

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division
Honolulu, Hawaii 96813

January 14, 2022

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

OAHU

Consideration of Petition for Contested Case Hearing filed by Tyler Ralston Regarding November 12, 2021 Agenda Item D-10, Annual Renewal of Revocable Permit 7915; Resorttrust Hawaii, LLC, Permittee; Waialae, Honolulu, Oahu, Tax Map Key: (1) 3-5-023:041.

Pursuant to Section 92-5(a) (4), Hawaii Revised Statutes (HRS), the Board may go into Executive Session in order to consult with its attorney on questions and issues pertaining to the Board's powers, duties, privileges, immunities and liabilities.

BACKGROUND

At its meeting on November 12, 2021 under agenda item D-10, the Board approved staff's recommendation to renew Revocable Permit No. 7915 for another year commencing from January 1, 2022 through December 31, 2022.¹

The Board received both oral and written testimony from Mr. Tyler Ralston, Mr. David Frankel, and Resorttrust Hawaii, LLC. During the meeting, Mr. Ralston verbally requested a contested case. Following an executive session, the Board voted to deny the request for contested case and proceeded to approve staff's recommendation. On November 18, 2021, the Department received a written petition for contested case from Mr. Ralston filed via email. A copy of the contested case petition is attached as **Exhibit 1**.

On December 10, 2021, Mr. Ralston also filed a Notice of Appeal regarding the Board's denial of Mr. Ralston's request for a contested case hearing.

After discussion with the Department of the Attorney General (AG), it was recommended that a request be placed on the agenda for the Board to reconsider the request for a contested case hearing. Staff notes that the Board may go into executive session to consult with its attorney about the request.

¹ See 2021 submittal at <https://dlnr.hawaii.gov/wp-content/uploads/2021/11/D-10.pdf>

Staff recommends the Board affirm its previous decision at the November 12, 2021 meeting of denying Mr. Ralston's request for a contested-case hearing.

RECOMMENDATION:

That the Board deny the Petition for a contested case hearing filed by Mr. Tyler Ralston on November 18, 2021.

Respectfully Submitted,

Barry Cheung

Barry Cheung
District Land Agent

APPROVED FOR SUBMITTAL:

Suzanne D. Case

Suzanne D. Case, Chairperson

RT



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 Tyler Ralston	2. Contact Person	
3. Address [REDACTED] (but contact attorney)	4. City Honolulu	5. State and ZIP HI 96816
6. Email	7. Phone	8. Fax

B. ATTORNEY (if represented)		
9. Attorney Name David Kimo Frankel	10. Firm Name	
11. Address [REDACTED]	12. City Honolulu	13. State and ZIP HI 96816
14. Email [REDACTED]	15. Phone [REDACTED]	16. Fax

