

**State of Hawai'i
Department of Land and Natural Resources
Office of Conservation and Coastal Lands
Honolulu, Hawai'i**

January 12, 2024

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

Regarding: Appointment and selection of a Hearing Officer to conduct all hearings for Contested Case OA 24-1 regarding Conservation District Enforcement File OA 22-18 and rescind Board's prior action of December 7, 2023, Item K-1 for alleged permit noncompliance, construction of shoreline erosion control device, and encroachment upon State Land located makai of 59-181 D Ke Nui Road, Tax Map Key: (1) 5-9-002:034

Exhibit: Petition for a Contested Case

Background

On December 7, 2023, the Board of Land and Natural Resources (Board) found Mr. Eric Freeman in violation of Hawai'i Revised Statutes (HRS) §§183C-7 and 171-6(12) and Hawai'i Administrative Rules (HAR) §13-5-24 for alleged permit noncompliance, construction of an unauthorized shoreline erosion control device, and encroachment upon state land located makai of 59-181 D Ke Nui Road, Tax Map Key (TMK): (1) 5-9-002:034 subject to the following:

1. Mr. Freeman is fined \$15,000 for violating the provisions of HAR §13-5-24 by failing to abide by the terms and conditions of Emergency CDUP OA 21-2 that required obtaining approval prior to performing modifications to the structure or installing new erosion control measures on submerged land in the Conservation District Resource Subzone;
2. Mr. Freeman is fined \$15,000 in twenty-two (22) instances for continuing unauthorized work despite verbal and written warning pursuant to HRS §183C-7;
3. Mr. Freeman is fined \$1,000 in 592 (592) instances for failing to remove the encroachments upon public lands, accrual of such having started when he received notice on February 7th, 2022;
4. Mr. Freeman shall pay all fines (\$937,000) within ninety (90) days from the date of the Board's action;
5. That Mr. Freeman shall remove all unauthorized erosion control materials and encroachments by July 1, 2024;
6. That Mr. Freeman shall remove or relocate the portions of the dwelling that are makai of the shoreline by July 1, 2024;

7. That Mr. Freeman shall restore the subject area to a more natural state and the Department's satisfaction by July 1, 2024;
8. That in the event Mr. Freeman fails to restore the subject area to a more natural state and the Department's satisfaction by July 1, 2024, Mr. Freeman shall be liable for all costs of removal incurred by the State or local government(s);
9. That in the event of failure by Mr. Freeman to comply with any order imposed in connection with this enforcement action, Mr. Freeman shall be fined an additional \$16,000 per day, pursuant to HRS §§ 171-6(12) and 183C-7, until the order is complied with; and
10. That in the event of failure by Mr. Freeman to comply with any order herein, this matter shall be turned over to the Attorney General for disposition, including all administrative costs.

After the Board rendered their decisions on the matter, Counsel Bernard Bays, of Starn O'Toole Marcus and Fisher, orally requested a contested case on behalf of his client, Mr. Eric Freeman. The Board then approved Mr. Freeman's request for a contested case regarding the matter.

On December 19, 2023, the Department received a written petition from Bernard Bays, of Starn O'Toole Marcus and Fisher, contesting the Board's findings. **(Exhibit 1)**

Hearings of violations

HAR §13-1-31.1, provides when a violation is alleged for which an administrative remedy is provided, the alleged violator is entitled to a contested case hearing and 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 Hearings 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.

Rescinding prior Board decision

The contested case hearing will result in a new Decision and Order. Rescinding the prior decision takes away any possible claim that the Board has tainted the hearing officer's judgment by its decision.

Discussion

As the oral request was followed by a written petition and this is an enforcement matter, staff recommends that the Board's prior action of December 7, 2023 regarding agenda Item K-1 be rescinded, and a contested case be granted to Mr. Freeman.

Staff notes that, by designating a Hearing Officer to conduct the hearing, the Board does 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.

Staff Recommendation

Staff recommends that the Board find:

1. That Mr. Eric Freeman is entitled to a contested case hearing;
2. That the Board's prior action of December 7, 2023, regarding agenda Item K-1 for Alleged Permit Noncompliance, Construction of Shoreline Erosion Control Device, and Encroachment Upon State Land Located Makai of 59-181 D Ke Nui Road, Tax Map Key: (1) 5-9-002:034 be rescinded;
3. That no person or government agency other than the department and alleged violator shall be admitted as parties in such proceedings; and
4. That the Board authorize the appointment of a Hearing Officer and delegate authority for the selection of the Hearing Officer to the Chairperson.

