

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Division of Boating and Ocean Recreation
Honolulu, Hawai'i

February 23, 2024

Chairperson and Members
Board of Land and Natural Resources
State of Hawaii
Honolulu, HI

SUBJECT: Denial of Petition for Contested Case Hearing filed on August 21, 2023 by Kama'aina Boaters regarding Item J-1 on the August 11, 2023 Board Agenda, titled: *Continuation of Revocable Permit Issued to Secure Parking Hawaii LLC for Management of Vehicular Parking at Ala Wai Small Boat Harbor, Honolulu, Oahu, Hawaii, Identified by Tax Map Keys: (1) 2-6-010:003 (Portion), (1) 2-3-037:012 (Portion), :024, :027, :033, :035 and :037; and Declare Project Exempt from Environmental Assessment Requirements of Chapter 343, HRS and Title 11, Chapter 200.1, Hawaii Administrative Rules..*

The Board may go into executive session pursuant to § 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.

SUMMARY:

Kama'aina Boaters (hereinafter "Petitioner") filed a contested case hearing ("CCH") petition on August 21, 2023 regarding the continuation of the revocable permit ("RP") issued to Secure Parking Hawaii LLC ("Secure") for management of vehicular parking at Ala Wai Small Boat Harbor, Honolulu, Oahu, which was presented by the Division of Boating and Ocean Recreation ("DOBOR") as Item J-1 of the August 11, 2023 Board of Land and Natural Resources ("Board") meeting. DOBOR recommends that the Board deny the CCH petition because Petitioner has not demonstrated that it is legally entitled to a CCH on the continuance of the RP to Secure.

BACKGROUND:

At the Board's August 11, 2023 meeting under agenda Item J-1, DOBOR requested approval to continue the RP issued to Secure for an additional one-year period, through

September 13, 2024.¹ After approximately an hour of public testimony and consideration, the Board voted to approve DOBOR's recommendation via its Staff Submittal, as verbally amended by DOBOR staff during the meeting, unanimously.²

Kate Thompson orally requested a CCH for Item J-1 at the August 11, 2023 Board meeting. While it is not clear whether Ms. Thompson was requesting a CCH on behalf of Petitioner, Petitioner was one of three individuals who filed written CCH petitions regarding Item J-1. Petitioner's written CCH petition is included as **Attachment A**. In it, Petitioner seeks a CCH to challenge the Board's approval of Item J-1. Petitioner's desired relief includes: revocation of the RP to Secure; initiating rulemaking to establish proper use and operation of a private contractor licensed to perform acts in connection with an RP; and requiring an environmental assessment before issuing the RP.

DISCUSSION:

An administrative agency is only required to hold a CCH when it is required by law, which means that a CCH 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). Petitioner claims here that a CCH is warranted pursuant to due process and its constitutional right to a clean environment. DOBOR staff disagrees and recommends denial of the request.

There is a two-step process in determining whether a person is constitutionally entitled to a CCH. First, a court would consider "whether 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." *Flores v. BLNR*, 143 Hawai'i 114, 125, 424 P.3d 469, 480 (2018) (citation and internal brackets omitted). Second, if a court "concludes that the interest is 'property,' th[e] court analyzes what specific procedures are required to protect it." *Id.*

Step one merely requires the court to determine whether a petitioner seeks to protect a constitutionally cognizable property interest. *Id.* To have such a property interest, a person "must clearly have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Sandy Beach Def. Fund v. City & Cty. of Honolulu*, 70 Haw. 361, 377, 773 P.2d 250, 260 (1989). Legitimate claims of entitlement that constitute property interests "are not created by the due process clause itself. Instead, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law[.]" *Flores*, 143 Hawai'i at 125, 424 P.3d at 480 (citation and internal brackets omitted).

¹ The written submittal provided by DOBOR staff in connection with the August 11, 2023 Board meeting's agenda Item J-1 is publicly available via the Board's website, at <https://dlnr.hawaii.gov/wp-content/uploads/2023/08/J-1.pdf>.

² See Audio Recording of the 8/11/2023 Meeting at approximately [1:32:38/ 7:01:57](https://www.youtube.com/watch?v=HQUZpZeZUHg), available at <https://www.youtube.com/watch?v=HQUZpZeZUHg>.