C. SUBJECT MATTER	
17. Board Action Being Contested	
The conditions upon which Revocable Permit 7915; Resorttrust Hawaii, LLC, Permittee; Waialae, Honolulu, Oahu, Tax Map Key: (1) 3-5-023:041 is being renewed.	
18. Board Action Date November 12, 2021	19. Item No. D-10
20. Any Specific Statute or Rule That Entitles Petitioner to a Contested Case	
See # 25 HRS chapters 205A and 171	
21. Any Specific Property Interest of Petitioner That Is Entitled to Due Process Protection	
<p>I have recreational, aesthetic, environmental and public trust interests. <i>See e.g. State v. Shigematsu</i>, 52 Haw. 604, 483 P. 2d 997 (1971); <i>Akau v. Olohana Corp.</i>, 65 Haw. 383, 390, 652 P.2d 1130, 1135 (1982); <i>Ka Pa'akai O Ka 'Aina v. Land Use Comm'n</i>, 94 Hawai'i 31, 43-4, 7 P.3d 1068, 1080-1 (2000); <i>Citizens for the Prot. of the N. Kohala Coastline v. Cnty. of Haw.</i>, 91 Hawai'i 94, 101, 979 P.2d 1120, 1127 (1999); <i>Life of the Land, Inc. v. Land Use Commission</i>, 61 Haw. 3, 8, 594 P.2d 1079, 1082 (1979); <i>Kilakila 'O Haleakalā v. Bd of Land & Natural Res.</i>, 131 Hawai'i 193, 204-5, 317 P.3d 27, 38-39 (2013); <i>Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp.</i>, 121 Hawai'i 324, 331, 219 P.3d 1111, 1118 (2009); <i>Kapiolani Park Preservation Soc'y v. Honolulu</i>, 69 Hawai'i 569, 751 P.2d 1022 (1988); <i>In re Maui Elec. Co.</i>, 141 Hawai'i 249, 408 P.3d 1 (2017); <i>Flores v. Bd. of Land & Natural Res.</i>, 143 Hawai'i 114, 424 P.3d 469 (2018). I also have an interest in seeing that our state's environmental laws are enforced and properly implemented. See #25.</p> <p>I began enjoying the RP parcel, the sandy beach, and the waters in front of the Kāhala Hotel and Resort (Kahala Hilton at that time) in the late 1960s. I have frequented the area for recreation and enjoyment my whole life and I am very familiar with the area. I started swimming and snorkeling out beyond the dredged lagoon over the reef and far out in front of the hotel in the channel through the reef, around 1980. Hundreds of times over the decades I've enjoyed recreation and relaxing on the sandy beach and the RP parcel after a swim with family and friends. When my son was born, and as he grew, our family spent countless hours swimming in the lagoon and out over the reef, and playing on the sandy beach and grassed over RP portion of the beach. More recently, in the last approximately six years, the area has changed for the worse. In particular, the grassed over beach portion (the State land RP parcel) has changed such that it's been more challenging to enjoy recreation, lounging, the natural views and beauty of the area. The negative changes have all been the result of the Hotel placing furniture and other items of their commercial activity on the RP parcel. Other than when I was away at college and at an internship, I would go to the beach in front of the Kāhala Hotel and Resort two to four times a week (until 2017). Since approximately 2017, I have gone there approximately twice a month, sometimes more frequently up to several times a week.</p> <p>My use and enjoyment of the revocable permit parcel and the surrounding area are adversely affected by the hotel's use of the revocable permit property (pre-setting beach chairs, storing equipment, and making commercial use of the land). I cannot use those areas where the hotel's chairs and equipment remain (I have no objection to the shower or garbage cans.). The area is</p>	

cluttered and unsightly.

Please see the testimony I provided this year and in prior years.

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

I disagree with allowing the hotel to use the revocable permit area in a way that excludes members of the public from using portions of it. Commercial interests should not supersede the public's rights. In particular, the pre-setting of chairs for the exclusive use of hotel guests and the storage of chairs on the property excludes the public from using those areas and clutters an otherwise attractive area. The proposed signage plan is also inadequate to protect public use.

23. Any Relief Petitioner Seeks or Deems Itself Entitled to

There should be no commercial use of the revocable permit property that serves to exclude public uses of land dedicated to **"be used as a public beach."** No RP should be granted unless:

1. uses are restricted to only maintenance and recreational uses;
2. commercial use (as that term is defined by HAR § 13-221-2) of the RP area and ma kai is explicitly prohibited;
3. public access and use of the RP area (and the ma kai beach) is explicitly authorized and the applicant is explicitly prohibited from discouraging and impeding such use and access; see e.g. HRS §§ 205A-2(b)(1)(A), -2(b)(3)(A), -2(b)(9)(A), -2(c)(1)(B)(i), -2(c)(1)(B)(iii) - 2(c)(1)(B)(iv), -2(c)(1)(B)(v), -2(c)(1)(B)(viii), 2(c)(3), -2(c)(9)(A), 205A-4, 205A-5(b); *State by Kobayashi v. Zimring*, 58 Haw. 106, 121, 566 P.2d 725, 735 (1977);
4. there is no pre-setting or storage of beach chairs; and
5. the Permittee ensures that its employees and contractors comply with the terms of this permit and shall be responsible for any violations.

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

The petitioner's participation in a contested case hearing will allow for the deliberate consideration of a plethora of evidence and carefully review of applicable statutes, rules and cases. The public interest is served when decisions are made based on a complete record and the applicable law.

