

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Office of Conservation and Coastal Lands
Honolulu, Hawaii

December 8, 2017

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

REGARDING: Appointment and Selection of a Hearing Officer to Conduct All Hearings for One (1) Contested Case Hearing

SUBJECT PETITIONS: **OA-18-01:** Petition requesting the Board of Land and Natural Resources hold a Contested Case regarding Enforcement Case OA-18-06

BACKGROUND

On October 13, 2017 a contested case request was made before the Board of Land and Natural Resources by Gregory Kugle of Damon Key Leong Kupchak Hastert, counsel for James and Denise O'Shea, regarding OCCL Enforcement Case OA-18-06 regarding alleged unauthorized land uses in Pūpūkea, Waialua District, O'ahu, seaward of TMK (1) 5-9-002:025. Mr. Kugle followed up the oral request with a written petition, which the Office of Conservation and Coastal Lands received on October 18, 2017.

The Board voted to defer the matter pending the outcome of the contested case hearing.

AUTHORITY FOR DESIGNATING HEARING OFFICERS

HAR §13-1-32 (d) provides that the BLNR may conduct the Contested Case Hearing, or at its discretion, may appoint a hearing officer to conduct the hearing. HAR §13-1-29 (a) provides that, *the time for making an oral or written request and submitting a written petition may be waived by the Board.*

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

HEARING OF VIOLATIONS

HAR §13-1-31.1 provides that when a violation is alleged for which an administrative remedy is provided, the violator is entitled to a contested case hearing and no person or government agency other than the department and alleged violator shall be admitted as parties in such proceedings.

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.

DISCUSSION

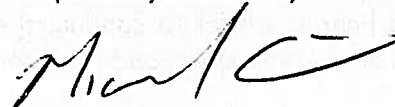
Staff notes that, by designating a Hearing Officer to conduct the hearing, the Board does not relinquish its authority to ultimately decide on the matters being contested. At the conclusion of the case, the Board would act with its own discretion on the Hearing Officer's Finding of Fact, Conclusion of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

Staff therefore recommends,

RECOMMENDATION:

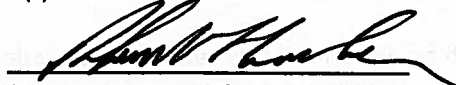
- 1) That James and Denise O'Shea are entitled to a contested case hearing;
- 2) That no person or government agency other than the department and alleged violator shall be admitted as parties in such proceedings;
- 3) That the Board authorize the appointment of a Hearing Officer for Contested Case OA-18-01, and let the Hearing Officer conduct all the hearings relevant to the subject petition for a Contested case Hearing; and
- 4) That the Board delegate the authority for selection of the Hearing Officer to the Chairperson.

Respectfully submitted,



Michael Cain
Office of Conservation and Coastal Lands

Approved for submittal:



SUZANNE D. CASE, Chair
Board of Land & Natural Resources



STATE OF HAWAII
BOARD OF LAND AND NATURAL RESOURCES

PETITION FOR A CONTESTED CASE HEARING

OFFICIAL USE ONLY	
Case No.	Date Received
Board Action Date / Item No.	Division/Office

INSTRUCTIONS:

- File (deliver, mail or fax) this form within ten (10) days of the Board action date to
 Department of Land and Natural Resources
 Administrative Proceedings Office
 1151 Punchbowl Street, Room 130
 Honolulu, Hawaii 96813
 Phone: (808) 587-1496, Fax: (808) 587-0390
- DLNR's contested case hearing rules are listed under Chapter 13-1, HAR, and can be obtained from the DLNR Administrative Proceedings Office or at its website (<http://hawaii.gov/dlnr/rules/Ch13-1-Official-Rules.pdf>). Please review these rules before filing a petition.
- If you use the electronic version of this form, note that the boxes are expandable to fit in your statements. If you use the hardcopy form and need more space, you may attach additional sheets.
- Pursuant to §13-1-30, HAR, a petition that involves a Conservation District Use Permit must be accompanied with a \$100.00 non-refundable filing fee (payable to "DLNR") or a request for waiver of this fee. A waiver may be granted by the Chairperson based on a petitioner's financial hardship.

