

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
OFFICE OF CONSERVATION AND COASTAL LANDS
Honolulu, Hawaii

October 27, 2023

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

REGARDING: Contested Case Requests Regarding Conservation District Use Permit **(CDUP) OA-3913** for the Diamond Head Breakwater Safety Project

PETITIONERS: 1) Fred Fong, and 2) Blake McElheny (Representing Friends of the Doris Duke Swim Basin)

LANDOWNER: State of Hawaii

LOCATION: Kaalawai, Honolulu, Oahu

TMK: (1) 3-1-041:seaward of 005

SUBZONE: Protective

I. BACKGROUND

On June 23, 2023, the Board of Land and Natural Resources (BLNR) approved Conservation District Use Permit (CDUP) OA-3913 for dismantling of the Diamond Head breakwater and the reuse of the dismantled boulders to re-naturalize the shoreline at the subject location.

No request was made for a contested case at the Board hearing. On June 30, 2023, Dr. Fred Fong filed a contested case request. Dr. Fong's petition is attached as **Exhibit 1**. Dr. Fong requested the contested case because as "an adjacent property owner, he will be so directly and immediately affected by the project proposed under CDUP OA-3913, including loss of safe use of the subject and adjacent coastal lands, threats to his constitutional and statutory rights to environmental quality and conservation and use of coastal resources."

On July 3, 2023, Mr. Blake McElheny filed a contested case request on behalf of the Friends of the Doris Duke Swim Basin. Mr. McElheny's petition is attached as **Exhibit 2**. Mr. McElheny requested the contested case because, he claims, the Friends of the Doris Duke Swim Basin would "be so directly and immediately affected by the project proposed under CDUP OA-3913, including loss of safe use of the subject and adjacent coastal lands and threats to constitutional and statutory rights to environmental quality and conservation and use of coastal resources."

II. SUMMARY OF LEGAL FRAMEWORK

Is a contested case required by law to determine the legal rights, duties, or privileges of a specific person?

A contested case hearing is required by law if the statute or rule governing the activity in question mandates a hearing prior to the administrative agency's decision, or if a hearing is mandated by due process.

A claim of due process right to a hearing in turn requires a two-step analysis:

- a. Is the particular interest which the claimant seeks to protect by a hearing *property* within the meaning of the due process clauses of the federal and state constitutions, and
- b. If the interest is *property*, then what specific procedures are required to protect it?

Property interests are those benefits created by sources, such as state law, in which the claimant has "a legitimate claim of entitlement." Further, there must be "more than an abstract need or desire" or "a unilateral expectation" of such benefit.

When a hearing determines the legal rights, duties, or privileges of a specific person, that person will have standing. When the contested case is required by due process, a person with a protectable property interest will have standing.

III. ANALYSIS OF CURRENT PETITIONS

Is a contested case required by law?

Question: What is the statute or rule that would mandate a hearing?

Answer: A contested case hearing is not "required by law" unless it is required by (1) agency rule; (2) statute; or (3) constitutional due process. Here, the relevant statutes are Hawaii Revised Statutes chapters 205A and 343, and the relevant administrative rule is Hawai'i Administrative Rule § 13-1-28. As discussed in the attached memorandum, no statute or rule mandates a contested case hearing.

Question: Does due process require a contested case hearing?

Answer: No. Constitutional due process protections mandate a hearing whenever the claimant seeks to protect a "property interest," in other words, a benefit to which the claimant is legitimately entitled. The petitioners do not have a protected property interest in the Diamond

Head Breakwater and swim basin, and even assuming they did, the process already afforded has been constitutionally sufficient.

Question: Have the claimants claimed any Native Hawaiian traditional and customary rights/practices that would entitle them to a contested case hearing?

Answer: No. The claimants' petitions do not identify any customary and traditional activities that will be affected by the project. Additionally, the Final Environmental Assessment/Findings of No Significant Impact for the project was published on June 23, 2017, and concluded that the project would not have a significant impact on traditional native Hawaiian cultural practices or resources.

Conclusion: A contested case is not required by law.

IV. RECOMMENDATION

That the Board of Land and Natural Resources deny the requests for a contested case regarding Conservation District Use Permit **(CDUP) OA-3913** regarding the Diamond Head Breakwater Safety Project, and that the Board deny the requests for a contested case without a hearing pursuant to HAR §13-1-29.1.

Respectfully submitted,

Calen Miyahara

mc

Cal Miyahara,
Office of Conservation and Coastal Lands

Approved for submittal:



Dawn N.S. Chang, Chairperson
Board of Land and Natural Resources

FRED FONG
4361 KAIKOO PLACE
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CELL: 808-277-6786
FAX: 808-537-3652

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DEPT. OF LAND
& NATURAL RESOURCES
STATE OF HAWAII

FAX TRANSMITTAL FORM AND
HAND DELIVERED FORM

DATE: 6/30/2023

TO: Department of Land and Natural Resources
Administrative Proceedings Office
1151 Punchbowl St., Room 130
Honolulu, Hawaii 96813
Phone: 808-587-1496
Fax: 808-587-0390

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2023 JUN 30 P 1:09
DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

FROM: Fred Fong

NUMBER OF PAGES INCLUDING THIS COVER SHEET: 05

RE: Petition for a Contested Case Hearing for CDUA-3913
Submitted by Fred Fong



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:

- 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 Fred Fong	2. Contact Person Fred Fong	
3. Address 4361 Kaikoo Place	4. City Honolulu	5. State and ZIP Hawaii 96816
6. Email Fongf001@hawaii.rr.com	7. Phone 808-277-6786	8. Fax 808-537-3652

