decide, in assessing penalties, whether to stay the removal of the seawall to allow the Daileys time to pursue permits for an alternative erosion control structure.

132. For the reasons stated above, allowing the seawall to remain long-term without permits is not an option. It is an illegal structure.

133. Although the original boulder revetment was nonconforming for the purposes of this enforcement action, all remaining boulders, as well as the illegal seawall, are makai of the shoreline, and therefore on public property.[13]

134. For any encroachment makai of the shoreline to remain, the Daileys would have to apply for and receive an easement from the state, which requires (1) BLNR approval and (2) a concurrent resolution from the Legislature. H.R.S. § 171-53.

135. In this process, the Daileys would be the applicants, and to the extent that the nonconforming status was relevant to the decision, would have the burden of proving that status. H.A.R. § 13-5-7(f)(2011).

136. Consideration of the easement request would have to include issues such as public safety concerns from leaving boulders in place, payment of compensation to the state, indemnity, and maintenance. The public trust doctrine would also have to be considered.

137. With respect to the 147' area where the seawall was built, to require removal of only the seawall, while leaving the underlying boulders, is not a viable option either for the public or the Daileys. (FOF 184).

138. Restoring the old rock revetment would also not be a viable option for the Daileys or the public. It has been failing. (FOF 2, 4, 14).

[13] The Board is not addressing the question whether actual title to this area must be adjudicated in the Land Court. In acting on the current matter, however, it must proceed on the evidence in the record indicating that because of erosion this area is now public property.

139. Based on the current record, either the engineered seawall or the engineered revetment allowed by the SSV, if built in the conservation district, would require a full conservation district use permit because these structures exceed the parameters allowed for repair of a nonconforming structure. The engineered seawall described by the SSV is much bigger than the illegal seawall built in 2006-2007, and the engineered revetment is much broader than the original revetment. (FOF 167-169).

140. The standards for such a permit are given in H.A.R. § 13-5-22(P-15)(D-1)(2011). (The rule in effect at the time of the application would have to be followed.) The applicant would have to show that (1) the applicant would be deprived of all reasonable use of the land or building without the permit; and (2) the use would not adversely affect beach processes or lateral public access along the shoreline. (Id.).

141. The applicant would also have to meet the criteria in H.A.R. § 13-5-30(c).

142. On the current record, it appears that the SSV granted in 2010 is a feasible option for the Daileys to build an erosion control structure entirely outside the conservation district, except possibly for issues at the Colony end.

143. If a similar SSV is granted, there would be some public benefit to having the old revetment and illegal seawall demolished at the same time the new erosion control structure is built, rather than having the revetment and seawall demolished first. (FOF 189).

144. There would obviously be considerable hardship for the Daileys to require removal prior to the construction of a new erosion control structure (if allowed).

145. Without prejudging the issue whether the Daileys could obtain such a CDUP for a seawall/engineered revetment within the conservation district, the above factors indicate that the Board should not exercise its discretion to stay an order requiring the removal of the seawall and

underlying boulders for the Daileys to seek a CDUP, but rather, that it grant a stay to allow them to re-obtain a SSV and build that structure.

146. The SSV required that a building permit be secured within one year. (Exh. A-15, p. 11). It appears that the SSV has now lapsed.

147. The 2011 certified shoreline has expired (see FOF 41) and would have to be redone for any new shoreline protection structure. (The 2011 Certified Map can be used as valid evidence of the location of the shoreline for the purposes of this proceeding but it would no longer function as establishing the shoreline to obtain new permits.)

148. The 45' of the original revetment between the unauthorized seawall and the Colony seawall, where no unauthorized construction occurred in 2006-2007, can be treated differently than the unauthorized seawall.

149. Simply allowing the 45' boulder area to remain is not an option: because it is now on state land. It would need, at minimum, an easement from the state, with the same requirements mentioned in COL 134, supra.

150. It is questionable on this record whether the desires of the Daileys for erosion control, the desires of the Colony to protect the Dailey end of their legal seawall, and the public interest in having a beach free from loose boulders, can be achieved by retaining the existing 45' of old revetment. But the current record was developed to establish whether or not a violation occurred, not to answer long-term questions. The long-term solution would be developed through a permitting process, and/or in considering an easement request. So the final order in this violation case should not preclude the Daileys from obtaining approvals for the use of this 45' area.

151. The Daileys have pointed out that the boulders closest to the Colony wall were placed there by the Colony, not themselves. Whether these boulders should remain can be determined in the easement process described below.

