

**STATE OF HAWAI‘I**  
**DEPARTMENT OF LAND AND NATURAL RESOURCES**  
**Office of Conservation and Coastal Lands**  
Honolulu, Hawai‘i

January 10, 2020

**Board of Land and Natural Resources**  
**Department of Land and Natural Resources**  
**State of Hawai‘i**  
**Honolulu, Hawai‘i**

**Contested Case: OA 20-01**

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

**PETITION:** **Docket No. OA 20-01**  
Petition requesting the Board of Land and Natural Resources for a Contested Case Hearing and Appointment of a Hearing Officer Regarding Enforcement Action OA-20-16.

**BACKGROUND**

On November 8<sup>th</sup>, 2019 a contested case request was made by Gregory W. Kugle of Damon Key Leong Kupchak Hastert, counsel for Gary & Cynthia Stanley, before the Board of Land and Natural Resources on the Office of Conservation and Coastal Lands’ (OCCL) Enforcement Case OA-20-16 regarding the alleged unauthorized installation of an erosion control structure located upon submerged lands at Sunset Beach, Koolauloa, O‘ahu, makai of 59-181 D Ke Nui Road noted as TMK (1) 5-9-002:034 (**Exhibit 1**).

Subsequently on November 18<sup>th</sup>, 2019, OCCL received a petition for a Contested Case from Mr. Gregory Kugle of Damon Key Leong Kupchak Hastert, representing the alleged violators Gary & Cynthia Stanley (**Exhibit 2**).

**HEARINGS OF VIOLATIONS**

HAR §13-1-31.1 provides when a violation is alleged for which an administrative remedy is provided, the alleged 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.

**AUTHORITY FOR DESIGNATING HEARING OFFICERS**

HAR §13-1-32 (b) provides that the BLNR may conduct the Contested Case Hearing, or at its discretion, may appoint a hearing officer to conduct the hearing.

Additionally, Hawaii Revised Statutes Sections 92-16 and 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.

**BASIS FOR DESIGNATING HEARING 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 Mr. Gregory W. Kugle, counsel for Gary and Cynthia Stanley, submitted a written petition requesting a Contested Case hearing pursuant to HAR §13-1-29 in a timely manner following their oral request in front of the Board on November 8<sup>th</sup>, 2019.

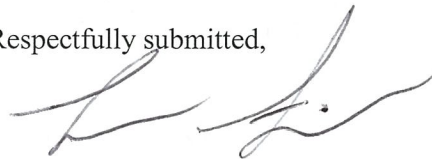
Staff also notes that the Board does not relinquish its authority to ultimately decide on the matters being contested by designating a Hearing Officer to conduct the hearing. At the conclusion of the contested case, the Board will act with its own discretion on the Hearing Officer's Finding of Fact,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

Staff therefore recommends,

**RECOMMENDATION:**

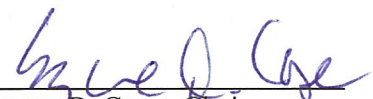
- 1) That the Board authorize the appointment of a Hearing Officer for Contested Case OA 20-01 to conduct all the hearings relevant to the subject petition for a Contested Case Hearing. Pursuant to HAR §13-1-32 (b), the Chairperson shall select such Hearing Officer once the Board has delegated the conduct of the Contested Case Hearing to a Hearing Officer.

Respectfully submitted,



Trevor Fitzpatrick, Staff Planner  
Office of Conservation and Coastal Lands

Approved for submittal:


  
\_\_\_\_\_  
SUZANNE D. CASE, Chairperson  
Board of Land & Natural Resources

# Exhibit 1: Sunset Beach

Koolauloa, Oahu



## Legend

-  59-181D Ke Nui Rd Stanley Residence





STATE OF HAWAII  
BOARD OF LAND AND NATURAL RESOURCES

RECEIVED  
OFFICE OF CONSERVATION  
COASTAL LANDS

PETITION FOR A CONTESTED CASE HEARING

2019 NOV 18 P 2-20

OFFICIAL USE ONLY	
Case No.	Date Received DEPT. OF LAND & NATURAL RESOURCES STATE OF HAWAII
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://dlnr.hawaii.gov/forms/contested-case-form/>). 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.
- All materials, including this form, shall be submitted in **three (3)** photocopies.

A. PETITIONER		
(If there are multiple petitioners, use one form for each.)		
1. Name Gary & Cynthia Stanley	2. Contact Person Gregory W. Kugle or Veronica A. Nordyke	
3. Address 59-181D 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 & Veronica A. Nordyke	10. Firm Name Damon Key Leong Kupchak Hastert	
11. Address 1003 Bishop Street, Suite 1600	12. City Honolulu	13. State and ZIP Hawaii, 96813

<b>14. Email</b> gwk@hawaiiattorney.com van@hawaiiattorney.com	<b>15. Phone</b> 808-531-8031	<b>16. Fax</b> 8808-533-2242
----------------------------------------------------------------------	----------------------------------	---------------------------------

**C. SUBJECT MATTER**

**17. Board Action Being Contested**  
Case No. OA-20-16 - Alleged Unauthorized Structures Located Along The Shoreline Within the Conservation District in violation of Hawaii Revised Statutes (HRS) § 183C-7, Hawaii Administrative Rules (HAR) § 13-5-6 and § 13-5-22