If step one of the analysis is satisfied, then step two analyzes how the government action would affect that interest with and without additional procedural safeguards. With respect to the step two, the Hawai'i Supreme Court has been careful to emphasize that "[d]ue process is not a fixed concept requiring a specific procedural course in every situation." *Sandy Beach*, 70 Haw. at 378, 773 P.2d at 261. Due process "is flexible and calls for such procedural protections as the particular situation demands." *Id.* (quoting *Morrisey v. Brewer*, 408 U.S. 471, 481 (1972)).

Step One Analysis: Petitioner has no Constitutionally Protected Property Interest in the Renewal of a One-Year RP to Secure

Hawaii Administrative Rules ("HAR") Section 13-1-29(b) provides that a formal petition for a contested-case hearing must include, among other things, a statement of "[t]he nature and extent of the requestor's interest that may be affected by board action on the subject matter that entitles the requestor to participate in a contested case[.]"

Petitioner alleges that the specific due process interests being affected by the subject Board action are: "to adequate signage/notice of parking laws and regulations; to have a proper determination made by a duly authorized state official when parking rules and regulations have been violated; and the right to have regulations fairly enforced and not subject to excessive and unreasonable fines and/or payment terms." These are not constitutionally protected property interests affected by the subject Board action because Petitioner has no legitimate claim of entitlement to them. Petitioner did not participate in the original invitation for bids that DOBOR issued in March 2021, which determined the recipient of the parking RP. Secure was the successful bidder and was issued the initial RP for management of vehicular parking for Ala Wai Small Boat Harbor on September 10, 2021, as Board Agenda Item J-1.³

Additionally, Petitioner states as justification for being considered a party entitled to a CCH that its members include "boat owners with a mooring permit at the Ala Wai Boat Harbor that use the parking subject in the [RP]." However, holding a permit to moore a vessel at the Ala Wai small boat harbor does not establish any legitimate claim of entitlement to regarding the details of parking management and enforcement at the harbor's public parking facility. The Board should deny Petitioner's request for a CCH on the continuance of the RP to Secure on this basis alone.

Step Two Analysis: Even if Petitioner Identified a Constitutionally Protected Property Interest, Petitioner Is Not Entitled to a CCH Based Upon the Specific Factual Situation at Issue

Petitioner claims that a CCH is warranted pursuant to the right to a clean environment. However, continuance of the RP to Secure would not cause any significant

³ Staff notes that neither Ms. Thompson nor Petitioner engaged in the sunshine process ahead of the Board's initial RP issuance to Secure.

environmental impacts from the original issuance of the RP to Secure. Further, any repairs and maintenance to the parking areas at Ala Wai Small Boat Harbor would be solely within DOBOR's responsibility to fund and manage, and denying continuance of the RP to Secure would not affect this responsibility.

For the sake of argument, even if Petitioner could establish a constitutionally protected property interest in the RP renewal, Petitioner would still not be entitled to a CCH. The touchstone of due process is "notice and an opportunity to be heard at a meaningful time and in a meaningful manner before governmental deprivation of a significant property interest." *Sandy Beach*, 70 Haw. at 378, 773 P.2d at 261. To determine what further process is due, if any, the administrative agency must examine and balance three factors, repeated from above:

- (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.

Flores, 142 Hawai'i at 126–27, 424 P.3d at 481–82.

Even assuming the first factor could be established, the risk of an erroneous deprivation of any property interest in the absence of a CCH is minimal, as Petitioner was already afforded sufficient due process through Sunshine Law procedures. Any *additional* procedures via an adversarial, trial-type CCH would not add significant value. Petitioner received ample notice of the August 11, 2023 Board meeting, including the publicly available staff submittal, and Petitioner had an opportunity to be heard via the submission of public testimony, which it submitted in opposition to the agenda item. Additionally, Ms. Thompson testified in person and was heard by the Board prior to its decisionmaking on Secure's RP at the August 11, 2023 meeting. Petitioner was therefore afforded ample notice *and* a substantial opportunity to be heard by providing written and oral testimony. *Sandy Beach*, 70 Haw. at 378, 773 P.2d at 261. Petitioner has not demonstrated that there would be any significant value in being allowed to participate in the trial-type procedures of a full CCH on the same.

