

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

REF:OCCL:DH

Contested Case KA-11-3

January 13, 2011

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

REGARDING: Appointment and Selection of a Hearing Officer to Conduct Hearings for One (1) Contested Case Hearing; Response to Additional Petition for Contested Case; Response to Request for Mediation Requesting Petition for Deviation from Conditions. All re TMK Nos. (4) 5-9-002:018, 21, 22, 35, 39, 41, 43, 44, 50, 51, 52, and 61; (4) 5-9-003:046; and (4) 5-9-005:021

SUBJECT PARCELS:

(4) 5-9-005:021	Mark Moran et al
(4) 5-9-002:018	Edwin Cryer et al
(4) 5-9-002:035	Murcia-Toro, Inc.
(4) 5-9-002:061	Michael Tiernan et al
(4) 5-9-002:043	Barbara Baker et al
(4) 5-9-002:022	Gary Stice et al
(4) 5-9-002:039	Caroline Simpson
(4) 5-9-002:021	Earl G. Bart Trust
(4) 5-9-003:046	Pieter Myers
(4) 5-9-002:041	Smith Family Trust
(4) 5-9-002:051	Diane G. Faye Trust et al
(4) 5-9-002:044	Helferich Family Trust
(4) 5-9-002:050	James Greenan et al
(4) 5-9-002:052	Ive Revocable Trust

BACKGROUND:

Each of the subject parcels listed is located in Haena, Island of Kauai. All subject parcels are located in the State Land Use (SLU) Conservation District. Pursuant to Hawaii Revised Statutes (HRS) Chapter 183C and Hawaii Administrative Rules (HAR) Chapter 15-3. Any land use in the Conservation District is required to obtain a permit known as a conservation district use permit ("CDUP") from the Board of Land and Natural Resources (Board).

Each of the above owners or their predecessor, at various times between 15 and 40 years ago, applied for and obtained a CDUP (with the Boards approval) to construct a single family

residence (SFR). Each CDUP had terms and conditions; including each permittee's agreement (with some minor variation in language) that the single family residence would not be used for rental purposes. Rules promulgated pursuant to chapter 183C (specifically HAR § 13-5-42) also prohibit rental of single family residences built in the conservation district unless approved by the Board.

Despite the no rental conditions in their CDUPs and in the rule, some of the owners rented their properties for short term vacation rentals. When the Department of Land and Natural Resources (DLNR) found out about the rentals, the owners were notified that the department "received information regarding the alleged, unauthorized vacation rental use of the subject property." The letters stated that if the unauthorized use continued after June 30, 2007, then fines of up to \$2000 per day and other penalties could be sought.

The owners filed a "petition for deviation" by which they asked the Board to change the conditions and restrictions contained in the CDUPs and rule, pursuant to HAR § 13-5-42(c), which authorizes the Board to consider modifying the standard conditions in HAR § 13-5-42(a). The Board considered the petition at its meetings on October 26, 2007, and December 14, 2007. The Board denied the petition at the December 14, 2007, meeting.

The owners requested a contested case hearing. This request was denied by the Chair but was not addressed by the Board. The owners sued. Judge Kathleen Watanabe on Kauai agreed that a contested case was not required. However, the Intermediate Court ruled the Board, not the Chair, must make the decision whether to hold a contested case.

At the November 12, 2010, Board meeting, staff asked the Board to deny the requests for a contested case in regards to the subject petition for deviation. However, the Board approved counsel's request for a contested case.

AUTHORITY FOR DESIGNATING HEARING OFFICERS:

HAR, Section 13-1-32 (d) provides that the Board may conduct the Contested Case Hearing, or at its discretion, may appoint a hearing officer to conduct the hearing. HAR, Section 13-1-29 (a) provides that, "the time for making an oral or written request and submitting a written petition may be waived by the Board." Additionally, HRS, Sections 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 HEARING 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.

DISCUSSION:

The board has already determined that a contested case should be afforded. The board directed that the hearing officer hear the parties' positions as to the scope of the issues to be considered at the contested case. Similarly the hearing officer can address any issues as to standing.

Staff notes that each of the above persons originally requested a contested case. As of the November meeting, Mr. Vitousek represented seven of the lot owners. It is not clear if all of the lot owners still wish to participate in a contested case. That issue also can be addressed by the hearing officer.

ADDITIONAL PETITION:

On November 22, 2010, the department received an additional petition for contested case. Exhibit 1. Upon clarification from Mr. Vitousek, staff understands that this petition also relates to the board's action on December 14, 2007, and is submitted to address possible procedural issues. Staff believes the submittal is late and unnecessary and should therefore be denied. Staff acknowledges the board has already granted a contested case. Staff is not aware of procedural issues that might affect the board's ruling. Staff also believes that any filing fees submitted with the new petition should be returned.

REQUEST FOR MEDIATION:

The department received a request for mediation on December 21, 2010. Exhibit 2. Staff understands that the board authorized a contested case so that the facts could be more fully developed for final consideration by the board. Unless the board itself was to participate in the mediation (as seems to be allowed by Haw. Rev. Stat. § 91-8.5), referral to mediation seems likely to result in the matter being discussed and preliminarily resolved outside of the board's purview. Staff therefore believes mediation is contrary to the expressed wishes of the board and should be denied.

Staff therefore recommends,

RECOMMENDATION:

- 1) That the Board authorize the appointment of a Hearing Officer for CC KA-11-3 and let the Hearing Officer conduct all the hearings relevant to the subject petition for a contested case Hearing,
- 2) That the Board delegate the authority for selection of the Hearing Officer to the Chairperson,
- 3) That the Board deny the most recent petition for a contested case hearing and authorize return of filing fees associated with the petition; and

- 4) That the Board deny the request for meditation.

Respectfully submitted,



Dawn T. Hegger
Senior Staff Planner

Approved for submittal:



William J. Aila Jr., Interim Chairperson
Board of Land & Natural Resources



STATE OF HAWAII
BOARD OF LAND AND NATURAL RESOURCES

PETITION FOR A CONTESTED CASE HEARING

RECEIVED

OFFICIAL USE ONLY	
Case No.	Date Received
Board Action Date / Item No.	Division/Office

INSTRUCTIONS:

1. 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

2. 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://hawaii.gov/dlnr/rules/Ch13-1-Official-Rules.pdf>). Please review these rules before filing a petition.
3. 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.
4. 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.

A. PETITIONER		
(If there are multiple petitioners, use one form for each.)		
1. Name Haena Hui Hou (see list of members/properties attached hereto)	2. Contact Person Roy A. Vitousek III, Cades Schutte LLP	
3. Address 75-170 Hualalai Rd., Ste. B-303	4. City Kailua-Kona	5. State and ZIP HI 96740
6. Email rvitousek@cades.com	7. Phone 808-329-5811	8. Fax 808-326-1175

B. ATTORNEY (if represented)		
9. Attorney Name Roy A. Vitousek III	10. Firm Name Cades Schutte LLP	
11. Address 75-170 Hualalai Rd., Ste. B-303	12. City Kailua-Kona	13. State and ZIP HI 96740
14. Email rvitousek@cades.com	15. Phone 808-329-5811	16. Fax 808-326-1175

EXHIBIT 1

C. SUBJECT MATTER**17. Board Action Being Contested**

See Exhibit A - C attached hereto: letters dated 12/19/07 (Request for Contested Case Hearing); and 7/15/10 and 9/7/10 further supporting request for contested case hearing.

18. Board Action Date

December 14, 2007 and November 12, 2010

19. Item No.

December 14, 2007: K-5

November 12, 2010: K-2

20. Nature and Extent of Petitioner's Interest That May Be Affected by the Board Action

See Exhibits A - C attached hereto.

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

See Exhibits A - C attached hereto.

22. Any Relief Petitioner Seeks or Deems Itself Entitled to

See Exhibits A - C attached hereto.

