

STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Division of Boating and Ocean Recreation  
Honolulu, Hawai'i 96819

January 13, 2017

Board of Land and Natural Resources  
State of Hawai'i  
Honolulu, Hawai'i

Approval of a Petition for a Contested Case Hearing and Appointment and Selection of a Hearing Officer to Conduct All Hearings for a Contested Case for the Non-Renewal of a Mooring Permit Issued to Sarah MacInnes for the Keauhou Bay Small Boat Harbor, Hawai'i

Background:

The Division of Boating and Ocean Recreation (DOBOR) requested approval at the November 10, 2016, Board of Land and Natural Resources (Board) meeting, Item J-1, to cancel the mooring permit issued Sarah MacInnes for the Keauhou Bay small boat harbor. The reason for this request was that DOBOR had proposed to upgrade and install a new mooring field in the facility but due to opposition primarily from the Keauhou Canoe Club and existing permittees the project was cancelled.

Now that it has been determined that no new moorings will be added to the Harbor, DOBOR will rescind the conditional offers for mooring that had been made and reinstate the applicants to the waitlist in the order they were in at the time of initial offering.

Sarah MacInnes was the first person to obtain a mooring permit but was not the next qualified applicant on the waitlist. Because Ms. MacInnes was not the next qualified applicant on the waitlist at the time of the original offers for a mooring permit, DOBOR was recommending to reinstate everyone to the waitlist and offer the mooring that had been issued to Sarah MacInnes to the next qualified applicant on the waitlist.

Prior to the matter being heard at the November 10, 2016 Board meeting, a request for a contested case hearing was made by Kalani Nakoa who is the designated representative for Sarah MacInnes. A Petition for a Contested Case Hearing application was received within ten days of the Board action date.

DOBOR consulted with the Department of the Attorney General and believes that a contested case hearing is warranted regarding this matter. Stated briefly, a permittee has a property interest in an unexpired mooring permit.<sup>1</sup> Thus, a contested case hearing is required by

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<sup>1</sup> In contrast, there is no property interest in a permit that has expired – by lapse of time or otherwise. Both these propositions are illustrated in *Brown v. Thompson*, 91 Hawai'i 1, 979 P.2d 586 (1999). That case arose “out of the

the constitutional requirement of due process. *Kilakila 'O Haleakala v. Bd. of Land & Nat. Res.*, 131 Hawai'i 193, 317 P.3d 27 (2013).

#### Authority for Designating Hearing Officers

§13-1-32 (b), HAR provides that the Board may conduct the contested case hearing, or at its discretion, may delegate the conduct of the contested case hearing to a hearing officer, in which case the chairperson shall select such hearing officer.

Additionally, §§92-16 and 171-6, HRS also provide that the Board may delegate to the Chairperson the authority to select the hearing officer to conduct a Contested Case Hearing.

#### Basis for Designating Hearings Officers

Conducting a Contested Case Hearing may involve: giving notice of hearings, administering oaths, compelling attendance of witnesses and the production of documentary evidence, examining witnesses, certifying acts, issuing subpoenas, making rules, receiving evidence, holding conferences and hearings, fixing filing deadlines, and disposing of other matters that may arise during the orderly and just conduct of a hearing. History suggests that designating a Hearing Officer to perform these actions may provide a more expeditious resolution of the case than having the full Board conduct the hearing.

Staff notes that, by designating a Hearing Officer to conduct the hearing, the Board does not relinquish its authority to ultimately decide on the matters being contested. At the conclusion of the contested case, the Board would act with its own discretion on the Hearing Officer's Finding of Fact, Conclusion of Law, and Decision and Order.

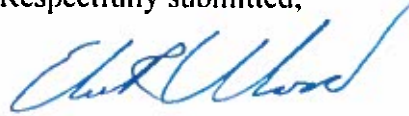
#### Recommendation:

- 1) That the Board determine Sarah MacInnes is entitled to a contested case hearing;
- 2) That the Board authorize the appointment of a Hearing Officer and delegate authority for the selection of the Hearing Officer to the Chairperson.

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impoundment by the respondents of two vessels owned by Brown, vessel 7430 and vessel 9362." 91 Hawai'i at 4, 979 P.2d at 589. Brown had a regular mooring permit and a live-aboard permit for vessel 7430 – both unexpired. Brown previously had a regular mooring permit for vessel 9362, but this permit expired by its own terms when the one-year term ran out. The Court concluded that Brown had a property interest in his permits for vessel 7430. The Court found no such right in the expired regular mooring permit for vessel 9362. *See also Cassidy v. State of Hawaii, Dept. of Transp., Harbors Div.*, 915 F.2d 528 (9th Cir. 1990) (holding that plaintiff had no property interest in a permit that had automatically terminated pursuant to its own terms).

Respectfully submitted,



Edward R. Underwood  
Administrator

Approved for submittal:



Suzanne D. Case  
Chairperson