

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Division of Aquatic Resources
Honolulu, Hawaii 96813

May 24, 2024

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

Recommendation that the Board of Land and Natural Resources Deny the Written Contested Case Hearing Request by Kevin S. Albert and Kimberly L. Albert, Trustees of the Albert Revocable Trust, Regarding the Enforcement Action Against Jim Jones, Noelani Yacht Charters, LLC, Kevin S. Albert, Kimberly L. Albert, and the Albert Revocable Trust for Unlawful Damage to Stony Coral and Live Rock Resulting from the February 20, 2023 *Nakoa* Anchoring Incident outside of the Honolua-Mokule`ia Bay Marine Life Conservation District, Island of Maui

SUMMARY

Petitioners Kevin S. Albert and Kimberly L. Albert (“Petitioners”), Trustees of the Albert Revocable Trust, requested a Contested Case Hearing (“CCH”) in writing¹ challenging the enforcement action against Jim Jones (“Jones”), Noelani Yacht Charters, LLC (“Noelani Yacht Charters”), and Petitioners (cumulatively, “Responsible Parties”) for stony coral and live rock damage resulting from the February 20, 2023 *Nakoa* grounding incident that occurred outside of the Honolua-Mokule`ia Bay Marine Life Conservation District, Island of Maui, which was scheduled and heard by the Board of Land and Natural Resources (“Board”) at its April 26, 2024 Board Meeting (Agenda Item F-5).² We find that Petitioners are not entitled to a CCH and recommend that the Board deny the petition.

BACKGROUND AND PROCEDURAL HISTORY

On February 18 and 19, 2023, Jones, the manager and agent of Noelani Yacht Charters, was operating the 94-foot luxury yacht, the *Nakoa*, and moored the vessel overnight inside Honolua Bay, Maui on a mooring ball. On February 20, 2023, at approximately 5:20 a.m., the *Nakoa* detached from its mooring and became adrift. Despite efforts by Jones and the on-board captain to steer the *Nakoa* away from shore, the *Nakoa* grounded upon the rocky shoreline between Honolua Bay and Līpoa Point,

¹ See Exhibit 1 – Contested Case Hearing Request – The Albert Trust, April 30, 2024 (attached)

² “Enforcement Action against Jim Jones, Noelani Yacht Charters, LLC, Kevin S. Albert, Kimberly L. Albert, and the Albert Revocable Trust for Stony Coral and Live Rock Damage resulting from the *Nakoa* grounding incident on February 20, 2023, outside of the Honolua-Mokule`ia Bay Marine Life Conservation District, island of Maui” was originally brought before the Board on July 28, 2023 [Agenda Item F-1] and again on January 26, 2024 [Agenda Item F-1].

Maui (the “*Nakoa* grounding incident”). The Department of Land and Natural Resources’ (“DLNR”) Division of Aquatic Resources (“DAR”) conducted two biological damage surveys and documented at least 119 stony coral colonies and at least 1,640.5 square meters of Live Rock that were damaged as a result of the grounding.

An enforcement action against Jones, Noelani Yacht Charters, and Petitioners was placed on the agenda for the July 28, 2023, Board meeting [<https://dlnr.hawaii.gov/wp-content/uploads/2023/07/F-1.pdf>]. At this meeting, DAR sought a fine of **\$117,471.97** against the Responsible Parties for violations of Hawaii Administrative Rules (“HAR”) §§ 13-95-70 and 71 (unlawful damage to stony coral and live rock). At the conclusion of the July 28, 2023 Board meeting, Petitioners reached a tentative agreement with the Board in which they would agree to pay a settlement amount of \$117,471.97 for the damage to natural resources, the restoration of such natural resources, and the cost of the DLNR investigation. In return for this settlement payment, the Board would release Petitioners from any and all liability from current and future claims by the State deriving from the February 20, 2023 *Nakoa* grounding incident. The Board reserved its right to assess fines and penalties against Jones and Noelani Yacht Charters at a later date. By December of 2023, it was evident to DLNR that the tentative settlement agreement reached by DLNR and Petitioners was stalled and not moving forward.

On January 26, 2024, the DLNR again brought an administrative enforcement action against Jones, Noelani Yacht Charters, and Petitioners for violations of Hawaii Administrative Rules §§ 13-95-70 and 71 [<https://dlnr.hawaii.gov/wp-content/uploads/2024/01/F-1-1.pdf>]. At the conclusion of this meeting, the Board deferred final action against the Responsible Parties and directed DAR to hold a meeting with community members from West Maui to receive input on the final civil fine amount. The Board further directed DAR to resubmit the enforcement action to the Board after the conclusion of the community meeting. On February 22, 2024, representatives from DAR hosted a meeting for West Maui community members at Kumulani Chapel in Lahaina, Maui. The Board and DAR sought input from attendees about how the *Nakoa* grounding incident impacted their lives and their thoughts on DAR’s civil penalty recommendation.