23. How Petitioner's Participation in the Proceeding Would Serve the Public Interest

See Exhibits A - C attached hereto.


24. 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

See Exhibits A - C attached hereto.

☒ 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.

Roy A. Vitousek III
Petitioner or Representative (Print Name)


Signature

11/18/10
Date

Petitioner Haena Hui Hou

Petitioner Members and Properties

- (4) 5-9-002: 021 (Bart, Earl G. Trust)
- (4) 5-9-002: 022 (Stice, Gary D., et al.)
- (4) 5-9-022: 035 (Murcia-Toro Inc.)
- (4) 5-9-002: 051 (Faye, Diane G. Trust, et al.)
- (4) 5-9-002: 061 (Tiernan, Michael J., et al.)
- (4) 5-9-003: 046 (Myers, Pieter S.)
- (4) 5-9-005: 021 (Moran, Mark G., et al.)

Facsimile Cover Sheet

DATE : December 19, 2007

TO	Name	Fax No.	Phone No.
	Laura H. Thielen, Department of Land & Natural Resources	808-587-0390	808-587-0401
	Samuel J. Lemmo Office of Conservation and Coastal Lands	808-587-0322	808-587-0377
	Vince S. Kanemoto, Esq. Dept. of the Attorney General	808-587-2999	808-587-2991

FROM : Name: Roy A. Vitousek III
Fax Number: (808) 326-1175
Phone Number: (808) 329-5811
E-mail Address: rvitousek@cades.com

RE : Subject: Haena Hui Hou/Citations for Vacation Rentals
File No.:
Pages: 7

Transmitting: 12/19/07 letter from Vitousek to Thielen, Lemmo, Kanemoto

Remarks: Hard copy is being mailed.

If all pages are not received, please call Barbara Huitt at 808-329-5811.

THIS MESSAGE IS INTENDED FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHICH IT IS ADDRESSED, AND MAY CONTAIN INFORMATION THAT IS PRIVILEGED, CONFIDENTIAL AND EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone, and return the original message to us at the above address via the U.S. Postal service. Thank you.

ImanageDB:808213.1

C S

Cades Schutte Building
1000 Bishop Street, Suite 1200
Honolulu, Hawaii 96813
Tel: 808.521-9200
Fax: 808.521-9210
www.cades.com

Kona Office
75-170 Hualalai Road, Suite B-303
Kailua Kona, Hawaii 96740
Tel: 808.329-5811
Fax: 808.326-1175

EXHIBIT A

Roy A. Vitousek III
Direct Line: (808) 329-5811
Direct Fax: (808) 326-1175
E-mail: rvitousek@cades.com

December 19, 2007

Laura H. Thielen, Chairperson
Board of Land and Natural Resources
P. O. Box 621
Honolulu, Hawaii 96809

Samuel J. Lemmo, Administrator
Office of Conservation and Coastal Lands
Department of Land and Natural Resources
P. O. Box 621
Honolulu, Hawaii 96809

Vince S. Kanemoto, Esq.
Department of the Attorney General
Land/Transportation Division
Kekuanao'a Building, Room 300
465 S. King Street
Honolulu, Hawaii 96813

Re: Enforcement Action Relating to Certain Vacation Rentals, Haena, Kauai;
Petitioners: Gary Bart, et al.;

(TMK (4) 5-9-005: 021)
(TMK (4) 5-9-002: 018)
(TMK (4) 5-9-002: 035)
(TMK (4) 5-9-002: 061)
(TMK (4) 5-9-002: 043)
(TMK (4) 5-9-002: 022)
(TMK (4) 5-9-002: 039)

(TMK (4) 5-9-002: 021)
(TMK (4) 5-9-003: 046)
(TMK (4) 5-9-002: 041)
(TMK (4) 5-9-002: 051)
(TMK (4) 5-9-002: 044)
(TMK (4) 5-9-002: 050)
(TMK (4) 5-9-002: 052)

REQUEST FOR CONTESTED CASE HEARING
Relative to Haena Hui Hou Petition for Deviation from Conditions

Laura H. Thielen
Samuel J. Lemmo
Vince S. Kanemoto
December 19, 2007
Page 2

Dear Ms. Thielen, Mr. Lemmo, and Mr. Kanemoto:

In the meetings of the Board of Land and Natural Resources ("Board") held on October 26 and December 14, 2007, the Petitioners listed on Exhibit "A" hereto and referred to collectively as the Haena Hui Hou, made requests that the above-referenced Petition for Deviation from Conditions in the Conservation District Use Permits ("CDUP") issued to the Hui members be referred to a contested case hearing.

This is a written request for a contested case hearing pursuant to Hawaii Administrative Rules ("HAR") § 13-1-29(a).

1. Legal Authority for Hearing

These requests are made pursuant to Hawaii Revised Statutes ("HRS") chapters 91 and 183C and HAR chapters 13-1 and 13-5.

The instant request for a deviation from the "no rental" condition is a proceeding in which the rights, duties, and interests of specific parties (the Haena Hui Hou members) are required by law to be determined after an opportunity for an agency hearing.

Petitioners have requested that the Board remove or modify the "no rental" condition in their CDUPs. The Department of Land and Natural Resources' ("DLNR") Office of Conservation and Coastal Lands ("OCCL") has acknowledged that out of the 21 "standard conditions" of HAR 13-5-42, the "no rental" condition is the only one that limits the use of land. The other conditions, according to OCCL, "apply to land uses in general and relate to conserving natural resources or to permit administration." See Department of Land and Natural Resources, Conservation District's *The Review*, January 1998; Discussion Draft, October 1997, Conservation District Management Plan, p.82, ¶ 9.4 (Exhibit B to Petitioners Memorandum in Support of Petition to Deviate from Conditions filed October 25, 2007).

Haena Hui Hou filed a petition to the Board under HAR § 13-5-42 to deviate from this condition based on the position that the condition is an illegal, unauthorized, unreasonable, and unenforceable condition. Petitioners argued that the condition placed illegal and inappropriate limitations on the use of their lands and homes.

HAR § 13-5-42 requires that such petition be directed to and decided by the Board. The Board is the discretionary decision-making authority for the DLNR. See HRS § 183C-3.

Under HAR § 13-1-2, a contested case hearing is a proceeding in which rights, duties, or privileges of specific parties are required by law to be determined after an agency hearing.

A "proceeding" is defined by HAR § 13-1-2 to include the Board's consideration of relevant facts and law with respect to a particular subject within the Board's jurisdiction, initiated by filing a request, including a petition or application granting relief from any rule or requirement. The request to deviate is a proceeding as it involves the Board's consideration of relevant facts and applicable law to a particular subject (the "no rental condition") within the Board's jurisdiction (HAR § 13-5-42) initiated by the Haena Hui Hou members' request that they be granted relief from a requirement made by the Board under HRS chapter 183C.

The rules require that this determination be made by the Board and the Board's rules, HAR § 13-1 et seq., state when the Board is required to implement contested case hearing procedures.

Here, the rights and duties of specific parties are involved as the parties have requested relief from a Board-imposed requirement which limits the use of their lands. The requirement that this be determined by the Board, and the requirement that the Board follow certain procedures where individual rights are involved, establishes that a contested case hearing is required by law.

2. Nature of Specific Legal Interest

Petitioners are fee simple owners of the parcels listed above and on Exhibit A hereto. Each parcel is subject to a CDUP approving a single family residence. Each CDUP has a condition which restricts the use of the single family residence. Petitioners have asked to modify the conditions to make the conditions more consistent with the objectives of the Conservation District.

Petitioners have a legal interest in the use of their property. The rules establish a procedure for permit holders to request modification of use restrictions. The rules require that the issue be determined by the Board.

3. The Specific Disagreement, Denial, or Grievance

Petitioners have requested a contested case hearing because the Department has recommended denial of the request without an adequate assessment of the actual factual and legal issues presented by the request.