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 DEPT. OF LAND & NATURAL RESOURCES
 STATE OF HAWAII

A. PETITIONER		
(If there are multiple petitioners, use one form for each.)		
1. Name James and Denise O'Shea, Individually and as Trustees of the James and Denise O'Shea Trust	2. Contact Person Gregory W. Kugle, Esq.	
3. Address 59-171-D Ke Nui Road	4. City Haleiwa	5. State and ZIP Hawaii 96712
6. Email See Below	7. Phone See Below	8. Fax See Below

B. ATTORNEY (if represented)		
9. Attorney Name Gregory W. Kugle	10. Firm Name Damon Key Leong Kupchak Hastert	
11. Address 1003 Bishop Street, Suite 1600	12. City Honolulu	13. State and ZIP Hawaii 96813
14. Email gwk@hawaiilawyer.com	15. Phone 808-531-8031	16. Fax 808-533-2242

C. SUBJECT MATTER

17. Board Action Being Contested

Case No. OA-18-06, contesting staff's recommendation to seek a finding of a violation of HAR 13-5-30 and HRS 183C-6, imposing fines, and requiring removal of debris.

18. Board Action Date

October 13, 2017

19. Item No.

Agenda Item K-2

20. Nature and Extent of Petitioner's Interest That May Be Affected by the Board Action

The sudden seawall collapse places the petitioner's home and property in immediate grave danger. The staff report admits that the subject property and the adjoining landowners have existing seawalls, that the seawall for the subject property completely failed suddenly, and that shoreline erosion is a significant hazard to beach-front homes. All of which will have an immediate financial impact on Petitioner, as well as a physical taking of its real property interests. In addition, the potential of the imposition of fines will also directly impact Petitioner.

21. Any Disagreement Petitioner May Have with an Application before the Board

Petitioner strongly disagrees with the staff recommendation. Petitioner also disagrees that it has violated any statutes or regulations. Petitioner further disagrees with the relief requested by staff, including removal of debris without a commitment to alternative relief, and Petitioner further disagrees with staff's recommended fines, which are excessive under the circumstances.

22. Any Relief Petitioner Seeks or Deems Itself Entitled to

Petitioner is entitled to a rejection of the staff recommendation and a closure of the enforcement action. Petitioner should be allowed to retain the erosion protection measures while the beach is actively eroding and/or until a long term remedy can be implemented, including repair of the seawall or other alternatives. Moreover, because of Petitioner's real property interests and constitutional due process rights, Petitioner is entitled to a hearing and is entitled to judicial review of the Board's decision.

23. How Petitioner's Participation in the Proceeding Would Serve the Public Interest

Petitioner's participation will ensure that due process is afforded and that the Board's ultimate action is based on science, evidence and witness testimony, subject to rights and obligations afforded by a contested case procedure. Petitioner owns the property at issue, and Petitioner faces the fines that staff recommends, so Petitioner must be afforded an opportunity to present its case and to appeal an adverse decision.

24. Any Other Information That May Assist the Board in Determining Whether Petitioner Meets the Criteria to Be a Party under Section 13-1-31, HAR

HAR 13-1-31.1 provides that when a violation is alleged for which an administrative remedy is provided and for which the alleged violator is entitled to a contested case hearing, then a contested case hearing SHALL be held and the alleged violator SHALL be a party.

Petitioner also satisfies the more generalized provisions of HAR 13-1-31. In this case, because Petitioner has property interests in the real property and lawfully resides on the real property. HAR 13-1-31 (b)(2) provides that "the following persons ... shall be admitted as parties: ... all persons who have some interest in the land, who lawfully reside on the land"

Check this box if Petitioner is submitting supporting documents with this form.

Check this box if Petitioner will submit additional supporting documents after filing this form.

Gregory W. Kugle
Petitioner or Representative (Print Name)


Signature

10/18/2017
Date