The courts have also broadened standing in actions challenging administrative decisions. The U.S. Supreme Court has granted standing where plaintiffs allege environmental harm even though plaintiffs' harm is equally shared by a large segment of the public. *United States v. SCRAP*, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973). In *In re Hawaiian Electric Co.*, 56 Haw. 260, 535 P.2d 1102 (1975) we granted standing to utility users who challenged a Public Utility Commission's approval of rate increases, although plaintiffs shared the additional rate with all other users. We have also broadly construed standing in other administrative law cases. See *Life of the Land v. Land Use Commission*, 63 Haw. 166, 623 P.2d 431 (1981); *Waianae Model Neighborhood Area Association, Inc. v. City and County of Honolulu*, 55 Haw. 40, 514 P.2d 861 (1973).

Claims of harm to public trust property is another area where courts are expanding standing. *Besig v. Friend*, 463 F. Supp. 1053 (N.D.Cal. 1979); *Paepcke v. Public*

Building Commission, 46 Ill.2d 330, 263 N.E.2d 11 (1970). In *Marks v. Whitney*, 6 Cal.3d 251, 98 Cal. Rptr. 790, 491 P.2d 374 (1971), the California Supreme Court granted standing to an individual who sued a private property owner claiming that the owner was obstructing use of public tidelands. In an implied dedication case, *Dietz v. King*, 2 Cal.3d 29, 84 Cal. Rptr. 162, 465 P.2d 50 (1970), the court granted standing to individuals representing a class who sued a private landowner to enforce a public right to use a beach access route across his property.

This court has been in step with the trend away from the special injury rule towards the view that a plaintiff, if injured, has standing. In *Life of the Land v. Land Use Commission*, *supra*, we said:

Standing is that aspect of justiciability focusing on the party seeking a forum rather than on the issues he wants adjudicated. And the crucial inquiry in its determination is "whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of ... [the court's] jurisdiction and to justify exercise of the court's remedial powers on his behalf." [Citation omitted.] 63 Haw. at 172, 623 P.2d at 438.

We concur in this trend because we believe it is unjust to deny members of the public the ability to enforce the public's rights when they are injured. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 5 U.S. 137, 163, 2 L.Ed. 60 (1803). . . .

We hold, therefore, that a member of the public has standing to sue to enforce the rights of the public even though his injury is not different in kind from the public's generally, if he can show that he has suffered an injury in fact, and that the concerns of a multiplicity of suits are satisfied by any means, including a class action.

Akai v. Olohana Corp., 65 Haw. 383, 386-89, 652 P.2d 1130, 1133-34 (1982). The petitioner's interest in both the beach and the RP parcel have been adversely affected by Resorttrust and would be if its proposed use is authorized without appropriate conditions

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

My right to a contested case hearing is constitutionally based. A contested case hearing is required by law when required by constitutional due process. *In re Maui Elec. Co.*, 141 Hawai'i 249, 408 P.3d 1 at 258, 408 P.3d at 10. The *Maui Elec.* court held that the protections of the due process clause apply to the right to a clean and healthful environment as defined by laws related to environmental quality.

"The right to a clean and healthful environment" is a substantive right guaranteed to each person by article XI, section 9 of the Hawai'i Constitution:

Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources.

Haw. Const. art. XI, § 9; see also *Cty. of Haw. v. Ala Loop Homeowners*, 123 Hawai'i

391, 409, 417, 235 P.3d 1103, 1121, 1127 (2010) (recognizing a substantive right to a clean and healthful environment). Article XI, section 9 is self-executing, and it “establishes the right to a clean and healthful environment, ‘as defined by laws relating to environmental quality.’” *Ala Loop*, 123 Hawai‘i at 417, 235 P.3d at 1127. This substantive right is a legitimate entitlement stemming from and shaped by independent sources of state law, and is thus a property interest protected by due process. Although a person's right to a clean and healthful environment is vested pursuant to article XI, section 9, the right is defined by existing law relating to environmental quality.

Id. at 260-61, 408 P.3d at 12-13.

Thus, where a source of state law — such as article XI, section 9 — grants any party a substantive right to a benefit — such as a clean and healthful environment — that party gains a legitimate entitlement to that benefit as defined by state law, and a property interest protected by due process is created. In other words, the substantive component of article XI, section 9 that we recognized in *Ala Loop* is a protectable property interest under our precedents. . . . [T]he property interest created by article XI, section 9 is shaped by all state laws relating to environmental quality.

