

**STATE OF HAWAII**  
**DEPARTMENT OF LAND AND NATURAL RESOURCES**  
**OFFICE OF CONSERVATION AND COASTAL LANDS**  
**Honolulu, Hawaii**

January 13, 2011

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

**Regarding:** Request that the Board Grant Petition for a Contested Case Hearing with Respect to Conservation District Use Application KA-3525 For Landscaping (Fence Replacement, Brush & Pasture Management and Habitat Improvement) Located at Lepeuli, Hanalei, Kauai, TMK: (4) 5-1-003: 003 (Larsen's Beach) and for Authorization to Select and Appoint a Hearing Officer

**Background**

On February 16, 2010 the Chairperson of the Board of Land and Natural Resources (BLNR) approved (as a departmental permit pursuant to HAR § 13-5-33) Conservation District Use Permit (CDUP) KA-3525 for Landscaping (Fence Replacement, Brush & Pasture Management and Habitat Improvement), located at Lepeuli, Hanalei, Kauai, subject to eighteen (18) conditions.

On March 1, 2010 the Department of Land and Natural Resources (DLNR) received a petition from Linda Sproat represented by the Native Hawaiian Legal Corporation appealing the Chairperson's decision on the CDUP and requesting a contested case. Surfrider Foundation, Malama Moloaa, et al. represented by Cruise & Yost, LLC also submitted a petition.

HAR § 13-5-33 states in part:

(g) Any person may appeal the chairperson's decision by filing a written appeal to the department not later than fourteen days after the date of the department's determination of the departmental permit. The written appeal shall provide all relevant information and shall state with specificity the reasons for the appeal.

(h) Where the appellant under subsection (g) sets forth facts or law, or both, showing that the chairperson's decision is arbitrary and capricious, the board may affirm, amend or reverse the decision of the chairperson, or order a contested case hearing or other procedure to be conducted prior to the board's decision on the appeal.

At its May 13, 2010, meeting the BLNR addressed the appeals that were filed regarding the issuance of Conservation District Use Permit (CDUP) KA-3525. The BLNR found that the Chairperson had not acted arbitrarily or capriciously in issuing the subject CDUP KA-3525 and declined to order that a contested case be held. The BLNR requested that the Office of Conservation and Coastal Lands (OCCL) investigate allegations made and concerns raised with regards to the CDUP. The OCCL did initiate an investigation, however because staff is now recommending that this matter be granted a contested case, OCCL has suspended that investigation.

In the meantime, Ms. Sproat filed a lawsuit appealing to the court the denial of her request for a contested case.

**Discussion:**

Staff, together with the Department of Attorney General, believes that Ms. Sproat has raised serious questions as to whether she is entitled as a matter of law to a contested case hearing in order to determine and consider her native Hawaiian rights.

The Board has authority to “hold a contested case on its own motion.” HAR § 13-1-28(a). Staff believes that holding a contested case in this matter is appropriate, given the high level of public interest and the difficult legal issues raised in the lawsuit. Holding a contested case would in no way determine or admit that the chair abused her discretion by awarding the departmental permit, that Ms. Sproat is entitled to a contested case (the issue would be moot), or that Board’s previous action was incorrect.

Staff also recommends that if a contested case is held and if Surfrider Foundation, Malama Moloaa et al still wish to participate, they be allowed to do so.

Finally, staff notes that some brush management pursuant to the CDUP has taken place but the proposed fence has not yet been constructed, as the fence appears to be the subject of contention. It is staff’s understanding that the CDUP applicant has held off constructing the fence until the matter is resolved – in court or otherwise.

Staff therefore recommends:

**Recommendation:**

- 1) That the Board grant the request for a contested case hearing with respect to Conservation District Use Application KA-3525;
- 2) That the Board authorize the appointment of a Hearing Officer to conduct all hearings; and
- 3) That the Board delegate authority for selection of the Hearing Officer to the Chairperson.

Respectfully submitted,



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

Approved for submittal:

  

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WILLIAM J. AILA JR, Chairperson  
Board of Land & Natural Resources