

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

May 27, 2022

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

REGARDING: Approval of Petition for a Contested Case Hearing by Mr. Todd Dunphy, Individually and as Agent for Tropical Exotics III LLP and Tropical Exotics IV LLP for Conservation District Enforcement Case OA 22-22 as well as the Delegation to the Chair for the Appointment and Selection of a Hearing Officer to Conduct All Hearings for Contested Case OA 22-03 Regarding the Request for Administrative Fines and Other Penalties Against Mr. Todd Dunphy, Individually and as Agent for Tropical Exotics III LLP and Tropical Exotics IV LLP for Conservation District Enforcement Case OA 22-22 Regarding the Alleged Unauthorized Grading and Construction of Shoreline Erosion Control Devices Located Makai of 59-181 E Ke Nui Rd., Tax Map Key: (1) 5-9-002:035, and Makai of 59-181 F Ke Nui Rd., Tax Map Key: (1) 5-9-002:036

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

BACKGROUND

Mr. Todd Dunphy, individually and as agent for Tropical Exotics III LLP and Tropical Exotics IV LLP, owns shoreline properties located along the coastline of the Pūpūkea-Paumalū Beach Lots in the Ko'olauloa area of O'ahu's north shore, TMKs: (1) 5-9-002:035 and (1) 5-9-002:036 (the properties). Mr. Todd Dunphy allegedly failed to remove debris from past erosion control structures fronting the properties after receiving notice from the Department, constructed an unauthorized erosion control structure consisting of sandbags and geotextile blankets, graded submerged land to bury the unauthorized erosion control structure(s) and debris, and constructed a sand berm on public and state owned conservation land seaward of the properties in violation of HRS §171-6 (12), HRS §183C-7, and HAR §13-5-24.

Staff scheduled and submitted the alleged violation for final disposition by the Board of Land and Natural Resources (Board) at its April 22, 2022, meeting.¹ Notice of the April 22, 2022, hearing as well as the Staff submittal was emailed and mailed to Mr. Todd Dunphy.

On April 21, 2022, Mr. Todd Dunphy and their agent submitted a request for a 30-day continuance to prepare for Landowner's April 22, 2022, hearing. See **Exhibit 1**. On May 2, 2022, Mr. Todd Dunphy and their agent submitted a Petition for Contested Case Hearing regarding the subject matter. See **Exhibit 2**.

HEARINGS OF VIOLATIONS

HAR §13-1-31.1 provides that when a violation is alleged for which an administrative remedy is provided and with respect to which the alleged violator is entitled to a contested case hearing, a contested case shall be held upon the petition of the alleged violator, provided that the petition is made in accordance with the provisions of section 13-1-29(a). 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 Board may conduct the contested case hearing, or at its discretion, may delegate the conduct of the contested case hearing to a hearing officer, in which case the chairperson shall select such hearing officer.

Additionally, HRS §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, by designating a Hearing Officer to conduct the hearing, the Board does

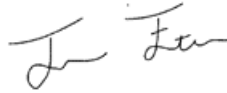
¹ A copy of the Staff Report for the April 22, 2022, Board meeting that was submitted and later withdrawn can be viewed at <https://dlnr.hawaii.gov/wp-content/uploads/2022/04/K-1.pdf>.

not relinquish its authority to ultimately decide on the matters being contested. At the conclusion of the contested case, the Board would act with its own discretion on the Hearing Officer's Finding of Fact, Conclusion of Law, and Decision and Order.

AS SUCH, STAFF RECOMMENDS AS FOLLOWS:

- 1) That Mr. Todd Dunphy, individually and as agent for Tropical Exotics III LLP and Tropical Exotics IV LLP, is entitled to a contested case hearing;
- 2) No person or government agency other than the department and alleged violator(s) shall be admitted as parties in such proceedings; and
- 3) The Board approve the Petition for a Contested Case Hearing by Mr. Todd Dunphy, individually and as agent for Tropical Exotics III LLP and Tropical Exotics IV LLP, and authorizes the appointment of a Hearing Officer and delegate authority for the selection of the Hearing Officer to the Chairperson.

