

**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 24-04 regarding Conservation District Enforcement File OA 21-18 and rescind Board's Prior Action of January 12, 2024, Item K-2, for alleged permit noncompliance, construction of shoreline erosion control device, and encroachment upon State land located makai of 59-151 A Ke Nui Road, Hale iwa, Island of Oahu, HI, Tax Map Key : (1) 5-9-002:005

Exhibit: Petition for a Contested Case

Background

On January 12, 2024, the Board of Land and Natural Resources (Board) found Sunset Oasis LLC, including member William and Melinda Kernot (collectively the Kernots) 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 59-151 A Ke Nui Road, Tax Map Key (TMK): (1) 5-9-002:005 subject to the following:

1. The Kernots are fined \$15,000 for violating the provisions of HAR §13-5-24, for installing a sand filled burrito system (ENF: OA 21-18) on land within the Conservation District Resource Subzone;
2. The Kernots are 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 19-02 and to remove the temporary erosion control measure at the end of the authorization period;
3. The Kernots are fined a total of \$45,000 for a total of three days (January 14, 2021, July 23, 2021, and October 18, 2021) of willful violation of this chapter after having received notification from the Department to stop all work;
4. The Kernots are fined up to \$1,000 per day for their failure to remove the encroachments upon public lands, accrual of such starting when they received notice on July 18, 2021, when CDUP OA 19-02 expired, and therefore may total \$873,000;
5. Therefore, that the total fines and administrative costs that may be levied against the Kernots may be \$948,000 , and that the Kernots shall pay all designated fines and administrative costs within ninety days from the date of the Board's action;

ITEM K-2

6. That the Kernots, or a future owner of Parcel 005, shall remove all unauthorized erosion control materials and encroachments by September 1, 2024;
7. That in the event the Kernots, or a future owner of Parcel 005, fail to restore the shoreline area to a more natural state and to the Department's satisfaction by September 1, 2024, the Kernots shall be liable for the costs of removal by the State or City and County of Honolulu;
8. That the Kernots, or a future owner of Parcel 005, shall remove or relocate the portions of the dwelling that are makai of the shoreline by September 1, 2024.
9. That the Kernots, or a future owner of Parcel 005, shall ensure that removal or relocation of the dwelling or portions of it that are makai of the shoreline comply with all applicable statutes, ordinances, rules, regulations, and conditions of the Federal, State, and County governments;
 - That in the event of failure of the Kernots, or a future owner of Parcel 005, to comply with any order imposed in connection with this enforcement action, they shall be fined an additional \$16,000 per day, pursuant to Section 171-6(2) and 183C-7, HRS, until the order is complied with;
 - That in the event of failure of the Kernots, or a future owner of Parcel 005, to comply with any order herein, this matter shall be turned over to the Attorney General for disposition, including all administrative costs; and
 - The Kernots have an option to offset fines if the landowner relocates the house off the property and removes all shoreline debris

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 clients, the Kernots.

On January 23, 2024, 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 January 12, 2024, regarding agenda Item K-2 be rescinded, and a contested case be granted to the Kernots.

Staff recommendation

Staff recommends that the Board find:

1. That Sunset Oasis LLC, including members William Kernot and Melina Kernot are entitled to a contested case hearing;
2. That the Board's prior action of January 12, 2024, regarding agenda Item K-2 for alleged permit noncompliance, construction of a shoreline erosion control device, and encroachment upon State Land located makai of 59-151 A Ke Nui Road, Tax Map Key (TMK): (1) 5-9-002:005 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,

Alyssa Accardo

Alyssa Accardo, Staff Planner
Office of Conservation and Coastal Lands *mc*

Approved for submittal:



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

STARN · O'TOOLE · MARCUS & FISHER

A L A W C O R P O R A T I O N

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 21-18 – Written Request for Contested Case**

Dear Chair Chang:

As you know, we represent Sunset Oasis, LLC, William Kernot, and Melinda Kernot (collectively, the “*Kernots*”) in connection with the Office of Conservation and Coastal Lands (“*OCCL*”) Enforcement Action OA 21-18 (the “*Enforcement*”). The Enforcement requests administrative fines and other penalties against the Kernots for the construction of shoreline erosion control devices, alleged permit noncompliance, and encroachment upon State land located makai of 59-151 A Ke Nui Road, Haleiwa, Hawaii 96712 (identified as Tax Map Key (“*TMK*”) (1) 5-9-002:005) (the “*Property*”).

We write to follow-up our oral request for a Contested Case concerning the Enforcement, 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 Requestors’ Interest

The Kernots own the Property that is mauka of the subject area of the Enforcement and are the parties cited in the Enforcement. The Property is located on Oahu’s North Shore and has been (and continues to be) affected by periodic shoreline erosion events that impact the stretch of beach where the Property is located.

The Kernots were issued a Notice of Alleged Violation letter for Enforcement OA 21-18 on or about January 13, 2021, from the OCCL. The Kernots were also issued a Notification of Alleged Noncompliance letter from the OCCL on or about August 18, 2021, concerning Emergency Conservation District Use Permit OA 19-02.

Pacific Guardian Center, Makai Tower – 733 Bishop Street, Suite 1900 – Honolulu, HI 96813
Telephone: (808) 537-6100 – Fax: (808) 537-5434 – Website: www.starnlaw.com

Received
Office of Conservation and Coastal Lands
Department of Land and Natural Resources
Jan 22, 2024

The Enforcement was placed on the Board's agenda in late 2023 and was ultimately heard on January 12, 2024. The OCCL recommends in its staff submittal for the Board's January 12, 2024, meeting that the Kernots be fined a total of \$948,000 for the Enforcement.

As the owners of the Property and the alleged violator of OA 21-18, the Kernots have a direct and substantial interest that may be affected by the Board's action on the Enforcement. Accordingly, consistent with the OCCL's acknowledgement on January 12, 2024, the Kernots are entitled to a Contested Case.

II. Requestors' Disagreement

The Kernots 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. The Kernots also wish to review and address each instance of violation alleged in the Enforcement, including evidence purporting to show the alleged conduct. Finally, the Kernots contest 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 the Kernot's, 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 the Kernot's prior to the hearing. Mr. Bays also had to obtain a conflict waiver from the Attorney General's office in order to represent the Kernots. Notwithstanding the request, the Board considered and decided the Enforcement on January 12, 2024, depriving the Kernots of the opportunity to be meaningfully represented by counsel at the meeting.

IV. Relief Requestors Seek

The Kernots seek to avoid arbitrary and capricious monetary penalties, such as those outlined in the staff submittal. The Kernots further desire 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.

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. The Enforcement effectively prevents the Kernots from taking further actions to reduce the potential harm posed to structures on the property, such as adaptation and relocation. The Board's proposal that the Kernot's remove all of structures from the Property is not workable in that it would eliminate any economic value for the Property. The suggestion that the Kernot's should remove all structures from their Property in order to offset administrative fines and penalties raises several legal and constitutional issues.

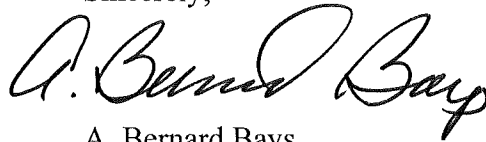
V. Public Interest

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 shoreline preservation solutions. Given current policies and regulations, the Kernots are left without a practical or workable solution to the effects of erosion on the Property.

VI. Other Information

The Kernots will request the complete file concerning the Enforcements and the Property from the OCCL. Consequently, the Kernots 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, looped initial "A".

A. Bernard Bays