Petitioners disagree with the Staff Recommendation of denial.

Petitioners disagree with and are aggrieved by the action taken by the Board in its meeting on December 14, 2007.

Laura H. Thielen
Samuel J. Lemmo
Vince S. Kanemoto
December 19, 2007
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Petitioners disagree that the Department has developed an adequate record or adequately analyzed the legal issues.

One function of a contested case is to require an agency to apply an appropriate degree of rigor to the decision-making process.

4. Specific Issues to Be Raised

The facts involved and the issues raised are set out and discussed in the Petition for Deviation from Conditions filed with the Board on September 11, 2007, and the proposal and supplemental memorandum submitted by Petitioners on December 7 and 12, 2007. Copies of these documents are already on file with the Department.

5. Basic Facts.

The Petitioners are landowners in the Haena Hui Partition lands. They own single family residences authorized by the Board pursuant to previously issued CDUPs. The Department has alleged that they are in violation of a condition of their CDUPs. Petitioners have applied to the Board, pursuant to HAR § 13-5-42 to allow deviation from these conditions. Petitioners submit that the conditions as drafted are illegal, unreasonable, and unenforceable and ask that the conditions be amended.

The Department has not addressed the issue of how the conditions, as drafted, are consistent with the standards of HRS chapter 183C. Petitioners intend to use the contested case hearing process to develop a record to better inform the Board in making decisions on the Petition.

Petitioners also submit that the letter from OCCL dated December 18, 2007, which purports to be the Decision for the Board is not based on facts on the record, clearly erroneous, and is not consistent with the actual ruling of the Board.

5. Relief or Remedy Sought

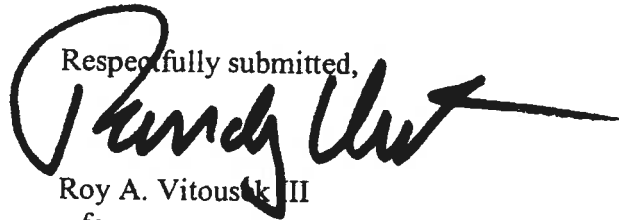
Petitioners request approval of their request to deviate from the conditions in their CDUPs.

Petitioners reiterate their demand that the Board and the Department retain the tape recording or a verbatim transcript of the meeting of the Board dated October 26, 2007, and December 14, 2007.

Laura H. Thielen
Samuel J. Lemmo
Vince S. Kanemoto
December 19, 2007
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Thank you for your consideration of this matter. Please contact me if you have questions or require additional information.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Roy A. Vitousk II", with a long horizontal stroke extending to the right.

Roy A. Vitousk II
for

CADES SCHUTTE

A Limited Liability Law Partnership

RAV:bah
encl.

EXHIBIT "1" – HAENA HUI HOU

<u>NAMES OF FEE OWNERS</u>	<u>TAX MAP KEY ("TMK") NO. OF PROPERTY</u>	<u>CDUP No.</u>	<u>CONDITION No.</u>	<u>LANGUAGE OF CONDITION</u>
Caprice Moran Mark G. Moran	(4) 5-9-005: 021	KA-1051	No. 8	The proposed dwelling shall not be used for rental purposes.
Ann C. Harthorn Edwin T. Cryer	(4) 5-9-002: 018	KA-1355	No. 7	That the single family dwelling not be used for rental or any other commercial purposes.
Murcia-Toro Inc. Carmen & Charo Rasten	(4) 5-9-002: 035	KA-1348	No. 7	That the single family dwelling not be used for rental or any other commercial purposes.
Elizabeth T. Tiernan Michael J. Tiernan Margaret Sullivan William Van Dyk	(4) 5-9-002: 061	KA-1330	No. 7	That the single family dwelling not be used for rental or any other commercial purposes.
Barbara J. Baker Stephen L. Baker	(4) 5-9-002: 043	KA-1497	No. 7	That the single family dwelling not be used for rental or any other commercial purposes.
Apolonia A. Stice Gary D. Stice Paraluman P. Stice-Durkin Ligaya L. Stice-Beredino	(4) 5-9-002: 022	KA-1706	No. 7	That the single family dwelling not be used for rental or any other commercial purposes.
Caroline D. Simpson	(4) 5-9-002: 039	KA-1932	No. 8	The single family dwelling shall not be used for rental or any other commercial purposes.
Earl G. Bart Trust c/o Gary Bart	(4) 5-9-002: 021	KA-1962	No. 6	The single family dwelling shall not be used for rental or any other commercial purposes.
Pieter S. Myers	(4) 5-9-003: 046	KA-1954	No. 6	The single family dwelling shall not be used for rental or any other commercial purposes.
Smith Family Trust c/o E. Brian Smith	(4) 5-9-002: 041	KA-2016	No. 6	The single family dwelling shall not be used for rental or any other commercial purposes.
Diane G. Faye Trust Lindsay C. Faye Trust Diane D. Faye Trust	(4) 5-9-002: 051	KA-2725	No. 9	The single family dwelling shall not be used for rental or any other commercial purposes.
Helferich Family Trust c/o Farah Helferich & Udo Helferich	(4) 5-9-002: 044	KA-2769	No. 4	The single family dwelling shall not be used for rental or other commercial purposes unless approved by the [B]oard [of Land and Natural Resources].
James S. Greenan Pamela B. Greenan	(4) 5-9-002: 050	KA-2946	No. 4	The single family dwelling shall not be used for rental or any other commercial purposes unless approved by the [B]oard [of Land and Natural Resources].
Nan Guslander Whit L. Preston Hillary Preston	(4) 5-9-002: 052	KA-2209	No. 10	Neither the single family dwelling nor any portion of the property is to be used for rental or for any other commercial purposes.

July 15, 2010

Roy A. Vitousek III
Direct Line: (808) 329-5811
Direct Fax: (808) 326-1175
E-mail: rvitousek@cales.com

Laura H. Thielen, Chairperson
and Members of the Board
Board of Land and Natural Resources
P. O. Box 621
Honolulu, Hawaii 96809

Re: Petition for Deviation from Conditions (Rental) in Conservation
District Use Permits for Single-Family Residences at Haena,
Kauai, Relating to TMKs (4) 5-9-002: 18, 21, 22, 35, 39, 41, 43,
44, 46, 50, 51, 52, 61; (4) 5-9-005: 21

Dear Ms. Thielen and Members of the Board:

This office represents the Petitioners in the Petition for Deviation from Conditions filed on September 11, 2007. The Petitioners are owner of homes in the State land use Conservation District in Haena, Kauai, who received with "cease and desist" letters from the Department of Land and Natural Resources which alleged that their homes were being used for vacation rental purposes in violation of conditions in their respective Conservation District Use Permits ("CDUPs"). In response to these "cease and desist" letters, the Petitioners filed a request to the [Department] Board of Land and Natural Resources pursuant to Hawaii Administrative Rules ("HAR"), Rule 13-5-42(c), to remove or modify the "no rental" conditions. After considerable discussion over two Board meetings, the Board voted to deny the Petition and the Petitioners filed a timely request for a contested case hearing.¹

Petitioners' request for a contested case hearing was never presented to the Board for consideration and decision. Instead, the request was denied by Board Chairperson by letter dated January 14, 2008. A copy of this letter is attached. Petitioners appealed the denial of the request for contested case hearing and denial of the Petition to the Fifth Circuit Court. This was an agency appeal under Hawaii Revised Statutes ("HRS") chapter 91. When the Department argued

¹ It is extremely interesting, but very disappointing, that the Department has recently made a formal proposal to amend HAR § 13-5-42(5) to clarify the "no-rental" condition and to allow longer-term (more than 30 days) rental use (see proposed amendment attached hereto). This proposed rule change 1) is another admission by the Department that the condition as written is vague and overbroad and 2) is essentially the type of clarification and specification the Petitioners were requesting in the Petition for Deviation from Conditions. In other words, the Office of Conservation and Coastal Lands and the Department denied the Petition and forced all parties into two years of litigation but now proposes essentially the same modification to the conditions requested by Petitioners.

that Petitioners were not entitled to judicial review of the agency decisions because no contested case hearing was held, Petitioners also filed a Complaint for Declaratory Relief in the Fifth Circuit Court. Both in the agency appeal in the declaratory relief action, Appellants/Petitioners argued that the authority to grant or deny a contested case hearing resided in the Board and that this authority had not been delegated to the Chairperson. The Fifth Circuit Court, per Judge Watanabe, found that it lacked jurisdiction under HRS ch. 91 and dismissed the appeal. The Circuit Court also granted the State's motion for summary judgment relative to the declaratory relief action on the grounds that Petitioners/Appellants were not entitled to a contested case hearing under any rule, statute or the Constitution. Petitioners/Appellants appealed from the Fifth Circuit Court's decisions to the Intermediate Court of Appeals ("ICA").

