

**STATE OF HAWAI'I
DEPARTMENT OF LAND AND NATURAL RESOURCES
OFFICE OF CONSERVATION AND COASTAL LANDS
Honolulu, Hawai'i**

March 22, 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 24-03 regarding the Conservation District Enforcement Files OA 19-08 and OA 21-07 and rescind Board's prior action of January 12, 2024, Item K-1, for alleged permit noncompliance, construction of shoreline erosion control device, and encroachment upon State land located makai of 59-149 A Ke Nui Road, Hale'iwa, Island of O'ahu, HI, Tax Map Key: (1) 5-9-002:004

Exhibit: Petition for a Contested Case

Background

On January 12, 2024, the Board of Land and Natural Resources (Board) found Zhungo LLC and its managing member, Mr. Rodney Youman 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 59-149 A Ke Nui Road, Tax Map Key (TMK): (1) 5-9-002:004 subject to the following:

1. Mr. Youman is fined \$15,000 for violating the provisions of Section HAR §13-5-24, for constructing a seawall/erosion control structure (ENF: OA 19-08) on submerged land within the Conservation District Resource Subzone;
2. Mr. Youman is fined \$15,000 for violating the provisions of Section HAR §13-5-24 for the placement/construction of an unauthorized rock revetment (ENF: OA 21-07) on submerged land within the Conservation District Resource Subzone;
3. Mr. Youman is fined \$15,000 for violating the provisions of Section HAR §13-5-24, by failing to abide by the terms and conditions of Emergency CDUP OA 19-01 and remove the temporary erosion control measure at the end of the authorization period;
4. Mr. Youman is fined \$75,000 for a total of five days (September 30, 2020, December 10, 2020, September 2, 2020, September 7, 2022, and November 4, 2023) of willful violation of this chapter after having received notification from the Department to stop all work;

5. Mr. Youman is fined up to \$1,000 per day for failure to remove the encroachments upon public lands, accrual of such starting when Mr. Youman received notice on July 18, 2021, when CDUP OA 19-01 expired, and therefore may total \$873,000;
6. Therefore, that the total fines and administrative costs that may be levied against Mr. Youman may be \$993,000, and that Mr. Youman shall pay all designated fines and administrative costs within ninety days from the date of the Board's action;
7. That the Board authorize the Department of the Attorney General to file a Notice of Pendency of Acton with the deed or deed instrument of Parcel 004 at the Bureau of Conveyances pursuant to Sections 171-6.4©, 591-151, and 634-51, HRS.
8. That Mr. Youman, or a future owner of Parcel 004, shall remove all unauthorized erosion control materials and encroachments by September 1, 2024;
9. That in the event Mr. Youman, or a future owner of Parcel 004, fails to restore the subject area to a more natural state and the Department's satisfaction by September 1, 2024, then Mr. Youman, or a future owner of Parcel 004, shall be liable for all costs of removal incurred by the State or local government(s); and
10. That in the event of failure of Mr. Youman, or a future owner of Parcel 004, to comply with any order imposed in connection with this enforcement action, Mr. Youman shall be fined an additional \$16,000 per day, pursuant to Sections 171-6(12) and 183C-7, HRS, until the order is complied with.

After the Board rendered their decisions on the matter, Counsel Eric Robinson, of Starn O'Toole Marcus and Fisher, orally requested a contested case on behalf of his client, Zhungo LLC and its managing member, Mr. Rodney Youman. The Board then approved the request for a contested case regarding the matter.

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.

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 January 12, 2024, regarding agenda Item K-6 be rescinded, and a contested case be granted to Zhungo LLC and its managing member, Mr. Youman.

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 Zhungo LLC and its managing member, Mr. Rodney Youman, are entitled to a contested case hearing;
2. That the Board's prior action of January 12, 2024, regarding agenda Item K-1 for Alleged Permit Noncompliance, Construction of Shoreline Erosion Control Device, and Encroachment Upon State Land Located Makai of 59-149 A Ke Nui Road, Tax Map Key: (1) 5-9-002:004 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,

S Michael Cain

Michael Cain, Administrator
Office of Conservation and Coastal Lands

Approved for submittal:



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

STARN · O'TOOLE · MARCUS & FISHER

A LAW CORPORATION

January 22, 2024

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

**Re: Office of Conservation and Coastal Lands Conservation District Enforcement
Action OA 19-08 and 21-07 – Written Request for Contested Case**

Dear Chair Chang:

As you know, we represent Zhungo, LLC and Rodney Youman (collectively, “*Mr. Youman*”) in connection with the Office of Conservation and Coastal Lands (“*OCCL*”) Enforcement Actions OA 19-10 and OA 21-07 (the “*Enforcements*”). The Enforcements request administrative fines and other penalties against Mr. Youman for: (1) construction of seawall (OA 19-08); (2) construction of shoreline erosion control devices (OA 21-07); and (3) alleged permit noncompliance (Emergency Conservation District Use Permit (“*E-CDUP*”) OA 19-01) and encroachment upon State land located makai of 59-149 Ke Nui Road, Haleiwa, Hawaii 96712 (identified as Tax Map Key (“*TMK*”) (1) 5-9-002:004) (the “*Property*”).