Id. at 264, 408 P.3d at 16. *See also In re Hawai‘i Elec. Light Co.*, 145 Hawai‘i 1, 445 P.3d 673 (2019) (Public Utilities Commission unconstitutionally deprived environmental group of a contested case hearing).

I have the right to a clean and healthful environment (including the “conservation, protection and enhancement of natural resources”) as defined by HRS chapters 205A and 171 — just as the Sierra Club had rights pursuant to HRS chapter 269.

The Supreme Court recently held, “HRS ch. 205A is a law “relating to environmental quality” for the purposes of article XI, section 9.” *Protect and Preserve Kahoma Ahupua‘a Association v. Maui Planning Commission*, 489 P.3d 408, 417 (2021). In rendering decisions, BLNR is obligated to comply with HRS chapter 205A (including the chapter’s objectives and policies). HRS §§ 205A-4(a), -4(b), -5(b) –6(a).

HRS chapter 171 is also a law relating to environmental quality. First, in determining whether a law is related to environmental quality, the Hawai‘i Supreme Court has relied on the legislature’s identification of laws related to environmental quality when it enacted of HRS § 607-25. *Cty. of Haw. v. Ala Loop Homeowners*, 123 Hawai‘i 391, 410, 235 P.3d 1103, 1122 (2010). Each chapter cited in HRS § 607-25 “implements the guarantee of a clean and healthful environment established by article XI, section 9.” *Id.* *See also* 1986 Haw. Sess. Laws Act 80, § 1 at 104-105. HRS § 607-25(c) identifies HRS chapter 171. Second, the legislature specified that all cases arising from title 12—of which HRS chapter 171 is a part—are subject to the jurisdiction of the environmental court. HRS § 604A-2(a). This legislative determination also demonstrates that this law that governs the use of the state’s public trust natural resources is a law relating to environmental quality. Third, HRS chapter 171 implements Hawai‘i State Constitution Art. XI, section 2, which reads in relevant part: “The legislature shall vest in one or more executive boards or commissions powers for the management of natural resources owned or controlled by the State, and such powers of

disposition thereof as may be provided by law.” This provision was drafted by the framers of the first state constitution in 1950 and went into effect at statehood. The framers were concerned about “the preservation of certain natural resources. . . . Hence, the importance of placing fairly rigid restrictions on the administration of these assets.” Committee of the Whole Report No. 22 in 1 Proceedings of the Constitutional Convention of Hawaii of 1950 at 335 (1950). Pursuant to Article XI section 2, the 1962 state legislature codified the laws that govern the administration and management of the state’s lands into RLH chapter 103A, which later became HRS chapter 171. *See* 1963 Supplement to Revised Laws of Hawaii 1955 at 485; Act 32, 1962 Session Laws of Haw. Thus, HRS chapter 171 is a law relating to the preservation of natural resources.

In addition, I have the right to protect the integrity of the public trust as articulated in Article XII § 4 and Article XI § 1 of the Hawai‘i State Constitution.

These constitutionally-based interests are entitled to some level of protection. *See e.g. Pele Def. Fund v. Puna Geothermal Venture*, 77 Hawai‘i 64, 68, 881 P.2d 1210, 1214 (1994). I believe that a contested case hearing is the most appropriate means for these rights to be protected. The Hawai‘i Supreme Court has explained that three factors need to be balanced in determining what procedures should be employed (and therefore whether a contested case is the appropriate procedure): “(1) the private interest which will be affected; (2) the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards; and (3) the governmental interest, including the burden that additional procedural safeguards would entail.” *Maui Elec*, 141 Hawai‘i at 265, 408 P.3d at 17.