As to the third factor, the Board should find that the governmental interest, including the burden that holding a CCH would entail, weighs heavily in favor of rejecting the CCH petition. CCHs are expensive and time-consuming endeavors for the Department of Land and Natural Resources. The cost for retaining hearing officers and court reporters alone can be thousands of dollars for even single-day CCHs, and those costs are compounded when considering staff and attorney time. Petitioner has failed to justify why the DOBOR should bear such costs and spend many hours of staff time on a CCH of that would have little to no significant value. Of significant note is that if a CCH were held and issuance of the RP to Secure Parking is stayed or revoked pending the outcome of the CCH, *see Mauna Kea*, 136 Hawai'i at 381, 363 P.3d at 229, there would

be no entity available to perform parking lot management at the Ala Wai, which would only serve to compound the very issues Petitioner seeks to address and would create additional issues with unmonitored and unenforced parking violations. On balance, even if Petitioner could establish a sufficient property interest, the *Sandy Beach* factors weigh in favor of denying the instant petition.

Additional Considerations

There are also procedural requirements that Petitioner failed to satisfy, which additionally support denial of the CCH petition. HAR Section 13-1-29(a), for example, provides: "An oral or written request for a contested case hearing must be made to the board no later than the close of the board meeting at which the subject matter of the request is scheduled for board disposition. An agency or person so requesting a contested case must also file (or mail a postmarked) written petition with the board for a contested case no later than ten calendar days after the close of the board meeting at which the matter was scheduled for disposition. For good cause, the time for making the oral or written request or submitting a written petition or both may be waived."

It was not clear during the August 11, 2023 meeting that Ms. Thompson requested a CCH on behalf of Petitioner, as opposed to making the request in her individual capacity. However, even assuming that Ms. Thompson properly complied with the requirements for requesting a CCH on behalf of Petitioner pursuant to HAR Section 13-1-29(a), Petitioner is still not entitled to a CCH on Agenda Item J-1 of the Board's August 11, 2023 meeting because Petitioner has neither demonstrated a sufficient property interest in continuance of the RP to Secure, nor has it shown that the *Sandy Beach* factors weigh in its favor. Ultimately, Petitioner does not have a due process right to a CCH.

Therefore, Petitioner is not entitled to a CCH, based on the above, and staff recommends that the Board deny the pending petition.

RECOMMENDATIONS:

1. That the Board deny the CCH petition by Petitioner, pursuant to HAR Section 13-1-29.1 because Petitioner does not have a legal right, duty, or privilege entitling it to a CCH regarding continuance of the RP issued to Secure Parking Hawaii LLC; and
2. That the Board authorize the Chairperson to take any and all actions necessary to effectuate its decision.

Respectfully Submitted,



EDWARD R. UNDERWOOD, Administrator
Division of Boating & Ocean Recreation

APPROVED FOR SUBMITTAL:



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

Attachment:

- A. August 21, 2023 Contested Case Hearing Petition by Kama'aina Boaters



STATE OF HAWAII
BOARD OF LAND AND NATURAL RESOURCES

RECEIVED
2023 AUG 21 PM 4:08

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 Ka'amaina Boaters (an unincorporated association)	2. Contact Person Kate Thompson	
3. Address [REDACTED]	4. City Kailua	5. State and ZIP HI 96734
6. Email [REDACTED]	7. Phone [REDACTED]	8. Fax

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

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C. SUBJECT MATTER

17. Board Action Being Contested
 Continuation of Revocable Permit ("Permit") Issued to Secure Parking Hawaii LLC, dba Concierge Car Wash and Traffic Monitoring Services ("Licensee") for Management of Vehicular Parking in the Designated Areas Located Within the Ala Wai Small Boat Harbor

18. Board Action Date 8/11/2023	19. Item No. J-1
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20. Any Specific Statute or Rule That Entitles Petitioner to a Contested Case
 HAR 13-1-28; Hawaii constitution Article 1, Section 4 (Due Process), and Article IX, Section 4 (Preservation of a Healthful Environment)

21. Any Specific Property Interest of Petitioner That Is Entitled to Due Process Protection
 Due process rights: to adequate signage/notice of parking laws and regulations; to have a proper determination made by a duly authorized state official when parking rules and regulations have been violated; and the right to have regulations fairly enforced and not subject to excessive and unreasonable fines and/or payment terms.
 Right to clean environment.