On April 26, 2024, the DLNR brought an administrative enforcement action against Jim Jones, Noelani Yacht Charters, LLC, and Petitioners for violations of Hawaii Administrative Rules §§ 13-95-70 and 71 for a third time [<https://dlnr.hawaii.gov/wp-content/uploads/2024/04/F-5.pdf>]. At this meeting, the Board chose not to accept DAR’s recommended fine amount of \$117,471.97. Instead, the Board chose to fine the Responsible Parties the statutory maximum of **\$1,818,851.97**, to be paid within sixty (60) days from the date of the Board meeting. Legal counsel for Petitioners was present during the meeting, submitted written testimony before the meeting, and gave oral testimony during the meeting, but Petitioners’ counsel did not request a CCH by the close of the meeting.

DISCUSSION

A contested case hearing is required if the statute or rule governing the activity in question mandates a hearing prior to the administrative agency's decision-making, or if a hearing is mandated by due process. *Bush v. Hawaiian Homes Com'n*, 76 Hawai'i 128, 134, 870 P.2d 1272, 1278 (1994). Thus, a petitioner is entitled to a contested case hearing if stated in a statute or rule or if the petitioner has a property interest entitled to due process protection. In order to obtain a contested case hearing, a petitioner must also follow specific procedures for making the request in order to be entitled to a contested case hearing. *Hui Kako'o Aina Ho'opulapula v. Bd of Land & Nat. Res.*, 112 Hawai'i 28, 39–41, 143 P.3d 1230, 1241–43 (2006). Those procedures are contained in HAR § 13-1-29.

A. Statutes and Rules

The statutes and rules in this case do not require a contested case hearing to be held. Petitioners were cited for violations of HAR §§ 13-95-70 and 13-95-71. Authorization to assess fines against Petitioners for these violations is contained in HRS § 187-12.5. See HAR § 13-95-2. Neither the rules nor the statute requires the Board to hold a contested case hearing in connection with the violations penalized under HRS § 187-12.5, and Petitioners have not cited to a statute or rule which requires the Board to hold a hearing.

B. Due Process

A petitioner must possess an interest which rises to the level of "property" in order to assert a right to procedural due process. *Bd. of Regents v. Roth*, 408 U.S. 564, 569 (1972); *accord Sandy Beach Defense Fund v. City Council of City & Cnty. of Honolulu*, 70 Hawai'i 361, 377, 773 P.2d 250, 260 (1989).

At the outset, a claim of a due process right to a hearing requires a two[-] step analysis: (1) 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 (2) if the interest is "property" what specific procedures are required to protect it.

Brown v. Thompson, 91 Hawai'i 1, 10, 979 P.2d 586, 595 (1999) (citations omitted).

Courts have held that parties have a property interest in their money. *Zilba v. City of Port Clinton*, 924 F. Supp. 2d 867, 877 (N.D. Ohio Feb. 15, 2013) ("No doubt, Plaintiff has a property interest in his money." (citing other sources)). Petitioners are subject to a monetary fine if found liable by the Board. Petitioners' potential liability creates a sufficient property interest to trigger due process.

C. Procedural Requirements

The Hawaii Administrative Rules require that a person requesting a CCH by the Board must make an oral or written request for a CCH by the close of the Board meeting at which the subject matter of the request is scheduled for Board disposition. HAR § 13-1-29(a). The initial request must be followed by the filing of a written petition no later than ten calendar days after the close of the Board meeting at which the matter was scheduled for disposition. *Id.* For good cause, the time for making the oral or written request or submitting a written petition, or both, may be waived. *Id.*

Failure to comply with HAR § 13-1-29 results in forfeiture of the ability to request a contested case hearing. See *Matter of HELCO*, 145 Hawai'i 1, 20, 445 P.3d 673, 692 (2019) (noting that “inasmuch as the DLNR has properly promulgated specific procedures for a contested case hearing . . . and the Appellants failed to follow the requisite procedures, there was no contested case from which the Appellants could appeal[.]”) (internal citation omitted).

Petitioners did not properly follow the requirements contained in HAR § 13-1-29 because they did not request a CCH orally or in writing prior to the close of the April 26, 2024 Board meeting at which the enforcement action against them was heard. Petitioners filed a written petition on April 30, 2024, four (4) days after the close of the April 26, 2024 Board meeting. In *Matter of HELCO*, the petitioner had made an oral request for a CCH prior to the close of the Board meeting, but petitioner failed to subsequently submit a written petition to the Board requesting a CCH within the ten (10) day window. In the instant case, the Board is presented with an almost identical situation, but instead of the Petitioners failing to request a CCH in writing after the April 26, 2024 Board meeting, they failed to request it orally (or in writing) before the close of the April 26, 2024 Board meeting.