We write to follow-up our oral request for a Contested Case concerning the Enforcements, made at the Board’s meeting on January 12, 2024. This written request is made in accordance with Hawaii Administrative Rules (“*HAR*”) § 13-1-29. We note OCCL’s position at the Board’s meeting that alleged violators in enforcement actions are entitled to a Contested Case as of right.

I. Nature and Extent of the Requestor’s Interest

Mr. Youman owns the Property that is mauka of the subject area of the Enforcements and is the party cited in the Enforcements. The Property is located on Oahu’s North Shore and has been (and continues to be) affected by the periodic shoreline erosion events that impact the stretch of beach where the Property is located.

Mr. Youman was issued a Notice of Alleged Violation letter for Enforcement OA 19-08 on or about September 5, 2018, and Enforcement OA 21-07 on or about October 23, 2020, from the OCCL. Mr. Youman was also issued a Notification of Alleged Noncompliance letter from the OCCL on or about August 18, 2021, concerning E-CDUP OA 19-01.

Pacific Guardian Center, Makai Tower – 733 Bishop Street, Suite 1900 – Honolulu, HI 96813
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Received
Office of Conservation and Coastal Lands
Department of Land and Natural Resources
Honolulu, HI 96813
Jan 22, 2024

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Exhibit: Petition for Contested Case

The Enforcements were placed on the Board's agenda in late 2023 and were ultimately heard on January 12, 2024. The OCCL recommends in its staff submittal for the Board's January 12, 2024, meeting that Mr. Youman be fined a total of \$993,000 for the Enforcements.

As the owner of the Property and the alleged violator of OA 19-08 and OA 21-07, Mr. Youman has a direct and substantial interest that may be affected by the Board's action on the Enforcements. Accordingly, consistent with the OCCL's acknowledgement on January 12, 2024, Mr. Youman is entitled to a Contested Case.

II. Requestor's Disagreement

Mr. Youman contests the fines proposed under the Enforcements pursuant to Hawaii Revised Statutes ("**HRS**") §§ 171-6 and 183C-7. Fines of such magnitude are unprecedented and raise a number of constitutional concerns. Mr. Youman also wishes to review and address each instance of violation alleged in the Enforcements, including evidence purporting to show the alleged conduct. Finally, Mr. Youman contests the Staff Recommendations from the OCCL's January 12, 2024, staff submittal.

III. Due Process

A request for a brief deferral was made to OCCL by Bernard Bays, counsel for Mr. Youman, who retained Mr. Bays the day before the scheduled hearing. Mr. Robinson, an attorney in Mr. Bays office who was attending the hearing on another matter again requested the matter be deferred to the next Board meeting to give Mr. Bays an opportunity to review the documents and confer with his clients in order to provide them with meaningful representation. Mr. Robinson had not talked to Mr. Youman prior to the hearing. Mr. Bays also had to obtain a conflict waiver from the Attorney General's office in order to represent Mr. Youman. Notwithstanding the request, the Board considered and decided the Enforcement on January 12, 2024, depriving Mr. Youman of the opportunity to be meaningfully represented by counsel at the meeting.

IV. Relief Requestor Seeks

Mr. Youman seeks to avoid arbitrary and capricious monetary penalties, such as those outlined in the staff submittal. Mr. Youman further desires to find a solution to the periodic erosion issues that are affecting this stretch of beach and work toward a larger (*i.e.*, not parcel-by-parcel) solution to the shoreline erosion events. Similar to others facing enforcements in the area, Mr. Youman is amenable to mediating the Enforcements (pursuant to HAR § 13-5-4).

The current staff recommendations present a punitive, unworkable, parcel-by-parcel approach that will result in the collapse of structures onto the beach, creating direct threats to public health, safety, and welfare. We note that Mr. Youman has already relocated structures on the Property mauka, further away from harm, and the Board's proposal that Mr. Youman remove all structures from the Property is not workable in that it would eliminate any economic value for the Property. The suggestion that Mr. Youman should remove all structures from his property in order to offset administrative fines and penalties raises several legal and constitutional issues.

V. Public Interest

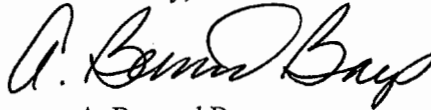
Dawn N.S. Chang, Chair
Board of Land and Natural Resources
January 22, 2024
Page 3

As noted at the Board's January 12, 2024, meeting, the Property is one of many that are experiencing periodic shoreline erosion events on this stretch of beach and are also subject to pending enforcement actions. It is in the public interest to resolve this Enforcement (and others) by finding longer-term solutions. Given current policies and regulations, Mr. Youman is left without a practical or workable solution to the effects of erosion on the Property.

VI. Other Information

Mr. Youman will request the complete file concerning the Enforcements and the Property from the OCCL. Consequently, Mr. Youman reserves 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, flowing style.

A. Bernard Bays