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

1. Board should not have approved the revocable permit because of legitimate reports that (i) signage regarding parking is inadequate, resulting in improper removal of vehicles; (ii) that state officials are not determining whether parking meters are expired before vehicles are towed/removed; (iii), that Licensee is not performing its duties as was reported to the Board and that no licensee representative is patrolling the parking area; and (iv) that fees in connection with towing and enforcement are excessive and unreasonable. Furthermore, Licensee has contracted with towing companies that refuse to accept non-cash forms of payment, indicating potential fraud and misrepresentation of income.
2. DOBOR did not adequately demonstrate that the application was entitled to an exemption from performing an environmental assessment because the Exemption Notice did not comply or did not demonstrate notice compliance with HAR 11.200.1-17 (b) or (c), and mistakes Exemption Class 1, Part 1, No. 44 of the Exemption List for the Department of Land and Natural Resources, Reviewed and Concurred Upon by the Environmental Council on March 3, 2020

23. Any Relief Petitioner Seeks or Deems Itself Entitled to

1. Revocation of the permit;
2. For the Board to engage in rule-making to establish proper use and operation of a private contractor licensed to perform the acts in connection with the revocable license, including procedures to provide adequate signage; determining when parking regulations have been violated; charging reasonable fines and fees in connection with the removal of vehicles; require licensees to require towing contractor to accept typical forms of legal tender including credit cards; require licensees to make the terms and conditions of all agreements with towing companies public, including terms regarding sharing of electronic information, and protections to ensure errors do not result in improper removal of vehicles; and require licensees to produce monthly towing records; and
3. Require an environmental assessment in accordance with Hawaii law, before issuing the license.

24. How Petitioner's Participation in the Proceeding Would Serve the Public Interest
Preserve due process and environmental rights to the public.

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
Petitioners include boat owners with a mooring permit at the Ala Wai Boat Harbor that use the parking subject the removcable permit.

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.

Kate Thompson
Petitioner or Representative (Print Name)


Signature

8-21-23
Date

J-1 Meeting Transcript 9-10-21 Passed by the BOARD OF LAND
AND NATURAL RESOURCES for DOBOR J-1

00:00:00

Suzanne Case Chairperson BOARD OF LAND AND NATURAL RESOURCES: I think you can. I think you can. Go ahead.

00:00:05

Richard Howard : This is Richard Howard for DOBOR. I've been seeing one is the issuance of a revocable permit to secure parking Hawaii LLC for management of the vehicular parking at the Ala Wai Small Boat Harbor. Staff requests minor amendments. To the submittal before the board votes on this item. The first of which is. Amending the applicant's name on the submittal from Secure Parking LLC to Secure Parking Hawaii LLC. The correct name, i.e. Secure Parking Hawaii LLC was published by Darlene. So I think we're okay with that. The second item. Is the Chapter 343 exemption paragraph on page three. It should read as follows In accordance with Section 11 200.115 Hawaii Administrative rules and the exemption list for the Department of Land and Natural Resources reviewed and concurred in by the Environmental Council on November 10th, 2020. The subject request is exempt. From the preparation of EA pursuant to general exemption type one operations, repairs or maintenance of existing structures, facilities, equipment or topographical features involving negligible or no expansion or change of use beyond that previously existing.

Part one item number 44, which states that permits, licenses, registrations and rights of entry issued by the department that are in routine, that are routine in nature, involving negligible, negligible impacts beyond that previously existing. On the final amendment we have to make is the commencement date. Uh, and that has to be amended from September 15th, 2021 to the first day of the month, determined by the Chair. DOBOR is requesting the issuance of a revocable permit to secure parking Hawaii LLC due to the AG's concerns with the IFB (Invitation For Bid) that we put out, which contained elements of both 102, which deals with concessions and 103 D, which is the procurement code, Uh, the, the issuance of this is will be temporary in nature and it will allow DOBOR to address the AG's concerns while allowing us to collect parking revenue from the Ala Wai Boat Harbor. We are willing to answer any questions.

Petitioners Note from Kate Thompson: Although, there may have been staff meetings on this topic, the 9-10-2021 meeting was the last public meeting on the Revocable Permit status with Secure Parking LLC. In this 2021 meeting, DOBOR requests more time to work on the IFB and to address the AG's concerns.

Yet in the next public meeting two years later on 8-11-2023 DOBOR submits J-1 requesting a 'backdated' permit and forward commitment to a 'Month to Month' permits that only allows release of the permit if the contracted company has violated the the terms of the Revocable Permit.