At the commencement of every Board meeting, the Chair of the Board reads a standard CCH request statement which sets forth the requirements for requesting a CCH.³ This statement is also clearly printed on agendas for Board meetings, and it was included on the agenda for the April 26, 2024 meeting.⁴ Legal counsel for Petitioners was present during the meeting and did not request a CCH before the Board took action, after the Board took action, or before the end of the meeting. In Petitioners' written request for a CCH, Petitioners provided no explanation for why Petitioners' counsel did not request a CCH prior to the close of the April 26, 2024 meeting, nor did they provide “good cause” for why the Board should waive the requirements of HAR § 13-1-29(a).

Petitioners were given ample procedural safeguards to protect their property interest: there were three Board meetings at which this issue was considered, and their attorney appeared at all three meetings to discuss the matter with the Board. Petitioners

³ “In some of the matters before the Board, a person may wish to request a contested case hearing. If such a request is made before the Board’s decision, then the Board will consider the request first – before considering the merits of the item before it. A person who wants a contested case may also wait until the Board decides the issue, then request the contested case after the decision *but before the close of the board meeting*. It is up to you. Any request must also be made in writing within ten calendar days. If no request for contested case is made, the Board will make a decision. The Department will treat the decision as final and proceed accordingly.” (emphasis added)

⁴ See <https://dlnr.hawaii.gov/wp-content/uploads/2024/04/Agenda-240426.pdf>

submitted verbal and/or written testimony for each Board meeting. Petitioners attempted to engage with the Department of the Attorney General for settlement negotiations in mid-2023, but ultimately decided not to continue settlement negotiations with the Department.

CONCLUSION

The Board is not required to provide a contested case hearing to Petitioners because Petitioners did not comply with procedural requirements contained in HAR § 13-1-29. These procedures are explicitly laid out in HAR § 13-1-29(a) and were clearly recited by the Chair of the Board at the beginning of the April 26, 2024 Board meeting and expressed in writing on the April 26, 2024 Board Meeting Agenda. Furthermore, Petitioners have not provided good cause for why the Board should waive the requirements of HAR § 13-1-29(a).

RECOMMENDATION:

1. That the Board deny the Petition for Contested Case Hearing by Kevin S. Albert and Kimberly L. Albert, Trustees of the Albert Revocable Trust.

Respectfully submitted,



Brian J. Neilson
Division of Aquatic Resources

APPROVED FOR SUBMITTAL:



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

Attachments:

Exhibit 1 – Contested Case Hearing Request – The Albert Trust



April 30, 2024

VIA EMAIL ONLY

Board of Land and Natural Resources
P.O. Box 621
Honolulu, HI 96809
blnr.testimony@hawaii.gov

Re: Contested Case Hearing Request – The Albert Trust
April 26, 2024 Hearing Item F-5
Proposed DLNR Enforcement Action

Dear Sir/Madam:

As you know, this law firm represents Kevin S. Albert and Kimberley L. Albert (the “**Alberts**”), Trustees of the Albert Revocable Trust (the “**Trust**”) with respect to a proposed enforcement action being brought before the Board of Land and Natural Resources (“**Board**”) by the Hawaii Department of Land and Natural Resources (“**DLNR**”), Division of Aquatic Resources (“**DAR**”).

On April 26, 2024, the Board approved an administrative penalty of \$1,818,851.97 to purportedly compensate the State of Hawaii for damage to natural resources on public lands, restoration of such natural resources, and the cost of the investigation. Based on the Board’s decision to increase the proposed administrative penalty by more than ten times, the Alberts hereby request a contested case hearing on the above referenced matter. *See* Hawaii Administrative Rules (“**HAR**”) § 13-1-29(a) (“On its own motion, the board may hold a contested case hearing. Others must both request a contested case and petition the board to hold a contested case hearing.”). A petition will be submitted on or before May 6, 2024, within the “ten calendar days after the close of the board meeting at which the matter was scheduled for disposition.” *Id.*

To be clear, the Alberts maintain that: (1) there is no basis to impose liability against either the Alberts or the Trust because the grounding took place following the **theft** of the Vessel, and neither the Alberts nor the Trust violated any provisions of the Hawaii Administrative Rules; (2) the damage related to the initial grounding must be separated from the damage related to salvage; and (3) DLNR and its chosen salvor were the cause of the much greater damage and they should be responsible for the damage caused by their choices and conduct. The Alberts intend to present these positions in greater detail in their petition to the Board for a contested case hearing pursuant to HAR § 13-1-29.

Board of Land and Natural Resources

April 30, 2024

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Please do not hesitate to contact me if you have any questions.

Sincerely,

McCORRISTON MILLER MUKAI MacKINNON LLP



Randall K. Schmitt

cc: Client (via email only)