On June 23, 2010, the ICA issued an opinion in which it found that the Chairperson did not have the authority to deny the request for a contested case hearing. A copy of the opinion is attached. The ICA vacated the actions of the Circuit Court and 1) remanded the agency appeal to the Board of Land and Natural Resources for decision by the Board with respect to Petitioners' request for a contested case hearing, and 2) vacated the Court's judgment in the declaratory relief action and remanded that action to the Fifth Circuit Court. Consequently, the status of the Petition for Deviation from Conditions is that the Petitioners have filed a timely request for a contested case hearing and that request is to be determined by the Board of Land and Natural Resources.

It is significant that the ICA remanded the agency appeal to the Board. The Department argued to the Circuit Court and in the appeal that because no contested case hearing was held the Circuit Court lacked jurisdiction under HRS ch. 91 to consider the appeal. Because the ICA made a decision on the appeal and remanded the appeal to the Board, the ICA implicitly but necessarily decided that it had jurisdiction over the appeal and that Petitioners were entitled to file a chapter 91 appeal from the denial of the request for a contested case hearing.

Further, the fact that the ICA remanded the matter to the Board for a decision on Petitioner's request for contested case hearing clearly means that the ICA recognizes that Petitioners may have a legal right to a contested case hearing with respect to the Petition for Deviation. In hearings relative to the Petition, the Deputy Attorney General representing the Board apparently opined to the Board that Petitioners had no legal right to a contested case hearing in a Petition for Deviation and that the Board had no legal basis to allow a contested case hearing. The Deputy AG representing the Department in the appeal repeatedly argued that "it mattered not" who made the decision to deny the contested case because Petitioners had absolutely no legal right to request or participate in a contested case hearing in a Petition for Deviation from Conditions. If the ICA had agreed with the Department's position, then the Court would lack jurisdiction and/or the issue would be moot and there would be no need to remand the issue to the Board for a decision on Petitioners' request.

Petitioners are very concerned, based on the history of this proceeding, that the Department and the Attorney General's office may attempt to deprive Petitioners of a full and fair opportunity to present their request for contested case hearing. Petitioners believe that the Board has already received incorrect advice which is essentially confirmed in the ICA opinion. Petitioners also raised in the appeal and declaratory relief action the concern that the Board held an improper "executive session" during its consideration of the Petition for Deviation. Specifically, Petitioners alleged that in the Board meeting on December 14, 2007, and during consideration of the Petition, an executive session was held that included members of the Department staff who were advocating against the Petition and that the merits of the Petition were discussed. Petitioners are particularly concerned, as they alleged in the complaint for declaratory relief, that non-Board members had attended the executive session and that the merits of the Petition were discussed. The Deputy Attorney General answered these allegations by stating that the Department and the Board were without knowledge or information as to the truth or falsity of the allegation. This cannot be an accurate representation because it is impossible that the Board and the Department would not know who attended the executive session on December 14, 2007, and what was discussed.

In order to avoid improper procedures and to assure a full and fair discussion of the issues, the Petitioners respectfully request that the Petition for Deviation and Petitioners' request for a contested case hearing be placed on the agenda of a regular public Board meeting and that Petitioners have the opportunity to present information and argument to the Board on the issue of whether or not the Board should grant the request for a contested case hearing. While HAR § 13-1-29.1 states that the Board may make a decision on a request for a contested case hearing "without a hearing," the Board is still required to act in a public meeting and to have a vote of a majority of the members of the Board for the Board to take action. See HRS § 171-5. Petitioners submit that it is only fair for the Board to consider the request for a contested case hearing in an open public meeting of the Board in which the Petitioners have the opportunity to advocate the position to the Board.

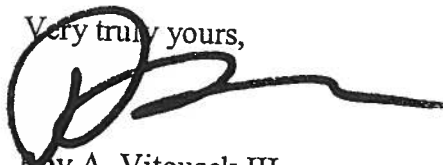
Petitioners will also be submitting to the Board a request pursuant to HRS § 91-8.5 asking that in the event the Board approves the request for a contested case hearing that the issues set out in the Petition for Deviation be referred to mediation. The Department has itself acknowledged that if the "no rental" conditions prohibit any form of occupancy by any anyone other than the home owner, the conditions are overbroad and unreasonable. Petitioners filed the Petition for Deviation in an effort to encourage the Board to define and interpret the purported prohibition against rental use and, if appropriate, to remove or modify the condition prohibiting rental use in a fair and reasonable manner. Petitioners submit that mediation is a reasonable way to approach resolution of the issues, particularly in light of the recently proposed amends to HAR § 13-5-42(5), and is without prejudice to legal positions the Petitioners or the Department may take in the contested case hearing itself.

July 15, 2010

Page 4

Thank you for your attention to this matter.

Very truly yours,

A handwritten signature in black ink, appearing to be "Roy A. Vitousek III", written over the closing "Very truly yours,".

Roy A. Vitousek III

for

CADES SCHUTTE

A Limited Liability Law Partnership

encl. January 14, 2008, letter denying contested case hearing
ICA 6/23/10 Memorandum Opinion
Proposed amendment to HAR § 13-5-42(5)

cc: Samuel J. Lemmo, Admin., DLNR
Vince S. Kanemoto, Dep. Atty. Gen.
William J. Wynhoff, Dep. Atty. Gen.
Deirdre Marie-Iha, Dep. Atty. Gen.

LINDA LINGLE
GOVERNOR OF HAWAII



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
OFFICE OF CONSERVATION AND COASTAL LANDS
POST OFFICE BOX 621
HONOLULU, HAWAII 96809

LAURA H. THIELEN
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

RUSSELL Y. TSUJI
FIRST DEPUTY

KEN C. KAWAHARA
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

REF:OCCL:DH

Haena Vacation Rentals

CERTIFIED/RETURN RECEIPT

JAN 14 2008

Roy Vitousek
Cades Schutte
75-170 Hualalai Road, Suite 303
Kailua Kona, Hawaii 96740

Dear Mr. Vitousek,

SUBJECT: Request for Deviation from Conservation District Use Permit Terms and Conditions

This is in response to your letters dated December 17, 2007, December 19, 2007, and January 8, 2008, requesting a contested case hearing regarding the denial of your clients' request for deviation from certain conditions in their conservation district use permits pursuant to Chapter 13-1, Hawaii Administrative Rules.

The request is denied because a contested case hearing on this matter is not required by law.

Please call Sam Lemmo at the Office of Conservation and Coastal Lands at 587-0377 should you have any questions about this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Laura H. Thielen", is written over a circular stamp.

