

State of Hawai'i
DEPARTMENT OF LAND AND NATURAL RESOURCES
Division of Forestry and Wildlife
Honolulu, Hawai'i 96813

May 14, 2021

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

Board Members:

SUBJECT: Petition for a Contested Case Hearing filed by The Ka'ū Advisory Council regarding Board action of April 23, 2021, Agenda Item C-2, *Approve grant awards from available funds in the Land Conservation Fund, for:*

B. Ala Kahakai Trail Association, \$1,475,000, for the acquisition of approximately 1,841.3 acres at Ka'ū, Hawai'i (Kiolaka'a), Tax Map Key Numbers (3) 9-4-001:008, :009, :016, :017, and :023

SUMMARY

On May 3, 2021 the Board received a Petition for a Contested Case Hearing from The Ka'ū Advisory Council. The Petition follows up on the email and spoken requests for a contested case hearing made by Sophia Hanoa and Pernell Hanoa at the Board meeting held on April 23, 2021, under Agenda Item C-2. The Division provides the following factual background and related discussion for the Board's consideration.

BACKGROUND

At its meeting held January 22, 2021, the Board deferred action on portions of Agenda Item C-1, for approval of grant awards from available funds in the Land Conservation Fund, including sub-item B, Ala Kahakai Trail Association, \$1,475,000, for the acquisition of approximately 1,841.3 acres at Ka'ū, Hawai'i (Kiolaka'a), Tax Map Key Numbers (3) 9-4-001:008, :009, :016, :017, and :023. At its meeting held April 23, 2021, under Agenda Item C-2, the Board again considered the Division's recommendations for approving grant awards from available funds in the Land Conservation Fund. The Board received extensive written and spoken testimony supporting and opposing the Kiolaka'a acquisition.

The Board decided, unanimously, to approve the Division's recommendations for Item C-2 (including the Kiolaka'a acquisition), with amendments (including a special requirement that supports public access for Kiolaka'a and other approved acquisitions).

ITEM C-2

After this decision, the Board Secretary received an email from Sophia Hanoa indicating that "Pele Defense Fund and The Ka'ū Advisory Council are requesting a contested case hearing" (**Attachment 1**). Later, towards the end of the Board meeting, the Chairperson recognized Pernell Hanoa as a person associated with a contested case request for Agenda Item C-2; Mr. Hanoa verified that he had sent in a request for a contested case hearing; and the Chairperson reminded him about the requirement to file a written request within ten days.

Petition

On May 03, 2021, the Chairperson's Office received, via email, a Petition for a Contested Case Hearing from Petitioner, The Ka'ū Advisory Council (**Attachment 2**). The Petition identifies the subject matter as for Item C-3 from the Board's meeting held April 24, 2020. Staff believes the Petition was intended to refer to agenda item C-2 of the Board's meeting held on April 23, 2021.

Within the Petition, the only explicit reference to the subject matter of Item C-2 (April 23, 2021) is in Section C.22 (Any Disagreement Petitioner May Have with an Application before the Board), stating that "Kiolakaa and surrounding ahupua'a in Ka'ū that are under land management of Ala Kahakai Trail Association focuses more on specific land acquisition and does not guarantee or insure the enforcement of Native Hawaiian Cultural Practices" (page 2 of 3).

DISCUSSION

The Department's Rules of Practice and Procedure state that "When required by law, the board shall hold a contested case hearing upon its own motion or on a written petition of any government agency or any interested person." Section 13-1-28(a), Hawai'i Administrative Rules (Haw. Admin. R.). Section 91-1, Hawai'i Revised Statutes (Haw. Rev. Stat.) defines "contested case" as "a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing."

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). To establish a due process right to a contested case, the claimant must first show that "the particular interest which claimant seeks to protect by a hearing [is] 'property' within the meaning of the due process clauses of the federal and state constitutions[.]" *Sandy Beach Def. Fund v. City Council of Honolulu*, 70 Haw. 361, 376, 773 P.2d 250, 260 (1989).

"Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that

secure certain benefits and that support claims of entitlement to those benefits." *Int'l Broth. Of Painters and Allied Trades v. Befitel*, 104 Hawai'i 275, 283, 88 P.3d 647, 655 (2004) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564 (1972)). This property interest must be one for which the claimant has "a legitimate claim of entitlement" and must be "more than an abstract need or desire" or "a unilateral expectation." *Bush*, 76 Hawai'i at 136, 870 P.2d at 1280.

The Petition filed by The Ka'ū Advisory Council does not appear to identify a Department rule or a statute that requires the Board to hold a contested case hearing, and seems to rely solely upon constitutional due process.

As to constitutional due process, it is difficult to discern what specific property right petitioner believes it has, or how the interest might be affected by the proposed grant. In section 20 of the Petition, petitioner refers to "available lands" subject to the jurisdiction of the Department of Hawaiian Home Lands (DHHL). The subject property, however, is not DHHL trust land.

In section 20, petitioner also refers to "miscellaneous rights of the people" preserved under Chapter 7, Haw. Rev. Stat. In sections 21 and 22, petitioner refers to native human rights and Native Hawaiian Cultural Practices. The Division questions whether the Board's approval of the subject grant award in any way affects native Hawaiian rights as may exist. These reserved rights of tenants will not be affected by the grant award itself, nor by the change in land ownership that would occur if and when the awarded funds are expended. The subject properties are privately owned at present. Any transfer pursuant to the grant does not itself affect or interfere with native Hawaiian rights in the properties. In this case:

[T]he '*Kalipi* rights' of a native tenant do not depend on who owns the subject land. In other words, if a native Hawaiian has the right to enter the land of another, the transfer of land alone does not extinguish those native Hawaiian rights. Concomitantly, the existence of native Hawaiian rights to enter a particular parcel of land does not burden a landowner's rights to transfer his or her interest in the land.

Pele Defense Fund v. Paty, 73 Haw. 578, 614, 837 P.2d 1247, 1268 n. 26 (1992).

LEGACY LAND CONSERVATION PROGRAM
PETITION FOR A CONTESTED CASE HEARING
MAY 14, 2021

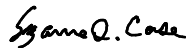
In determining its response to the subject Petition, the Board may wish to consider the Background and Discussion provided above, as composed with assistance from counsel. It appears that the requests and petition for a contested case hearing were timely and properly made, however the Division defers to the Board for conclusions about whether a hearing that would determine the rights, duties and liabilities of Petitioner is required by law, and whether petitioner has standing to participate in a contested case hearing that may be held concerning the subject Petition.

Respectfully submitted,



DAVID G. SMITH, Administrator

APPROVED FOR SUBMITTAL:



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

ATTACHMENTS:

Attachment 1: Email Request for a Contested Case Hearing

Attachment 2: Petition for a Contested Case Hearing

Attachment 1
May 14, 2021
Item C-2

From: Sophia Hanoa <hanoa.sophia@aol.com>

Sent: Friday, April 23, 2021 1:43 PM

To: Ferreira, Darlene S <darlene.s.ferreira@hawaii.gov>

Subject: [EXTERNAL] Pele Defense Fund and The Ka'u Advisory Council Requesting a contested case hearing.