The first factor is the private interest to be affected. In this case, the private interests are the rights guaranteed by Article XII § 4 and Article XI § 1 of the Hawai‘i State Constitution (the right of a trust beneficiary to ensure that public trust principles are diligently applied, and public trust resources protected and appropriately managed) as well as “the right to a clean and healthful environment, which is a substantive right guaranteed by the Hawai‘i Constitution.” *Maui Elec*, 141 Hawai‘i at 265, 408 P.3d at 17. “This right to a clean and healthful environment includes the right that specific consideration be given to”, *id.*, the objectives and policies of HRS § 205A-2. See HRS § 205A-4 and 205A-5(b). That includes specific consideration of HRS §§ 205A-2(b)(1)(A), -2(b)(3)(A), -2(b)(9)(A), -2(c)(1)(B)(i), -2(c)(1)(B)(iii) -2(c)(1)(B)(iv), -2(c)(1)(B)(v), -2(c)(1)(B)(viii), 2(c)(3), and -2(c)(9)(A). It also requires that special consideration be given before development takes place within the special management area and before structures are placed within the shoreline setback area. This right also includes the right to ensure that public lands governed by HRS chapter 171 are appropriately managed.

The second factor to be considered the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards.

A contested case hearing is similar in many respects to a trial before a judge: the parties have the right to present evidence, testimony is taken under oath, and witnesses are subject to cross-examination. It provides a high level of procedural fairness and

protections to ensure that decisions are made based on a factual record that is developed through a rigorous adversarial process.

Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res., 136 Hawai'i 376, 380, 363 P.3d 224, 228 (2015). A contested case hearing provides procedural protections to both parties. A contested case can ensure that a decision is based exclusively on evidence in the record. A contested case hearing can also prevent irrelevant issues from distracting decisionmakers from the pertinent issues. A contested case is an effective means of resolving disputed facts. And it allows for deliberate decisionmaking rather than hastily crafted and vague conditions.

Unlike the situation in *Flores v. Bd. of Land & Natural Res.*, 143 Hawai'i 114, 424 P.3d 469 (2018), I have not had the opportunity to cross examine any witnesses. Flores was denied the opportunity to have a contested case hearing over a land disposition because he had "already been afforded a full opportunity to participate in a contested case hearing."

The third factor is the governmental interest. The BLNR has a strong interest in making deliberate decisions when it comes to public trust land.

Under public trust principles, the State as trustee has the duty to protect and maintain the trust property and regulate its use. Presumptively, this duty is to be implemented by devoting the land to actual public uses, e.g., recreation. Sale of the property would be permissible only where the sale promotes a valid public purpose.

State by Kobayashi v. Zimring, 58 Haw. 106, 121, 566 P.2d 725, 735 (1977). See also *Kelly v. 1250 Oceanside Partners*, 111 Hawai'i 205, 231 140 P.3d 985, 1011 (2006) (public trust duty requires agency to "ensure that the prescribed measures are actually being implemented"); *Mauna Kea*, 136 Hawai'i at 414, 363 P.3d at 262 (concurring opinion of J Pollack, joined by Wilson and McKenna) (trustee must "fulfill the State's affirmative constitutional obligations"). The BLNR's decision must be made "with a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state." *In Re Water Use Permit Applications*, 94 Hawai'i 97, 143, 9 P.3d 409, 455 (2000). When acting as a trustee, BLNR

must make its findings reasonably clear. The parties and the court should not be left to guess, with respect to any material question of fact, or to any group of minor matters that may have cumulative significance, the precise finding of the agency. . . Clarity in the agency's decision is all the more essential in a case such as this where the agency performs as a public trustee and is duty bound to demonstrate that it has properly exercised the discretion vested in it by the constitution and the statute.

Id. at 158-59, 9 P.3d at 469-70 (2000)(citations and internal quotation marks omitted). These values are best assured in the context of a contested case. A contested case hearing could answer questions with testimony given under oath like:

- what authorization did the hotel receive to place outfall pipes underground on public land?
- where is the best place to put beach chairs that does not inhibit public access and use?
- how much public land would the general public be effectively denied from using?

- what are the impacts of sea level rise on this parcel?
- has the hotel violated the conditions of its permit?

To be clear, if the contested case hearing proceedings last beyond December 31, 2021, the petitioner will not object – and is willing to enter into an appropriate stipulation -- that allows the hotel to use the parcel for recreational and maintenance purposes (only) provided the hotel does not pre-set beach chairs, store equipment, or engage in any commercial activity (as that term is defined by HAR§ 13-221-2) on the RP area and ma kai until a decision is made at the conclusion of the proceedings.

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

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

Tyler Ralston
Petitioner or Representative (Print Name)

Tyler Ralston
Signature

11/17/2021
Date