Laura H. Thielen, Chairperson
Board of Land and Natural Resources

c: Deputy Attorney General Kanemoto
Kauai Docare Branch
Kauai Land Division Office
County of Kauai Planning Department

NOS. 29338 and 29524

CADES SCHUTTE

IN THE INTERMEDIATE COURT OF APPEALS

JUN 24 2010

OF THE STATE OF HAWAII

Time _____ m. Init. _____

No. 29338

GARY BART; EARL G. BART TRUST; GARY D. STICE;
APOLONIA A. STICE; PARALUMAN P. STICE-DURKIN;
LIGAYA L. STICE-BEREDINO; EDWIN T. CRYER;
ANN C. HARTHORN; MURCIA-TORO, INC., a Nevada
corporation duly registered in the State of Hawaii;
CHARO RASTEN; CARMEN LESHER; CAROLINE D. SIMPSON;
SMITH FAMILY TRUST; E. BRIAN SMITH; BARBARA J. BAKER;
STEPHEN L. BAKER; HELFERICH FAMILY TRUST; UDO HELFERICH;
FARAH HELFERICH; DIANE G. FAYE TRUST; DIANE D. FAYE TRUST;
LINDSAY C. FAYE TRUST; NAN GUSLANDER; WHIT L. PRESTON;
HILARY PRESTON; MICHAEL J. TIERNAN; ELIZABETH T. TIERNAN;
MARGARET SULLIVAN; WILLIAM VAN DYK; PIETER S. MYERS;
MARK G. MORAN; AND CAPRICE R. MORAN,
Plaintiffs-Appellants,

v.

BOARD OF LAND AND NATURAL RESOURCES,
STATE OF HAWAII; DEPARTMENT OF LAND AND NATURAL
RESOURCES, STATE OF HAWAII; and LAURA THIELEN,
in her capacities as Chairperson of the BOARD
OF LAND AND NATURAL RESOURCES and Administrator
of the DEPARTMENT OF LAND AND NATURAL RESOURCES,
Defendants-Appellees
(Civil No. 08-01-0030)

and

No. 29524

GARY BART; EARL G. BART TRUST; GARY D. STICE;
APOLONIA A. STICE; PARALUMAN P. STICE-DURKIN;
LIGAYA L. STICE-BEREDINO; EDWIN T. CRYER;
ANN C. HARTHORN; MURCIA-TORO, INC., a Nevada
corporation duly registered in the State of Hawaii;
CHARO RASTEN; CARMEN LESHER; CAROLINE D. SIMPSON;
BARBARA J. BAKER; STEPHEN L. BAKER; HELFERICH FAMILY TRUST;
UDO HELFERICH; FARAH HELFERICH; DIANE G. FAYE TRUST;
DIANE G. FAYE; DIANE D. FAYE TRUST; DIANE D. FAYE;
LINDSAY C. FAYE TRUST; LINDSAY C. FAYE; NAN
GUSLANDER TRUST; NAN GUSLANDER; L. WHIT PRESTON TRUST;
L. WHIT PRESTON; HILARY PRESTON TRUST; HILARY PRESTON;
MICHAEL J. TIERNAN; ELIZABETH T. TIERNAN; MARGARET
SULLIVAN; WILLIAM A. VAN DYK; PIETER S. MYERS;
MARK G. MORAN; CAPRICE R. MORAN, IVE REVOCABLE TRUST;
HEATHER IVE; JONATHAN IVE; and TROY ECKERT,
Plaintiffs-Appellants,

v.

FILED

2010 JUN 23 AM 10:12

BOARD OF LAND AND NATURAL RESOURCES,
STATE OF HAWAII; DEPARTMENT OF LAND AND NATURAL RESOURCES, STATE
OF HAWAII; and LAURA H. THIELEN, in her capacities as
Administrator of the STATE OF HAWAII DEPARTMENT OF LAND AND
NATURAL RESOURCES, and Chairperson of the BOARD OF LAND AND
NATURAL RESOURCES, Defendants-Appellees
(Civil No. 08-01-0077)

APPEAL FROM THE CIRCUIT COURT OF THE FIFTH CIRCUIT

MEMORANDUM OPINION

(By: Nakamura, C.J., Foley and Fujise, JJ.)

In this consolidated appeal¹ arising out of a dispute over land use, the following parties appealed from the following Final Judgments entered in the Circuit Court of the Fifth Circuit² (circuit court):

(1) In Civil No. 08-01-0030, an agency appeal, Appellants-Appellants Gary Bart; Earl G. Bart Trust; Gary D. Stice; Apolonia A. Stice; Paraluman P. Stice-Durkin; Ligaya L. Stice-Beredino; Edwin T. Cryer; Ann. C. Harthorn; Murcia-Toro, Inc., a Nevada corporation duly registered in the State of Hawaii; Charo Rasten; Carmen Leshner; Caroline D. Simpson; Smith Family Trust; E. Brian Smith; Barbara J. Baker; Stephen L. Baker; Helferich Family Trust; Udo Helferich; Farah Helferich; Diane G. Faye Trust; Diane D. Faye Trust; Lindsay C. Faye Trust; Nan Guslander; Whit L. Preston; Hilary Preston; Michael J. Tiernan; Elizabeth T. Tiernan; Margaret Sullivan; William Van Dyk; Pieter S. Myers; Mark G. Moran; and Caprice R. Moran (Agency Plaintiffs) appealed from the Final Judgment entered on August 7, 2008 in favor of Appellees-Appellees Board of Land and Natural Resources, State of Hawaii (BLNR); Department of Land and Natural Resources, State of Hawaii (DLNR); and Laura H. Thielen

¹ On January 9, 2009, this court granted a stipulation to consolidate appeal Nos. 29338 and 29524. Although the majority of the same parties appear as plaintiffs in both appeals, there is a difference in the parties.

² The Honorable Kathleen N.A. Watanabe presided.

(Thielen) in her capacities as Chairman of the BLNR and Administrator of the DLNR (collectively, Defendants or Appellees).

(2) In Civil No. 08-1-0077, a complaint for declaratory judgment and injunctive relief, Plaintiffs-Appellants Gary Bart; Earl G. Bart Trust; Gary D. Stice; Apolonia A. Stice; Paraluman P. Stice-Durkin; Ligaya L. Stice-Beredino; Edwin T. Cryer; Ann. C. Harthorn; Murcia-Toro, Inc., a Nevada corporation duly registered in the State of Hawai'i; Charo Rasten; Carmen Leshner; Caroline D. Simpson; Barbara J. Baker; Stephen L. Baker; Helferich Family Trust; Udo Helferich; Farah Helferich; Diane G. Faye Trust; Diane G. Faye; Diane D. Faye Trust; Diane D. Faye; Lindsay C. Faye Trust; Lindsay C. Faye; Nan Guslander Trust; Nan Guslander; L. Whit Preston Trust; L. Whit Preston; Hilary Preston Trust; Hilary Preston; Michael J. Tiernan; Elizabeth T. Tiernan; Margaret Sullivan; William A. Van Dyk; Pieter S. Myers; Mark G. Moran; Caprice R. Moran; Ive Revocable Trust; Heather Ive; Jonathan Ive; and Troy Eckert (Civil Plaintiffs) appealed from the Final Judgment entered on November 17, 2008 in favor of Defendants.

We will refer to Agency Plaintiffs and Civil Plaintiffs collectively as Appellants. On appeal, Appellants raise the following points of errors:

A. Agency Appeal

1. Did the Circuit Court err when it dismissed Appellants' HRS [Hawaii Revised Statutes] chapter 91 appeal on the grounds that the Court lacked subject matter jurisdiction to review the [BLNR's] denial of Appellants' Petition and its denial of Appellants' request for contested case hearing although HRS § 183C-8 authorizes appeals in accord with chapter 91 from any final order of the DLNR?
2. Did the Circuit Court err in dismissing the chapter 91 appeal pursuant to HRCF [Hawai'i Rules of Civil Procedure] Rule 12(b)(1) on the grounds that no "contested case hearing" had been held even though the [BLNR's] denial of the Petition was final, was made in a public meeting required by law, and the Petition was a request that the [BLNR] determine Appellants' legal "rights, duties, or privileges" under their CDUPs [conservation district use permits]?