III. DECISION AND ORDER

1. Based on the foregoing Findings of Fact and Conclusions of Law, the BLNR issues the following Decision and Order. The Board of Land and Natural Resources pursuant to the contested case hearing in OCCL/DLNR File No. OA-07-06 and subsequent remand ordered by the Circuit Court of the First Circuit in Civil No. 14-1-1541-07 finds and holds under the evidentiary record of this contested case that Petitioners Elizabeth Dailey and Michael Dailey violated H.R.S. § 183C-4(b) and the then-applicable H.A.R. § 13-5-30(b)(1994) as a continuing unauthorized and unpermitted land use in the conservation district including the reporting dates on or about December of 2006 through February of 2007.

2. While OCCL/DLNR has not met the "initial burden [of proof] by a preponderance of the evidence that the original structure was not nonconforming" imposed by the court upon remand, we nevertheless find and hold under the existing record that OCCL/DLNR has by a preponderance of the evidence met its burdens of producing evidence and persuasion that Petitioners Elizabeth Dailey and Michael Dailey violated H.R.S. § 183C-4(b) and H.A.R. § 13-5-30(b)(1994) by construction work on the prior original loose rock revetment which did not comport with either repair or replacement of a nonconforming structure under the requirements of H.R.S. § 183C-5 or H.A.R. § 13-5-37(1994), and resulted in a new and unauthorized structure.

3. For violation of the applicable conservation district statutes and rules as described above, petitioners Dailey are ordered:

a. To pay a fine of $2,000 for the unauthorized construction of a seawall in the conservation district.

b. To remove the unauthorized seawall, and the boulders makai of and underlying the seawall, from the conservation district. The order to remove the seawall and boulders will be stayed for up to three years from the date of this order to allow the Daileys to complete construction of an erosion control structure entirely

outside of the conservation district (except as stated in ¶ c. herein), including any necessary permitting and shoreline certifications. The new shoreline setback variance application shall be submitted no later than one year from the effective date of this order. Petitioners may request a single time extension for up to one year to apply for the shoreline setback variance, and two years for the deadline to complete construction (giving a maximum of five years from the effective date of this order) upon showing diligent good-faith efforts, which prior requests for extensions may be administratively granted by the chairperson. A refusal by the chairperson to grant a time extension shall be brought to the board for final determination if the applicant requests. This order shall not preclude the Daileys from obtaining necessary permits for activities in the conservation district, other than permanent construction, that may facilitate the construction of the erosion control structure, such as for excavation. The seawall, underlying boulders and boulders makai of the seawall, shall be removed immediately if the relevant deadlines are not met, and a fine of $100/day shall be imposed for non-removal.

b. During this time period, Daileys shall perform any remedial work requested by OCCL/DLNR to protect public safety problems that may arise from boulders or the seawall.

c. With respect to the 45' of boulders between the Daileys' unauthorized seawall and the Colony seawall, the Daileys are ordered to remove the boulders with the same deadlines, including time extensions, as the unauthorized seawall, except that the Daileys may, within one year, apply for an easement to allow the boulders (or a portion of the boulders) to remain. The issues relating to the public trust doctrine, public safety, any necessary improvements and stabilization of the boulders, and valuation of the easement, shall be dealt with in the request for the easement. If the Daileys choose to apply for an easement to allow the boulders to remain, they shall also obtain any other necessary approvals and permits, which may include permits for stabilizing or improving the boulders. The Daileys may have a time extension of up to one year, to apply for the easement, upon showing diligent

good-faith efforts, which may be administratively granted by the chairperson. A refusal by the chairperson to grant a time extension shall be brought to the board for final determination if the applicant requests. This order shall not preclude the Daileys from obtaining permits for activities in the conservation district in this 45' area that facilitate the connection of an erosion control structure that is otherwise on their private property with the Colony seawall, including permanent construction in the conservation district to the extent necessary to make a connection to the Colony seawall, within the deadlines given above in ¶ b. for the construction of an erosion control structure. The boulders shall be removed immediately if the relevant deadlines are not met, and a fine of $100/day shall be imposed for non-removal. During this time period, Daileys shall perform any remedial work requested by OCCL/DLNR to protect public safety problems that may arise from the boulders.

4. This order, allowing the Daileys time to apply for a shoreline setback variance, shall not be construed as an endorsement by the Board of a shoreline setback variance, which is entirely within the jurisdiction of the City and County Department of Planning and Permitting. OCCL and other DLNR divisions have the discretion to comment on any such applications as they see fit in their judgment and expertise. This order, allowing the Daileys time to apply for conservation district approvals for the 45' boulder area, shall not be construed as an endorsement by the Board of such approvals.

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