<b>18. Board Action Date</b> November 8, 2019	<b>19. Item No.</b> Agenda Item K-3
--------------------------------------------------	----------------------------------------

**20. Nature and Extent of Petitioner’s Interest That May Be Affected by the Board Action**  
The staff report admits that shoreline erosion "is producing increasingly hazardous conditions for beachfront homes [(including Petitioner's real property)] owing to rapid sand loss and run-up by large waves . . . threaten[ing] the integrity of overlying structures." Removal of Petitioners' erosion control measures will immediately endanger the overlying structure and will have an immediate financial impact on Petitioners, as well as create a physical taking of their real property interests. In addition, the potential of the imposition of fines will also directly impact Petitioners.

**21. Any Disagreement Petitioner May Have with an Application before the Board**  
Petitioners strongly disagree with the staff recommendation. Petitioners purchased the 59-181D Ke Nui Road (the "Property") on September 3, 2019 after having being informed that there was a valid permit for maintaining and bolstering a geotextile blanket and tubes to mitigate erosion issues on the seaward side of the Property. This information was confirmed by Buddy Shepperd, who had installed the erosion control system for the prior owner. Mr. Shepperd also informed Petitioners about damage to the current system caused by the removal of a neighbor's tractor/bulldozer that had gotten stuck in the sand and Mr. Shepperd offered a corrective plan of action. After the sale closed, Petitioners promptly retained Mr. Shepperd to complete the recommended repairs. On September 13, 2019, a week after the sale closed, Mr. Shepperd asked Petitioners for the Permit. At this time, it came to light that Mr. Shepperd had conducted work based upon the prior owner's statement that there was a valid permit and that Mr. Shepperd thought the buyers (the Petitioners) would provide the same to him. This was news to Petitioners who IMMEDIATELY and VOLUNTARILY (1) ceased work, (2) self-reported the unintentional unpermitted work and, (3) sought to proceed with work legally. See Exhibit P to the DLNR Staff Report. Rather than work with Petitioners, the State issued a Notice of Alleged Violation and Order to remove the vital erosion control system.

**22. Any Relief Petitioner Seeks or Deems Itself Entitled to**  
Petitioners are entitled to a rejection of the staff recommendation and a closure of the enforcement action. Petitioners 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 obtaining requisite permits, implementation of a beach nourishment program, or other alternatives. Moreover, because of Petitioners' real property interests and constitutional due process rights, Petitioners are 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**  
Petitioners' participation will insure 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. Petitioners own the Property, and Petitioners face the fines that staff recommends, so Petitioners must be afforded an opportunity to present its case and to appeal an adverse decision.

**Exhibit 2**

**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**

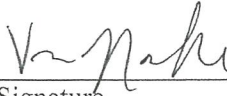
HAR 13-1-31.1 provides that when a violation is alleged for which an administrative remedy is provided and for which the alleged violator is entitled to a contested case hearing, then a contested case hearing SHALL be held and the alleged violator SHALL be a party. Applying almost identical rules, the Hawaii Supreme Court held in *Kaleikini v. Theilen*, 124 Hawaii 1, 19-20 (2010) that the Chairman of the Board of Land and Natural Resources erred by denying a contested case request that was procedurally proper. Because the DLNR has taken the position that there has been an alleged violation, 13-1-31.1 controls and requires a contested case hearing. In addition, due process requires that Petitioners be afforded a contested case hearing. In *Brown v. Thompson*, 91 Hawaii 1 (1999), the Hawaii Supreme Court held the Department of Land and Natural Resources failed to provide procedural due process when it failed to provide notice and an adequate hearing before depriving a boat owner of his property interests in the boat and the live aboard permit. Likewise, in *Price v. Zoning Board of Appeals*, 77 Hawaii 168 (1994), the Hawaii Supreme Court held that constitutional due process required an alleged violator to be provided with a hearing (a contested case hearing before the Zoning Board of Appeals) before the alleged violator could be subjected to fines.

Although Section 13-1-31.1 provides that Petitioner SHALL be a party and SHALL be afforded a contested case hearing, Petitioner also satisfies the more generalized provisions of HAR 13-1-31. "Without a hearing, an applicant or an alleged violator SHALL be a party." In this case, staff alleges a violation, therefore Petitioner shall be a party. In addition, because Petitioner has property interests in its real property, Petitioner "shall be admitted" as a party because the mandatory parties include "all persons who have some interest in the land, who lawfully reside on the land ... or who otherwise demonstrate that they will be so directly and immediately affected by the requested action". HAR 13-1-31(b)(2). In the staff report, the DLNR concedes that erosion control measures have been granted at the Property and for neighboring properties, and that such erosion threatens the integrity of the overlying structure - Petitioners' home. This is an admission that Petitioners will be actually harmed, and their property interests damaged and taken, if the Petition for Contested Case Hearing is not granted.

Doc #: 474747

- 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/Veronica A. Nordyke  
Petitioner or Representative (Print Name)

  
Signature

11/18/2019  
Date

**Exhibit 2**