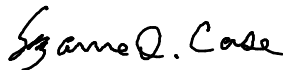
Respectfully submitted,



Trevor Fitzpatrick, Staff Planner
Office of Conservation and Coastal Lands



Approved for submittal:



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



Location Map



MICHAEL JAY GREEN AND ASSOCIATES, INC.

841 Bishop Street, Suite 2201
Honolulu, Hawai'i 96813
Tel: (808) 521-3336
Fax: (808) 566-0347

April 21, 2022

Via email: blnr.testimony@hawaii.gov

Board of Land and Natural Resources
PO Box 621
Honolulu, Hawaii 96809

Re: Todd D. Dunphy

Dear Board Members:

Please be advised that my office represents Todd D. Dunphy in matters before the board, reflected in item "K" on the Board's hearing agenda for April 22, 2022. Mr. Dunphy received his notice of hearing on April 21, 2022 and retained my office later that afternoon. We are requesting a 30 day continuance to prepare for Mr. Dunphy's hearing.

Thank you for your consideration in this matter. Should you have any questions, please feel free to contact me.

Very truly yours,


MICHAEL JAY GREEN

Exhibit 1

LAW OFFICES OF MYLES S. BREINER, ALC
1003 Bishop Street, Suite 2150
Honolulu, HI 96813
Telephone: (808) 526-3426 | Facsimile: (808) 521-7680

TRANSMITTAL LETTER

Date: Monday, May 02, 2022

To: **Suzanne D. Case**
Chairperson
Board of Land and Natural Resources
Kalanimoku Building
1151 Punchbowl Street
Honolulu, Hawaii 96813

Re: **Mr. Todd Dunphy**
Petition for Contested Case Hearing

Via: MAIL

Transmitted herewith are the following:

NO. OF COPIES	DATE	DESCRIPTION
1	5/2/22	Letter re: Petition for Contested Case Hearing

- | | |
|---------------------------------------|------------------------------|
| (X) For your information and/or files | () Per your request |
| () For signature & return | () Per our conversation |
| () For necessary action | () For review & comment |
| () For filing/recording | () For payment |
| () For your approval | () Please complete & return |
| (X) SEE REMARKS BELOW | |

REMARKS: Should you have any questions, please do not hesitate to contact our office.

Mahalo,
Courtney Mrowczynski
File Clerk/Legal Assistant

Exhibit 2

K-1



MYLES S. BREINER

1003 Bishop Street, Suite 2150
Honolulu, Hawaii 96813
Tel: (808) 526-3426
Fax: (808) 521-7680
e-mail: myles@breinerlaw.net
Web: hawaiiicriminaldefense.net

May 2, 2022

Suzanne D. Case
Chairperson
Board of Land and Natural Resources
Kalanimoku Building
1151 Punchbowl Street
Honolulu, Hawaii 96813

**Re: Mr. Todd Dunphy – Petition for Contested Case Hearing
59-181 E Ke Nui Road & 59-181 F Ke Nui Road**

Dear Ms. Case,

This letter is to inform you that the Law Office of Myles S. Breiner & Associates has been retained as legal counsel by Mr. Todd Dunphy with respect to his properties located at (1) 59-181 E Ke Nui Road and (2) 59-181 F Ke Nui Road (collectively referred to herein as “Property”). Please address all future communications pertinent to Mr. Dunphy or his Property to our office, accordingly.

Specifically, this correspondence addresses the “Request for Administrative Fines and other Penalties Against Mr. Todd Dunphy, Agent for Tropical Exotics III LLP and Tropical Exotics IV LLP for Conservation District Enforcement Case OA 22-22 Regarding the Alleged Unauthorized Grading and Construction of Shoreline Erosion Control Devices Located Makai of 59-181 E Ke Nui Rd.; Tax Map Key: (1) 5-9-002:035 and Makai of 59-181 F Ke Nui Rd.; Tax Map Key: (1) 5-9-002:036 (“Request for Fines”).