3. Did the Circuit Court err in holding that the [BLNR's] December 14, 2007 public meeting in which Appellants' Petition was denied was not a "contested case hearing" for purposes of jurisdiction under HRS § 91-14?
4. Did the Circuit Court err in failing to remand the action to the BLNR for the BLNR to rule on Appellants' request for a contested case hearing because the Chairperson lacks authority to deny requests for contested case hearings and only the BLNR has the authority to allow or deny a contested case?

B. Declaratory Judgment Action

1. Did the Circuit Court err when it granted summary judgment to all claims on the grounds that as a matter of law, Appellants were not entitled to a contested case hearing on the merits of the Petition?
2. Did the Circuit Court err in granting summary judgment as a matter of law on the grounds that the no-rental rule and conditions are not vague or ambiguous and give fair notice that certain conduct is prohibited where it is undisputed that both Appellees themselves and the Circuit Court have been unable to articulate what conduct is prohibited by the no-rental rule and conditions, and there was evidence of inconsistent enforcement?
3. Did the Circuit Court err when it granted summary judgment to all claims alleged in the Complaint on the grounds that as a matter of law, the no-rental conditions in the CDUP are not overbroad when there were undisputed facts in the record demonstrating that the [BLNR] had previously admitted the no-rental conditions are "unreasonable" and not enforceable and there were undisputed facts in the record demonstrating that the DLNR itself conducts short-term vacation rental in the Conservation District and thus there was a genuine issue of material fact as to whether the no-rental conditions are consistent with the purposes of the Conservation District in HRS [Chapter] 183C?
4. Did the Circuit Court err when it refused or failed to decide whether the no-rental rule and condition, as apparently interpreted by the Circuit Court, exceeded statutory authority of the BLNR and whether they were inconsistent with the standards of HRS [Chapter] 183C?
5. Did the Circuit Court err in granting summary judgment as a matter of law that the denial of Appellants' Petition was proper notwithstanding the existence of a genuine issue of material fact as to whether an illegal executive session was held by the [BLNR] in deciding the Petition?
6. Did the Circuit Court err in granting summary judgment on Appellants' claim that OCCL [Office of Conservation and Coastal Lands] lacked authority to enforce the CDUP conditions against Appellants where there was clear undisputed evidence in the record that the OCCL

was proceeding in an enforcement action against Appellants?

7. Did the Circuit Court abuse its discretion in denying Appellants' Motion to Compel when the discovery sought by Appellants was discoverable and directly relevant to the claims and defenses alleged by the parties, the discovery could have had a material impact on the merits of the claims that the Court dismissed by summary judgment, and thus resulted in substantial prejudice to Appellants?
8. Did the Circuit Court abuse its discretion in denying Appellants' request for an HRCF Rule 56(f) continuance to conduct discovery and granting summary judgment where Appellees had refused to produce any records in response to Appellants' pending discovery request, Appellants had no opportunity to conduct discovery, Appellants had filed a Motion to Compel, the discovery sought to be compelled was highly relevant to the claims and defenses alleged by the parties, and the discovery could have had a material impact on the merits of the claims that the Court dismissed by summary judgment?

We vacate and remand the agency appeal for BLNR determination on the Agency Plaintiffs' entitlement to a contested case hearing under Hawaii Administrative Rule (HAR) § 13-1-29.1. Because we vacate and remand on this point, we decline to address Appellants' other points.

I. BACKGROUND

Appellants own real property in the Haena Hui Partition area on the island of Kau'ai. The real property is located within a State of Hawai'i land use Conservation District. Appellants were granted CDUPs for single-family residences on their properties. The CDUPs included a no-rental condition, which prohibited renting out a single-family residence or using it for any commercial purpose.

HAR § 13-5-42(a) (5) prohibits the use of single-family residences for rental or commercial purposes without prior approval from the BLNR.

Despite the prohibition on renting, some Appellants rented their properties. On March 23, 2007, cease and desist

letters were sent to Appellants.³ The letters indicated that the OCCL⁴ had "received information regarding the alleged, unauthorized vacation rental use of the subject property." The letters further stated:

The OCCL notes you will have until June 30, 2007 to cease any unauthorized use on the subject parcel. Should you fail to cease such illegal use by this date, you will be subject to fines up to \$2,000.00 per day, pursuant to Chapter 13-5, HAR, in addition to administrative costs incurred by the [DLNR].

The letters were signed by Peter T. Young, BLNR Chairperson.

The letters did not constitute formal enforcement action against Appellants.

On September 11, 2007, Agency Plaintiffs filed a Petition for Deviation from Conditions (Petition), pursuant to HAR § 13-5-42(c), with the DLNR. The Petition requested "the deletion of any language which purports to prohibit the owner of a single family residence built pursuant to the CDUP from renting the property." The BLNR denied the Petition on December 14, 2007, and the DLNR notified Agency Plaintiffs of the denial by letter dated December 18, 2007. Agency Plaintiffs timely requested a contested case hearing on the denial.

On or about January 14, 2008, Thielen, the Chairperson of the BLNR, wrote a letter to Agency Plaintiffs' counsel denying Agency Plaintiffs' request for a hearing. The letter stated that "[t]he request is denied because a contested case hearing on this matter is not required by law." Thielen signed the letter in her official capacity as the BLNR Chairperson. The BLNR did not consider or act on Agency Plaintiffs' request.

On February 14, 2008, Agency Plaintiffs appealed to the circuit court from the denial of their Petition and their request for a contested case hearing, pursuant to HRS § 91-14 (1993 & Supp. 2009).

³ The record indicates that each Appellant received a cease and desist letter except for Guslander/Preston.

⁴ OCCL is an office within the DLNR.

On March 12, 2008, Defendants filed their Motion to Dismiss for Lack of Subject Matter Jurisdiction. Although the Agency Plaintiffs opposed the motion, the circuit court granted it and entered the Final Judgment on August 7, 2008.

Agency Plaintiffs timely appealed from the Final Judgment to this court.

On April 14, 2008, Civil Plaintiffs filed a declaratory judgment action against Defendants, asking for, among other things, a declaration that Thielen's action in denying Civil Plaintiffs' request for a contested case hearing "should be reversed." On May 20, 2008, Defendants filed a motion to dismiss the Complaint for Declaratory Judgment and Injunctive Relief, which motion the circuit court ultimately denied.

On August 11, 2008, Defendants filed a Motion for Summary Judgment as to all Claims and Parties. Civil Plaintiffs opposed the motion. On November 17, 2008, the circuit court granted Defendants' motion for summary judgment and entered the Final Judgment.

Civil Plaintiffs timely appealed.

II. STANDARD OF REVIEW

"On secondary judicial review of an administrative decision, Hawai['i] appellate courts apply the same standard of review as that applied upon primary review by the circuit court." *Kaiser Found. Health Plan, Inc. v. Dep't of Labor & Indus. Relations*, 70 Haw. 72, 80, 762 P.2d 796, 800-01 (1988). For administrative appeals, the applicable standard of review is set forth in [HRS] § 91-14 (2004), which provides:

Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedure; or

- (4) Affected by other error of law; or
- (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) Arbitrary, capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

HRS § 91-14(g). Pursuant to HRS § 91-14(g)(5), administrative findings of fact are reviewed under the clearly erroneous standard, which requires [the appellate] court to sustain its findings "unless the court is left with a firm and definite conviction that a mistake has been made." *Bumanglag v. Oahu Sugar Co., Ltd.*, 78 Hawai'i 275, 279, 892 P.2d 468, 472 (1995) (block format and citation omitted). Administrative conclusions of law, however, are reviewed under the *de novo* standard inasmuch as they are "not binding on an appellate court." *Id.* (block format and citation omitted). "Where both mixed questions of fact and law are presented, deference will be given to the agency's expertise and experience in the particular field and the court should not substitute its own judgment for that of the agency." *Dole Hawaii Div.-Castle & Cooke, Inc. v. Ramil*, 71 Haw. 419, 424, 794 P.2d 1115, 1118 (1990). "To be granted deference, however, the agency's decision must be consistent with the legislative purpose." *Camara v. Agsalud*, 67 Haw. 212, 216, 685 P.2d 794, 797 (1984).