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 of Conservation District Use Application CDUA OA-3913 Shangri La Breakwater Safety Initiative and Shoreline Stabilization Project	
18. Board Action Date June 23, 2023	19. Item No. K-2
20. Any Specific Statute or Rule That Entitles Petitioner to a Contested Case Petitioner Fred Fong is an "interested person" under §13-1-28(a). Fong is also an "adjacent property owner" under Section 13-1-31(b)(2). Petitioner has used the subject and adjacent coastal areas for many decades	
21. Any Specific Property Interest of Petitioner That Is Entitled to Due Process Protection Petitioner asserts that, in addition to being an adjacent property owner, he will be so directly and immediately affected by the project proposed under CDUA OA-3913, including loss of safe use of the subject and adjacent coastal lands, threats to his constitutional and statutory rights to environmental quality and conservation and use of coastal resources, that his interest in the proceeding is clearly distinguishable from that of the general public.	
22. Any Disagreement Petitioner May Have with an Application before the Board Petitioner submits that proper procedures were not followed after the proposal was twice before rejected by BLNR due to concerns over safety and lack of sufficient environmental review, that DLNR had a conflict of interest in processing its own application, that there was no proper environmental review as required under HRS Ch. 343, that the proposal would destroy an important coastal cultural and recreational resource without appropriate mitigation in violation of HRS Chapters 205A and 343, that the proposed project would endanger the public, and that the DLNR has failed to consider appropriate rational alternatives.	
23. Any Relief Petitioner Seeks or Deems Itself Entitled to Petitioner requests denial and/or retraction of any permit for the project proposed under CDUA OA-3913, that the Hearing's Officer direct that the proposal be processed by some agency other than DLNR, and that a ruling be issued requiring said outside agency and DLNR to strictly follow the requirements of HRS Chapters 205A and 343 and all rules and regulations issued thereunder in any further consideration or processing thereof or of any related proposal.	
24. How Petitioner's Participation in the Proceeding Would Serve the Public Interest Petitioner is acting in the public interest to assure compliance with Hawaii State Constitution Article XI, Section 9, with Hawai'i laws assuring preservation and protection of the environment and coastal resources, and with principles of fair procedure and good, open, transparent governance.	
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 Petitioner Fong owns and lives on property next door to the project, has regularly used the subject and adjacent submerged lands for recreation for many decades, qualifies as an "interested party" under HAR §13-1-28(a) and is entitled to be a party pursuant to HAR 13-1-31 (b)(2).	

- 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.

Fred Fong

Petitioner or Representative (Print Name)

Signature

A handwritten signature in black ink, appearing to read 'FRED FONG', written over a horizontal line.

June 30, 2023

Date





STATE OF HAWAII
BOARD OF LAND AND NATURAL RESOURCES

RECEIVED
OFFICE OF CONSERVATION
AND COASTAL LANDS

PETITION FOR A CONTESTED CASE HEARING 2023 JUN 33 A 10: 10

OFFICIAL USE ONLY	
Case No.	Date Received
Board Action Date / Item No.	Division/Office

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DEPT OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

A. PETITIONER		
(If there are multiple petitioners, use one form for each.)		
1. Name Friends of the Doris Duke Swim Basin	2. Contact Person Blake McElheny	
3. Address 59-272 Pupukea Rd.	4. City Haleiwa	5. State and ZIP Hawaii 96712
6. Email blakemcelhenyrr@gmail.com	7. Phone 808-479-9818	8. Fax

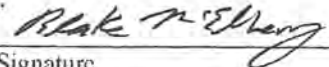
B. ATTORNEY (if represented)		
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18. Board Action Date June 23, 2023	19. Item No. K-2
20. Any Specific Statute or Rule That Entitles Petitioner to a Contested Case Petitioner Friends of Doris Duke Swim Basin ("FODDSB") is an unincorporated association which is acting in the public interest to seek compliance with Hawaii's environmental and coastal resource laws. Its members include concerned neighbors and community members who use or have used the subject and adjacent submerged lands on a regular basis and/or who submitted testimony in connection with the BLNR hearing on June 23, 2023 and FODDSB qualifies as an "interested person" under §13-1-28(a) and §13-1-31(b)(2) and (c).	
21. Any Specific Property Interest of Petitioner That Is Entitled to Due Process Protection Petitioner asserts that its members will be so directly and immediately affected by the project proposed under CDUA OA-3913, including loss of safe use of the subject and adjacent coastal lands and threats to constitutional and statutory rights to environmental quality and conservation and use of coastal resources, that its interest in the proceeding is clearly distinguishable from that of the general public.	
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23. Any Relief Petitioner Seeks or Deems Itself Entitled to Petitioner requests denial and/or retraction of any permit for the project proposed under CDUA OA-3913, that the Hearing's Officer direct that the proposal be processed by some agency other than DLNR, and that a ruling be issued requiring said outside agency and DLNR to strictly follow the requirements of HRS Chapters 205A and 343 and all rules and regulations issued thereunder in any further consideration or processing thereof or of any related proposal.	
24. How Petitioner's Participation in the Proceeding Would Serve the Public Interest Petitioner is acting in the public interest to assure compliance with Hawaii State Constitution Article XI, Section 9, with Hawai'i laws assuring preservation and protection of the environment and coastal resources, and with principles of fair procedure and good, open, transparent governance.	
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 Petitioner FODDSB is acting here in the public interest to seek compliance with Hawaii's State Constitution and its environmental and coastal resource laws. Its members are neighbors of and/or use or have used the subject and adjacent submerged lands on a regular basis and/or who submitted testimony in connection with BLNR's hearing on June 23, 2023 considering the subject CDUA and they qualify as "interested persons" under §13-1-28(a) and 13-1-31(b) and (c).	

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.

Blake McElheny for
Friends of the Doris Duke Swim Basin
Petitioner or Representative (Print Name)


Signature

June 30, 2023
Date