

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Division of Boating and Ocean Recreation
Honolulu, Hawaii 96813

June 26, 2020

Chairperson and Members
Board of Land and Natural Resources
State of Hawaii

RECONSIDERATION OF PRIOR ACTION AND DENIAL OF PETITIONS
FOR CONTESTED-CASE HEARING FILED ON BEHALF OF JONAS
IKAIA SOLLIDAY AND PACIFIC MARINE PARTNERS LLC WITH
RESPECT TO ITEM J-1, MAY 22, 2020:

TERMINATION OF BOATING LEASE NO. LH-19-002, PACIFIC MARINE
PARTNERS LLC, LESSEE, HONOKOHAU SMALL BOAT HARBOR,
NORTH KONA, HAWAI'I, TMK: (3) 7-4-008:-003 (POR).

INTRODUCTION:

The State, through the Board, leased property at Honokohau SBH to PMP by lease dated September 10, 2018. The property is used for boat storage.

PMP is substantially in arrears on the rent. DOBOR sent and PMP received a notice of default as required by law and the lease. PMP did not cure. The matter came before the Board on May 22, 2020. Attorney Tim Vandeveer was present and stated that he intended to ask for a contested case. After discussion, Mr. Vandeveer withdrew the oral request, specifically stated that he was aware of his client's rights, and specifically elected not to request a contested case pending a decision by the Board. The Board accepted staff's recommendation to terminate. Mr. Vandeveer orally requested a contested case after the Board made a decision. He timely filed a written request.

Attorney Sunny Lee did not appear at the meeting and did not make an oral request for contested. He nevertheless filed a written request for contested case on behalf of PMP.

Both of these requests are improper and staff recommends that they be denied on that basis. Mr. Vandeveer requested a contested case on behalf of an alleged member of PMP, not for PMP itself. Mr. Lee did not make an oral request by the end of the meeting.

Staff further recommends that the Board deny both requests on the merits as now discussed.

DISCUSSION:

The Supreme Court has stated that a written request for a contested case is in some respects a request that the agency reconsider its decision. *Hui Kakoo Aina Hoopulapula v. Bd. of Land & Nat. Res.*, 112 Hawai'i 28, 42, 143 P.3d 1230, 1244 (2006), abrogated by *Tax Found. of Hawai'i v. State*, 144 Hawai'i 175, 439 P.3d 127 (2019).

The filing of a subsequent substantive written petition would not only allow the petitioner another opportunity to convince the BLNR of his or her position, but would allow the BLNR to more carefully and deliberately reconsider its ruling and reverse itself, if appropriate.

To the extent that this remains good law, staff recommends that the Board reaffirm its decision. No material additional information is provided. It remains undisputed that PMP is seriously in arrears on rent and has been so since long before the COVID-19 emergency.

An administrative agency must hold a contested-case hearing if it is required by law, which means that the contested-case hearing is required by (1) statute, (2) administrative rule, or (3) constitutional due process. *Mauna Kea Anaina Hou v. BLNR*, 136 Hawai'i 376, 390, 363 P.3d 224, 238 (2015).

Neither PMP nor Mr. Solliday has identified any statute or administrative rule that requires that a contested-case hearing be held. Staff is aware of no such rule or statute.¹ Both applicants rely on constitutional due process.

Mr. Solliday identifies his affected property interest as a 50% ownership in PMP. PMP identifies the lease itself. Neither interest requires a contested case.

Mr. Solliday's interest in PMP itself is not at issue. Nothing in this dispute will affect that interest. The value of the interest will undoubtedly be less if the lease is abrogated. It is, however, a commonplace that a shareholder or other owner of a corporate interest does not herself have a claim or cause of action when corporate property is allegedly damaged. *Joy A. McElroy, M.D., Inc. v. Maryl Group, Inc.*, 107 Hawai'i 423, 431, 114 P.3d 929, 937 (Ct. App. 2005).

Nor does the Board's action entitle PMP itself to a contested case for at least three reasons. First, the Supreme Court specifically held in *Sharma v. State, Dept. of Land & Nat. Res.*, 66 Haw. 632, 636–37, 673 P.2d 1030, 1033 (1983) that the Board did not need to hold a contested case in connection with a lease termination. Sharma was limited by *Flores v. Bd. of*

¹ PMP points generally to “HAR Sections 13-1-28 to 13-1-31.1.” These procedural sections do not entitle anyone in particular to a contested case except 13-1-31.1 provides that an alleged violator is entitled to a contested case. That is not applicable here.

Land & Nat. Res., 143 Hawai'i 114, 123, 424 P.3d 469, 478 (2018). But *Flores* did not affect Sharma's core holding that:

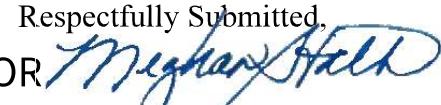
BLNR did not have to hold a contested case before terminating Sharma's lease because such a hearing was not required by statute or due process.

Second, the Board's action (in this case anyway) does not immediately and directly affect PMP's property interest in the lease. The State intends to file suit to affirm termination and gain possession of the property.

Third, and for that same reason, PMP will be afforded due process before any of its rights are affected by way of the court case. A contested case would add nothing and accomplish nothing. Even if a contested case was held to determine whether the Board wants to terminate, that termination would still have to be effectuated by a lawsuit. Cf. *Flores*, *supra* (holding that contested case not required where requestor otherwise received notice and a full opportunity to be heard).

RECOMMENDATION:

- (1) That the Board reaffirm its decision to terminate the lease;
- (2) That the Board deny the Petitions for a Contested Case Hearing; and
- (3) That the Board authorize the Chair and the Department of Attorney General to take any and all actions necessary to effectuate its decision.

Respectfully Submitted,
FOR 
EDWARD R. UNDERWOOD, Administrator
Division of Boating & Ocean Recreation

APPROVED FOR SUBMITTAL:



SUZANNE D. CASE, Chairperson
Board of Land and Natural Resources