Aloha Darlene,

Pele Defense Fund and The Ka'u Advisory Council are requesting a contested case hearing. We tried to submit it during the meeting and were kicked off the meeting. How else can we submit a request.
Mahalo

Sophia Hanoa
hanoa.sophia@aol.com



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:

1. 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
2. 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.
3. 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.
4. 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.
5. 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 The Ka'ū Advisory Council | 2. Contact Person Kūpuna Jesse Ké | |
| 3. Address P.O. BOX 562 | 4. City Pahala | 5. State and ZIP Hi |
| 6. Email kupuna_ke0562@yahoo.com | 7. Phone 808-928-8917 | 8. Fax |

| B. ATTORNEY (if represented) | | |
|------------------------------|----------------------|--------------------------|
| 9. Attorney Name | 10. Firm Name | |
| 11. Address | 12. City | 13. State and ZIP |
| 14. Email | 15. Phone | 16. Fax |

C. SUBJECT MATTER

17. Board Action Being Contested

Approval grant awards from offered funds in the Land Conservation Fund that was requested through an application process by Ala Kahakai Trail Association for the Fiscal Year 2020 Legacy Land Conservation Program. Ala Kahakai Trail Association was recommended by the Legacy Land Conservation Commission, for the acquisition of interests and rights in specific parcels of land having value as a resource to the State, for:

3. A. Ala Kahakai Trail Association, \$2,400,000, for the acquisition of approximately 1,363 acres at Ka'ū, Hawai'i (Kaunāmano), Map Key Numbers: (3) 9-5-011:001, :004, :005, and :006, and (3) 9-5-012:001.

3. D. Ala Kahakai Trail Association, \$875,000, for the acquisition of approximately 348 acres at Ka'ū, Hawai'i (Manaka'a Fishing Village), Tax Map Key Number: (3) 9-5-010:026.

18. Board Action Date
April 24, 2020

19. Item No.
3. A & D

20. Any Specific Statute or Rule That Entitles Petitioner to a Contested Case

"The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution, excluding therefrom lands defined as "available lands" by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for native Hawaiians and the general public. [Add Const Con 1978 and election Nov 7, 1978] (https://www.capitol.hawaii.gov/hrscurrent/vol01_ch0001-0042f/05-Const/CONST_0012-0007.htm)" (Note: reference is website).

CHAPTER 7 MISCELLANEOUS RIGHTS OF THE PEOPLE. "The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights (Legislator,1978) ".

21. Any Specific Property Interest of Petitioner That Is Entitled to Due Process Protection

I am requesting the rights to uphold and secure native human rights to promote and perpetuate the dire survival of Native Hawaiian Cultural Practices and not allow Ala Kahakai Trail Association said activities to interfere in the natural process of utilizing from Mauka to Makai the process of sustainable living .

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

Kiolakaa and surrounding ahupua'a in Ka'ū that are under land management of Ala Kahakai Trail Association focuses more on specific land acquisition and does not guarantee or insure the enforcement of Native Hawaiian Cultural Practices. Viewing human rights as irrelevant in the decision making process is an egregious act of disrespect to the value our cultural people as a whole place on their own existence and perpetuated survival.

23. Any Relief Petitioner Seeks or Deems Itself Entitled to

Accountability and active involvement into ethical standards based on the "Hawaii State Constitution of Hawaii-Article XII "Hawaiian Affairs"; which states, "Section 7. The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua`a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights". Perpuating customary and traditional Hawaiian practices, and educational learning opportunities for future generations.

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

Core values and real time awareness of the community heart beat extends the authenticity of the needs that are most pressing for everyone. My contribution is simple it is the integrity of resources, educational awareness, driven by cultural preservation. With the land is the people they both sustain one another and the solution is to conserve by providing more aid to what is lacking in the community. Example, culturally, traditionally, economically, medically, all barriers that need more prioritizing.

25. 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

The Ka'ū Advisory Council is not seeking litigation. We are requesting that BLNR uphold the integrity of the Hawaii State Constitution Article XII Section 7, to be included in all agreements and legal documents prior to Ala Kahakai acquiring any more parcels of land in the district of Ka'ū. We are open to mediation if necessary. The Ka'ū Advisory Council is also asking for a waiver of all fees. Mahalo

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.

Jesse Ke - Po'o Kupuna Jesse Ke
Petitioner or Representative (Print Name)

Jesse Ke
Signature

05/02/2021
Date