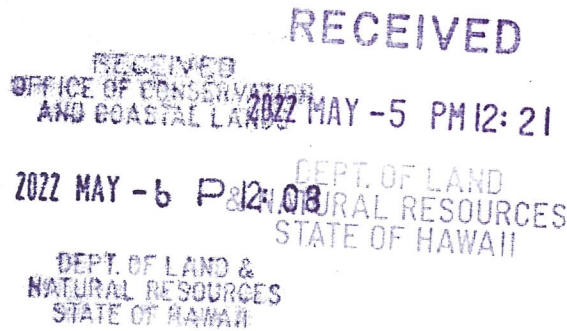
In accordance with Hawaii Administrative Rules (“HAR”) § 13-1-29(a), Mr. Dunphy now requests a contested case hearing with respect to the Request for Fines advanced by the State of Hawaii Department of Land and Natural Resources (“DLNR”), dated April 22, 2022.

I. Nature and Extent of the Requestor’s Interest

Mr. Dunphy owns Property along Oahu’s North Shore that has been and will continue to be affected by the ongoing erosion to the Rocky Point coastline.

Exhibit 2

K-1



On February 4, 2022, Mr. Dunphy received a letter from the DLNR's Office of Conservation and Coastal Lands ("OCCL") that contained images of debris fronting his Property, which were taken on January 24, 2022. Mr. Dunphy denies responsibility for the debris depicted on January 24, 2022.

On February 23, 2022, Mr. Dunphy was informed that ocean swells were going to reach 30 – 40 feet in height. In response, he placed sandbags fronting both his parcels to prevent significant and irreversible damage to his Property¹. Thereafter, between April 8, 2022 and April 11, 2022, Mr. Dunphy utilized a construction excavator to reposition preexisting sand to ensure that the lateral support for his Property, as well as the property of his neighbors, would not be compromised. Importantly, Mr. Dunphy received permission from his neighbors to reposition the sand prior to taking any action with the excavator. It is significant that this same method of emergency remediation was previously approved on multiple occasions by the DLNR / OCCL².

On April 22, 2022, the DLNR's OCCL sent its Request for Fines demanding payment in the amount of **ninety-two thousand dollars (\$92,000.00)** from Mr. Dunphy for his (1) alleged failure to remove debris from *past* "erosion control structures" after receiving notice on February 4, 2022 and (2) use of an excavator to fortify the lateral support for the Ke Nui Road properties on the Rocky Point coastline, which created another temporary "erosion control structure".

II. Requestor's Disagreement

Mr. Dunphy contests the fines under HRS §171-6 (12). As stated above, Mr. Dunphy is not responsible for the "unauthorized erosion control materials" outlined in the OCCL's Letter, dated February 4, 2022, which is expressly relied upon in the DLNR's Request for Fines, dated April 22, 2022³.

Specifically, the photos provided with the OCCL's February 4, 2022 Letter, identified as Exhibits "1" through "5" in the DLNR's Request for Fines and dated January 24, 2022, depict sandbags that were originally installed on or about January 4, 2014⁴. These "unauthorized erosion control materials", which Mr. Dunphy *did not install*, are identified as the subject "encroachments" in the DLNR's Request for Fines under HRS §171-6 (12). As a result of erroneously attributing these "encroachments" to Mr. Dunphy, the DLNR has assessed a fine of \$1,000.00 per day to Mr. Dunphy since the February 4, 2022 Letter was sent, which now equates to **seventy seven thousand dollars (\$77,000.00)**.

Exhibit 2

¹ See Request for Fines, Exhibit

² The DLNR previously authorized "sand pushes" in January 2014, March 2015, March 2018, and February 2021.