Peroutka v. Cronin, 117 Hawai'i 323, 326, 179 P.3d 1050, 1053 (2008).

III. DISCUSSION

Appellants contend that Thielen did not have the authority to deny Agency Plaintiffs' request for a contested case and the circuit court erred as a matter of law in failing to address this error. Appellants argue that the BLNR had to decide Agency Plaintiffs' request at a publicly noticed meeting.

Parties may request a contested case and petition BLNR to hold a contested case hearing. HAR § 13-1-29(a) (1982). BLNR has discretion to deny the request and/or petition:

The board without a hearing may deny a request or petition or both for a contested case when it is clear as a matter of law that the request concerns a subject that is not within the adjudicatory jurisdiction of the board or when it is clear as a matter of law that the petitioner does not have a legal right, duty, or privilege entitling one to a contested case proceeding.

HAR § 13-1-29.1.

We note that the chairperson's enumerated duties under HAR § 13-1-8 do not include officially determining a party's entitlement to a contested case hearing. We also note that the BLNR has the power to "[d]elegate to the chairperson or employees of the department of land and natural resources, subject to the board's control and responsibility, such powers and duties as may be lawful or proper for the performance of the functions vested in the board." HRS § 171-6(8) (Supp. 2007); see also HRS § 26-15(a) (2009 Repl.).

On or about January 14, 2008, Thielen, as BLNR Chairperson, wrote a letter denying Agency Plaintiffs' request for a contested case hearing on the denial of their request for deviation from the conditions in their CDUPs "because a contested case hearing on this matter is not required by law." In conducting discovery, Appellants found no indication that BLNR delegated to Thielen the authority to deny requests for contested case hearings. In their motion for summary judgment, Defendants conceded that "[t]he Board did not consider or act upon [Agency Plaintiffs'] request for a contested case hearing." In granting Defendants' motion for summary judgment, the circuit court did not make any finding or conclusion as to the propriety of Thielen's denial letter.

Given the foregoing law and facts, we conclude that without proper delegation from BLNR, Thielen could not lawfully deny Agency Plaintiffs' request for a contested case hearing. In granting Defendants' motions to dismiss the agency appeal and for summary judgment in the declaratory judgment action, the circuit court accordingly erred by failing to address the propriety of Thielen's denial letter.

IV. CONCLUSION

We vacate the Final Judgment filed on August 7, 2008 in Civil No. 08-1-0030 in the Circuit Court of the Fifth Circuit and remand the agency action for a BLNR determination on Agency Plaintiffs' entitlement to a contested case hearing under HAR


§ 13-1-29.1. The circuit court's November 17, 2008 Final Judgment in Civil No. 08-1-0077 in the Circuit Court of the Fifth Circuit as to Civil Plaintiffs' declaratory judgment action is vacated, and this case is remanded to the circuit court for further proceedings consistent with this opinion.

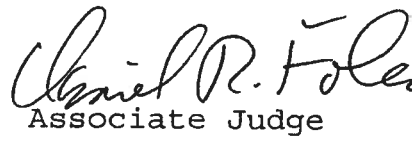
DATED: Honolulu, Hawai'i, June 23, 2010.

On the briefs:

Roy A. Vitousek III
Kristin S. Shigemura
(Cades Schutte LLP)
for Appellants.

Deirdre Marie-Iha,
Deputy Solicitor General,
for Appellees.

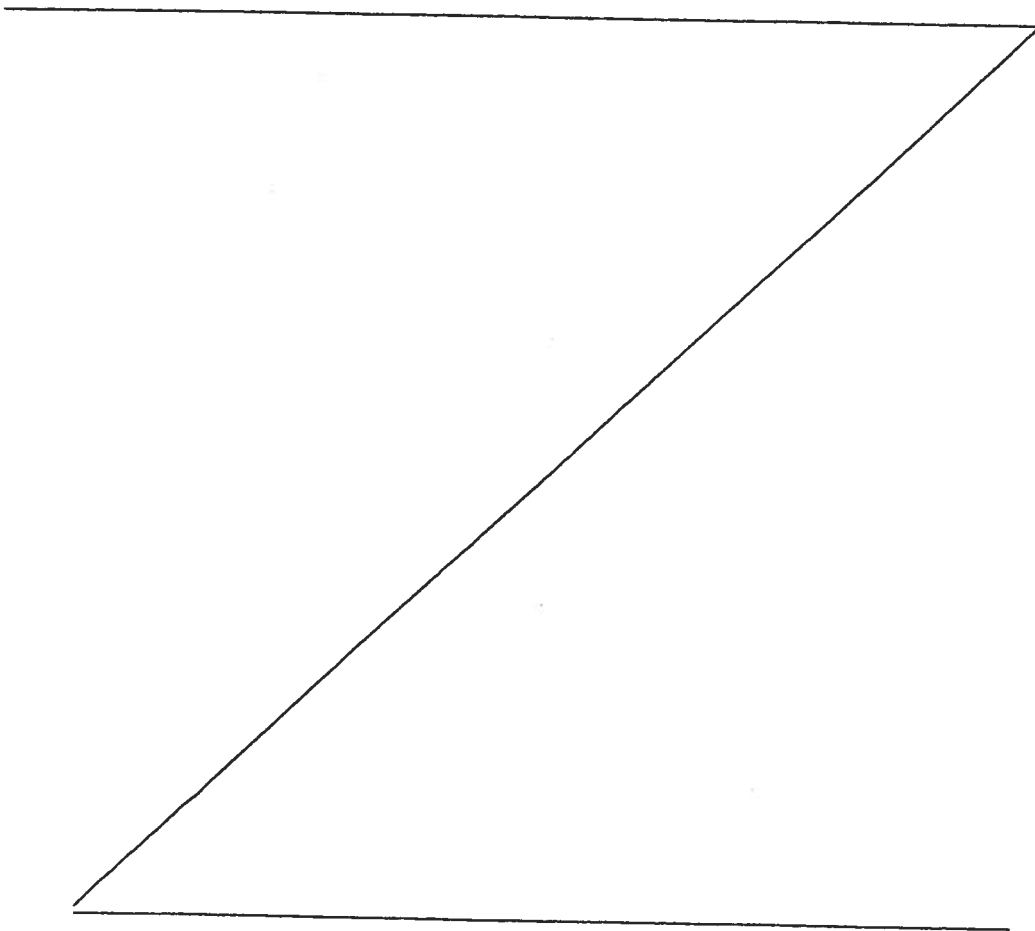

Chief Judge


Associate Judge


Associate Judge

Department of Land and Natural Resources
Rules Amending Title 13
Hawaii Administrative Rules
(Date of Adoption)

1. Chapter 5 of Title 13, Hawaii Administrative Rules, entitled "Conservation District", is amended and compiled to read as follows:



wash of the waves occurs, usually evidenced by the edge of vegetation growth, or the upper limit of debris left by the wash of the waves, or otherwise defined in S205A-1, HRS.

"Single family residence" means a building or structure used or designated and intended to be used as a home or dwelling place for a family

"Significantly different" means the alteration of an existing structure, facility, or use that increases the size, height, or density of an existing structure, facility, or use by more than fifty per cent.

"Site plan" means a plan drawn to scale, showing the actual dimensions and shape of the property, the size and locations on the property of existing and proposed structures and open areas including vegetation and landscaping.