In Addition, the J-1 Submittal presents Act 163 and DOBOR's authority to contract directly for parking concessions. This would be issue, since DOBOR fulfilled the request of the AG's office outlined in this testimony to the Board of Land and Natural Resources. Plus in the August 11, 2023 meeting DOBOR says the 'previous experience' point with be given for new Revocable Permits and Contracts yet Secure

J-1 Meeting Transcript 9-10-21 Passed by the BOARD OF LAND
AND NATURAL RESOURCES for DOBOR J-1

Parking Hawaii LLC did not meet the original published minimum requirements of five years of experience as a parking vendor. Therefore, to use Act 163 for the future parking contracts and permits, all interested parties should have an equal non-historic 'competitive process', and no additional 'points' should be given for years of experience with this AWSBH property.

00:03:10

Suzanne Case Chairperson BOARD OF LAND AND NATURAL RESOURCES:
Thank you. And, Mr. Murray, did you want to add anything or. Here. Here for questions.

00:03:20

MAURI, JONATHAN MGR Secure Parking: Uh, good afternoon. Board. No, don't want to add anything. I'm just here to answer any questions if you guys have any.

00:03:26

Suzanne Case Chairperson BOARD OF LAND AND NATURAL RESOURCES:
Okay. Um. All right. Board member's questions. Mr. Hoy.

00:03:32

Tommy Oi - BLNR: Um.

00:03:33

Tommy Oi - BLNR: To staff. How are you going, how would it determine the free parking? Six hours.

00:03:43

Richard Howard : You want to get that one or do you want me to answer that? Sure.

00:03:46

Ed Underwood DOBOR: We've been working with Mr. Murray on this, too. And one because we now have these new machines, what we could do, an option would be somebody that comes into the free parking area, can pull a ticket, and that'll give them six hours of free parking that they can put on their dash. And then once that's expired, they will have to move the car either to another open stall or vacate the facility or move into the paid area.

00:04:14

Tommy Oi - BLNR: So somebody's going to be within that parking area checking out all the. Tickets, correct?

00:04:23

Ed Underwood DOBOR: Yes.

00:04:23

Ed Underwood DOBOR: That's what Mr. Murray's company is going to be doing, standard parking.

Petitioners Note: In this statement DOBOR administrator Ed Underwood is not truthful with BLNR Member Tommy Oi because Ed Underwood knows Secure Parking Hawaii LLC has no authority to ticket and that Secure Parking will not be supplying parking attendants to walk around the parking lot.

J-1 Meeting Transcript 9-10-21 Passed by the BOARD OF LAND AND NATURAL RESOURCES for DOBOR J-1

00:04:27

Tommy Oi - BLNR: Okay. And then the other question is, how are you going to handle employees within that area of parking? In the parking?

00:04:38

Ed Underwood DOBOR: Well, that is very difficult because it's open public parking. Um. They're going to have to pull the ticket as well. When we came before the board, that's one of the reasons we wanted to lower the time frame. So if somebody was in a neighboring employee from a hotel was using it, then they would have to leave their job at least twice a day to deal with the car and hopefully discourage them. But we're going to, uh, Mr. Murray came up with that idea with the ticketing. So I think that might really help discourage people from parking there, especially employees and construction companies and those folks.

00:05:19

Tommy Oi - BLNR: Okay, just answer my question. Thank you.

00:05:23

Suzanne Case Chairperson BOARD OF LAND AND NATURAL RESOURCES: Thank you. Any other questions? All right. There's no further testimony. Is there a motion to approve as amended?

00:05:36

Vernon Char - BLNR: Move to approve as amended.

00:05:38

Suzanne Case Chairperson BOARD OF LAND AND NATURAL RESOURCES: Okay. Second from Char. All in favor say aye.

00:05:42

Suzanne Case Chairperson BOARD OF LAND AND NATURAL RESOURCES: All right.

00:05:44

Suzanne Case Chairperson BOARD OF LAND AND NATURAL RESOURCES: One, two, three, four. One, two, three, four, five. Mr. Yoon, are you. Did you vote? Yes. Okay. That's six votes in favor of Megan being absent. Thank you very much.



Exhibit A-2

Parking Plan



Screenshot

Exhibit A-2

This is not an accurate map of J-1, 8/11/23