³ See Request for Fines, Exhibit 7.

⁴ See Request for Fines, Exhibit 5, K-1, Page 31 – taken from the DLNR's own records.

In support, we have enclosed Mr. Dunphy's Motion for Early Termination of Supervised Release, filed on January 25, 2017 in the United States District Court for the District of Hawaii, which confirms that Mr. Dunphy was in federal custody when the sandbags were originally installed on January 4, 2014. In fact, Mr. Dunphy was not released from federal custody until December 9, 2014⁵, almost one year later.

Lastly, the Exhibits contained in the February 4, 2022 Letter do not depict Mr. Dunphy at all. Rather, these photos depict debris that the DLNR has seemingly attributed to Mr. Dunphy simply because they are fronting his Property. Consequently, the OCCL's February 4, 2022 Letter contains no evidence to support the allegation that Mr. Dunphy is responsible for the debris he is now being fined for.

III. Relief Requestor Seeks

As an initial matter, Mr. Dunphy seeks to avoid all monetary penalties outlined in the April 22, 2022 Request for Fines, issued by the DLNR's OCCL. As a secondary matter, Mr. Dunphy would like the DLNR's OCCL to provide guidance as to the appropriate method to address emergency lateral support issues caused by tidal swell erosion along the Rocky Point coastline.

As demonstrated throughout his urgent communications with the OCCL, *no guidance* was provided by the DLNR or the OCCL when Mr. Dunphy proposed the emergency option of moving preexisting sand beneath his Property to prevent it from being destroyed by the rising swells (enclosed). Rather than providing any recommendations, *the DLNR did nothing* and simply stated that Mr. Dunphy needed to devise another option, which left the possibility of emergency self-help remediation open.

This response was entirely unacceptable, negligent, and emblematic of the institutional and bureaucratic paralysis rampant throughout the DLNR and OCCL. As governmental institutions, the DLNR and the OCCL are expressly tasked with the authority to provide guidance to the public about land use, especially during emergency situations. In this case, Mr. Dunphy appropriately contacted the DLNR's OCCL because his inquiry fell squarely within its jurisdiction; however, when he received no guidance whatsoever, he resorted to an emergency "sand push", which was previously authorized by the DLNR in (1) January 2014, (2) March 2015, (3) March 2018, and (4) February 2021.

Lastly, the DLNR notified Mr. Dunphy that any form of emergency self-help remediation was not going to be acceptable *only after* Mr. Dunphy commenced repositioning sand with the excavator in April 2022.

Exhibit 2

⁵ See Motion for Early Termination

IV. Public Interest

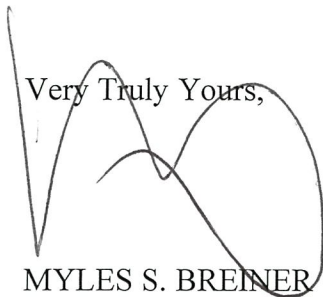
Mr. Dunphy's Property is one of many North Shore properties confronted by the affects of seasonal coastline erosion. It is unassailable that the DLNR's policy of prohibiting residential emergency remediation regarding coastal erosion issues will impact hundreds of North Shore residents, aside from Mr. Dunphy, who are similarly situated.

V. Other Information

Mr. Dunphy has requested his complete file from the DLNR's OCCL on April 29, 2022 (enclosed). Consequently, Mr. Dunphy reserves the right to amend the contents of this Petition for Contested Hearing in the event that other pertinent materials are made available.

Thank you for your time and attention to this matter. Please contact me at (808) 526-3426 upon your receipt of this Petition to discuss this matter in greater detail.

Very Truly Yours,



MYLES S. BREINER
KYLE T. DOWD
SEAN FITZSIMMONS

cc: Todd Dunphy.

Enclosures.