Respectfully submitted,



K. Tiger Mills, Staff Planner
Office of Conservation and Coastal Lands

Approved for submittal:



DAWN N.S. CHANG, Chairperson
Board of Land and Natural Resources

MC

STARN · O'TOOLE · MARCUS & FISHER

A LAW CORPORATION

December 15, 2023

VIA U.S. MAIL AND E-MAIL

Dawn N.S. Chang, Chair
Board of Land and Natural Resources
DLNR Main Office
Kalanimoku Building
1151 Punchbowl Street
Honolulu, Hawaii 96813
dlnr@hawaii.gov

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STATE OF HAWAII

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RECEIVED

**Re: Office of Conservation and Coastal Lands Conservation District
Enforcement Action OA 22-18 – Written Request for Contested Case**

Dear Chair Chang:

As you are aware, we represent 59-181 Ke-Nui LLC, Eric Freeman, and Moniza Freeman (collectively, the “*Freemans*”) in connection with the Office of Conservation and Coastal Lands (“*OCCL*”) Enforcement Action OA 22-18 (“*OA 22-18*” or the “*Enforcement*”). The Enforcement requests administrative fines and other penalties against the Freemans for alleged permit noncompliance, construction of shoreline erosion control device, and encroachment upon State land located makai of 59-181 D Ke Nui Road, Haleiwa, Hawaii 96712 (identified as Tax Map Key (“*TMK*”) (1) 5-9-002:034) (the “*Property*”).

We write as a follow-up to our oral request for a contested case concerning the Enforcement, made at the Board’s meeting on December 7, 2023. This written request is made in accordance with Hawaii Administrative Rules (“*HAR*”) § 13-1-29. We note that the Board considered and granted our oral request for a contested case at the December 7, 2023 meeting.

I. Nature and Extent of the Requestor’s Interest

The Freemans own the Property that is mauka of the subject area of the Enforcement and are the parties cited in OA 22-18. The Property is located on Oahu’s North Shore and has been (and continues to be) affected by the ongoing erosion that affects the relevant stretch of beach.

The Freemans were issued a Notice of Alleged Violation letter for the Enforcement on or about January 28, 2022 from the OCCL. A subsequent letter was sent by the OCCL on or about February 4, 2022. The Freemans responding to the February 4, 2022 letter on or about March 2, 2022, requesting a meeting with the OCCL, among others, to address ongoing concerns from erosion affecting the Property. No such meeting was held.

Exhibit 1

An additional letter was sent by the OCCL on or about February 6, 2023. The Freemans responded to the February 6, 2023 letter on or about February 20, 2023, again requesting a meeting to address ongoing concerns from erosion affecting the Property. No such meeting was held.

The Enforcement was placed on the Board's agenda in the Fall of 2023 and was ultimately heard on December 7, 2023. The OCCL recommends in its staff submittal for the Board's December 7, 2023 meeting that the Freemans be fined a total of \$937,000 for the Enforcement.

As the owners of the Property and the alleged violators of OA 22-18, the Freemans have a direct and substantial interest that may be affected by the Board's action on OA 22-18. Accordingly, as the Board found on December 7, 2023, the Freemans are entitled to a contested case.

II. Requestor's Disagreement

The Freemans contest the fines proposed under the Enforcement pursuant to Hawaii Revised Statutes ("*HRS*") §§ 171-6 and 183C-7. Fines of such magnitude are unprecedented and raise a number of constitutional concerns, including due process. The Freemans also wish to review and address each instance of violation alleged in the Enforcement, including evidence purporting to show the alleged conduct. Finally, the Freemans contest the Staff Recommendations from the OCCL's December 7, 2023 staff submittal.

III. Relief Requestor Seeks

The Freemans seek to avoid arbitrary and capricious monetary penalties, such as those outlined in the staff submittal. The Freemans desire to find a solution to the erosion issues that are affecting this stretch of beach and working towards a larger (*i.e.*, not parcel-by-parcel) solution to the same. As noted at the Board's December 7, 2023 meeting, the Freemans are amenable to mediating the Enforcement (pursuant to HAR § 13-5-4).

The current staff recommendations present an unworkable situation that will result in the collapse of structures onto the beach, creating direct threats to public health, safety, and welfare. The Freemans are willing (and able) to move the structures on the Property mauka and out of harms way, but are unable to effectively do so before the Enforcement is resolved. Accordingly, the Freemans wish to find a workable solution.

IV. Public Interest

As noted at the Board's December 7, 2023 meeting, the Property is one of many that are experiencing erosion on this stretch of beach and subject to pending enforcement actions. It is in the public interest to resolve this Enforcement (and others) and to address longer-term solutions. Given current policies and regulations, the Freemans are left without a practical or workable solution to the affects of erosion on the Property.

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Dawn N.S. Chang, Chair
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V. Other Information

The Freemans will request the complete file concerning the Enforcement and the Property from the OCCL. Consequently, the Freemans reserve the right to amend the contents of this request for contested case hearing in the event that other pertinent materials are made available.

Sincerely,

A handwritten signature in black ink that reads "A. Bernard Bays". The signature is written in a cursive style with a large, prominent initial "A".

A. Bernard Bays
Eric S. Robinson