Exhibit 2

MYLES S. BREINER 4364
Attorney at Law, Inc., ALC
841 Bishop Street, Suite 2115
Honolulu, Hawaii 96813
Telephone: 526-3426

Attorney for Defendant
TODD DONALD DUNPHY (01)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA,)	CR. NO. 09-00370 SOM
)	
Plaintiff,)	
)	
v.)	
)	
TODD DONALD DUNPHY, (01))	MOTION FOR EARLY
)	TERMINATION OF SUPERVISED
Defendant.)	RELEASE; DECLARATION OF
)	COUNSEL; EXHIBITS "A-G";
_____)	CERTIFICATE OF SERVICE

MOTION FOR EARLY TERMINATION OF SUPERVISED RELEASE

COMES NOW, Defendant TODD DUNPHY, by and through his attorney, MYLES S. BREINER, hereby moves this Honorable Court for an order terminating Defendant's supervised release.

This motion is made pursuant to Rule 47 of the Federal Rules of Criminal Procedure, the records and files herein, the attached Declaration of Counsel, and further argument to be adduced at the hearing on the instant motion.

Exhibit 2

K-1

Dated: Honolulu, Hawaii January 24, 2017.

/s/ Myles S. Breiner

MYLES S. BREINER

Attorney for Defendant

TODD DUNPHY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA,) CR. NO. 09-00370 SOM
)
Plaintiff,)
)
v.)
)
TODD DONALD DUNPHY, (01))
)
Defendant.)
)
_____) DECLARATION OF COUNSEL

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& NATURAL RESOURCES
STATE OF HAWAII

DECLARATION OF COUNSEL

I, MYLES S. BREINER, declare as follows:

1. I am the attorney for Defendant Todd Dunphy in the above-captioned matter.
2. On May 29, 2012, Defendant was sentenced in Cr. 09-00370 SOM to Counts 1 and 9 of the Indictment by the Hon. Susan O. Mollway;
3. Defendant was sentenced to thirty three (33) months imprisonment as to counts 1 and 9 and three (3) years of supervised release;
4. On December 9, 2014, Defendant was released from custody;
5. Defendant has completed approximately two (2) years and one (1) month of supervised release without violating any of the terms and conditions

of his supervised release;

7. Defendant has paid his \$200.00 special assessment in full and has been complying with his U.S Probation Officer, Bobby H. Love, Jr. *See* Exhibit “A”;

8. Defendant is employed full time by Mark Gerry, who is President of Gerry Properties and the World Martial Arts Masters Association among other things. *See* Exhibit “B”;

9. Defendant has many achievements in the competitive martial arts field and is also the Director of Sports Karate for the Dux Ryu Organization and his promotion to International Director is pending on his ability to travel internationally. *See* Exhibit “C”;

10. Defendant is involved with many positive endeavors such as film, television, and teaching martial arts. Because of Defendant’s champion titles and world records in martial arts, Defendant has immense opportunities in acting and stunts for martial arts film and television. On August 8, 2016, a contract was executed between Defendant and Strong Talent Management to pursue opportunities in the martial arts film and television genre. *See* Exhibit “D”;

11. In fact, Defendant has the opportunity to audition as a stunt coordinator, fight choreographer, and actor in upcoming productions located in

Brazil and Ireland. *See* Exhibit “E”;

12. Defendant has also been offered the opportunity to teach martial arts seminars throughout Thailand and the South East Asian Nations and at a Thailand Gym. *See* Exhibit “F” and “G” respectively;

13. Continued supervision is impeding on Defendant’s ability to commit to endeavors that will be a positive contribution to himself and society;

14. Continued supervision of Defendant is not necessary for the protection of the public or to prevent Defendant from reoffending;

15. Terminating supervision of Defendant would save the Government’s resources and allow the resources to be applied to Defendants who need assistance reintegrating into society, unlike Defendant;

16. Based on the foregoing and further argument to be adduced at the hearing on the instant motion, Defendant respectfully requests this Honorable Court terminate Defendant’s supervised release.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on January 24, 2017

/s/ Myles S. Breiner
MYLES S. BREINER

From: [Sean Fitzsimmons](#)
To: [Sean Fitzsimmons](#)
Subject: FW: Returned mail: see transcript for details
Date: Monday, May 2, 2022 11:16:42 AM

----- Forwarded message -----

From: Todd Dunphy <toddunphy80@gmail.com>

To: no-reply@hawaii.gov

Cc:

Bcc:

Date: Tue, 15 Feb 2022 18:46:47 -1000

Subject: [EXTERNAL] Re: From the Office of Governor David Y. Ige [CS74688]

Thank you for the reply. The department of land and natural resources has been in front of my home three days in a row and they have absolutely nothing to say. They have no suggestions no remedy. All they have said was you and everyone else is in violation. They sent us all violation notices for trying to put things in front to save our properties. They have no suggestions as what other countries around the world are doing with beachfront erosion. This state has been of no help and has no solution. There are four high speed fan homeowners consider it an emergency. And we needed to be considered an emergency in order for FEMA to come in and help. They're the only ones that do anything on the federal level to state in the government here on Oahu has done nothing for us for several several years. It's really tragic. 415-875-0366 is my number thank you for your time

On Tue, Feb 15, 2022, 8:45 AM Office of the Governor <officeofthegovernor@hawaii.gov> wrote:

EXECUTIVE CHAMBERS
HONOLULU

David Y. Ige
GOVERNOR

February 15, 2022

Mr. Todd Dunphy
59-181 F Ke Nui Rd Haleiwa 96712
Haleiwa, Hawaii 96712 United States
toddunphy80@gmail.com

Dear Mr. Dunphy:

Mahalo for contacting our office on February 10, 2022 regarding the current issue at your beachfront property. Your correspondence has been forwarded to the Department of Land and Natural Resources for follow-up.

The Department of Land and Natural Resources will be contacting you directly, as appropriate.

Exhibit 2

K-1

With warmest regards,

**Office of the Governor
State of Hawai'i**

EXECUTIVE CHAMBERS, STATE CAPITOL • HONOLULU, HAWAII 96813
PHONE: (808) 586-0034 • FAX: (808) 586-0006 • GOVERNOR.HAWAII.GOV

Exhibit 2

K-1



MYLES S. BREINER

1003 Bishop Street, Suite 2150
Honolulu, Hawaii 96813
Tel: (808) 526-3426
Fax: (808) 521-7680
e-mail: myles@breinerlaw.net
Web: hawaiiicriminaldefense.net

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DEPT. OF LAND
& NATURAL RESOURCES
STATE OF HAWAII

April 29, 2022

Mr. Michael Cain
Acting Administrator
Office of Conservation and Coastal Lands
Kalanimoku Building
1151 Punchbowl St., Room 131
Honolulu, HI 96813

Re: Notice of Representation -- Todd Dunphy

Dear Mr. Cain:

The purpose of this Letter is to inform you that our law firm has been retained by Mr. Todd Dunphy as his legal counsel. Accordingly, please address all future correspondences and materials germane to Mr. Dunphy to our office.

In addition, we also now request any and all materials related to Mr. Dunphy, including, but not limited to, all written correspondence, emails, orders, evaluations, permit applications, and meeting minutes. We also would like to request the Office of Conservation and Coastal Lands' ("OCCL") evaluation procedure pertinent to emergency and non-emergency permitting applications submitted by the public, as well as the *curriculum vitae* of the OCCP employees tasked with the permitting evaluation.

These materials will assist our assessment of Mr. Dunphy's case, as well as provide guidance for the Petition for Contested Hearing we are drafting on behalf of Mr. Dunphy.

Thank you in advance for your anticipated cooperation.

Very truly yours,

MYLES S. BREINER
KYLE T. DOWD
SEAN FITZSIMMONS

cc: Todd Dunphy

Exhibit 2

K-1