"State marine waters" means all waters of the State, including the water column and water surface, extending from the ~~[upper reaches of the wash of the waves on shore]~~ shoreline seaward to the limit of the State's police power and management authority, including the United States territorial sea, notwithstanding any law to the contrary.

"Subdivision" means a division of a parcel of land into more than one parcel.

"Submerged lands" means lands from the ~~[upper reaches of the waves on shore]~~ shoreline seaward to the extent of the State's jurisdiction.

"Subzone" means a zone established within the conservation district ~~[which]~~ that is identified by boundaries and resource characteristics pursuant to this chapter.

"Temporary variance" means an exception to zoned use, where good cause is shown and where the proposed variance is for a use determined to be in accordance with good conservation practices.

"Topographical features" means natural and artificial geographical features that appear on a topographical map, such as mountains, hills, valleys, rivers, gulches, streams, wetlands, shorelines, beaches, submerged lands, roads, and other such [structures] features.

"Transient rental" means the use of a single family residence or lodging unit for less than thirty

days, excluding month-to-month rentals, in exchange for compensation, including but not limited to monetary payment, services, or labor of employees.

"Transportation system" includes the means to transport people, animals, or goods or any combination thereof from one place to another, including roads, harbors, airways, and their related facilities.

"Water system" means a network of pipelines, storage, pumps, water sources, and other appurtenances (e.g., ditches, channels, canals, flumes, siphons, telemark lines, drainage systems, etc., all of which are part of a surface water collection system) [which] that furnishes a supply of water to [consumers] water users. The water sources may include diversions, impoundments, or wells, and may include water treatment facilities to achieve necessary water quality standards.

"Wilderness area" means an area designated by the department having a diversity and abundance of native flora and fauna, geological formation, or both, largely undisturbed by human influences, in which the introduction of non-indigenous plants and animals, mining, grazing of domestic animals, removal of vegetation, overnight camping, and the construction of roads or structures is prohibited or restricted.

~~["Wildlife sanctuary" means an area of land or water designated by the department to preserve, protect, conserve, and manage wildlife, where hunting and other activities may be restricted.]~~ [Eff

12/12/94; am and comp] (Auth: HRS §183C-3) (Imp: HRS §183C-2)

§13-5-3 Appeals. Any final order of the department or board based upon this chapter may be appealed to the circuit court of the circuit in which the land in question is found. [Eff 12/12/94; am and comp] (Auth: HRS §183C-3) (Imp: HRS §183C-8)

Note: See chapter 91, Hawaii Revised Statutes and Hawaii Rules of Civil Procedure.

in Exhibit 4, entitled "Single Family Residential ~~[Standards, "]~~ Standards", dated ~~[September 9, 2005. "]~~ (new date), except as may be allowed by the board upon finding that prevailing conditions warrant the deviation from specific standards, and upon finding that the deviation is consistent with the criteria and conditions set forth in this chapter. Deviation from any of the standards shall be limited to fifteen per cent. Exhibit 4 is located at the end of this chapter and made a part of this section.

(b) Not more than one single family residence shall be authorized within the conservation district on a legal lot of record.

(c) No single family residence shall be allowed in the conservation district where there is an existing residence in a different state land use district zoned for residential, rural, or agricultural use on another portion of the same legal lot of record. [Eff 11/14/05; am and comp] (Auth: HRS §183C-3) (Imp: HRS §183C-4)

§13-5-41.1 Fire protection zone. Where requested by the department, fire protection zones shall be established and shall include the requirements listed in Exhibit 5, entitled "Fire Protection Zone Standards", dated (new date), which is located at the end of this chapter and made a part of this section. [Eff and comp] Auth: HRS §183C-3) (Imp: HRS §183C-4)

§13-5-42 Standard conditions. (a) Any land use allowed within the conservation district is subject to the following standard conditions:

- (1) The ~~[applicant]~~ permittee shall comply with all applicable statutes, ordinances, rules, and regulations of the federal, state, and county governments, and applicable parts of this chapter;
- (2) The ~~[applicant]~~ permittee, its successors and assigns, shall indemnify and hold the State of Hawaii harmless from and against any loss, liability, claim, or demand for property

- damage, personal injury, and death arising out of any act or omission of the applicant, its successors, assigns, officers, employees, contractors, and agents under this permit or relating to or connected with the granting of this permit;
- (3) The ~~[applicant]~~ permittee shall obtain appropriate authorization from the department for the occupancy of state lands, if applicable;
 - (4) The ~~[applicant]~~ permittee shall comply with all applicable department of health administrative rules;
 - (5) The single family ~~[dwelling]~~ residence shall not be used for short-term rental or any other commercial purposes unless approved by the board. Transient rentals are prohibited, with the exception of camp sites approved by the board;
 - (6) The ~~[applicant]~~ permittee shall provide documentation (e.g., book and page or document number) that the permit approval has been placed in recordable form as a part of the deed instrument, prior to submission for approval of subsequent construction plans;
 - (7) Before proceeding with any work authorized by the department or the board, the ~~[applicant]~~ permittee shall submit four copies of the construction plans and specifications to the chairperson or ~~[his]~~ an authorized representative for approval for consistency with the conditions of the permit and the declarations set forth in the permit application. Three of the copies will be returned to the ~~[applicant]~~ permittee. Plan approval by the chairperson does not constitute approval required from other agencies;
 - (8) ~~[Any]~~ Unless otherwise authorized, any work or construction to be done on the land shall be initiated within one year of the approval of such use, in accordance with construction plans that have been signed by the chairperson, and ~~[, unless otherwise~~

- ~~authorized,~~] shall be completed within three years of the approval of such use. The applicant shall notify the department in writing when construction activity is initiated and when it is completed;
- (9) All representations relative to mitigation set forth in the accepted environmental assessment or impact statement for the proposed use are incorporated as conditions of the permit;
 - (10) The ~~[applicant]~~ permittee understands and agrees that the permit does not convey any vested right(s) or exclusive privilege;
 - (11) In issuing the permit, the department and board have relied on the information and data ~~[which]~~ that the ~~[applicant]~~ permittee has provided in connection with the permit application. If, subsequent to the issuance of the permit such information and data prove to be false, incomplete, or inaccurate, this permit may be modified, suspended, or revoked, in whole or in part, and the department may, in addition, institute appropriate legal proceedings;
 - (12) When provided or required, potable water supply and sanitation facilities shall have the approval of the department of health and the board of water supply;
 - (13) Provisions for access, parking, drainage, fire protection, safety, signs, lighting, and changes on the landscape shall be provided;
 - (14) Where any interference, nuisance, or harm may be caused, or hazard established by the use, the ~~[applicant]~~ permittee shall be required to take measures to minimize or eliminate the interference, nuisance, harm, or hazard;
 - (15) Obstruction of public roads, trails, lateral beach access, and pathways shall be avoided or minimized. If obstruction is unavoidable, the ~~[applicant]~~ permittee shall provide alternative roads, trails, lateral beach access, or pathways acceptable to the department;

- (16) Except in case of public highways, access roads shall be limited to a maximum of two lanes;
- (17) During construction, appropriate mitigation measures shall be implemented to minimize impacts to off-site roadways, utilities, and public facilities;
- (18) Cleared areas shall be revegetated, in accordance with landscaping guidelines provided in this chapter, within thirty days unless otherwise provided for in a plan on file with and approved by the department;
- (19) Use of the area shall conform with the program of appropriate soil and water conservation district or plan approved by and on file with the department, where applicable;
- (20) Animal husbandry activities shall be limited to sustainable levels in accordance with good soil conservation and vegetation management practices; ~~and~~
- (21) The permittee shall obtain a county building or grading permit or both for the use when applicable;
- (22) For all landscaped areas, landscaping and irrigation shall be contained and maintained within the property, and shall under no circumstances extend seaward of the shoreline as defined in section 205A-1, HRS;
- (23) Artificial light from exterior lighting fixtures, including but not necessarily limited to floodlights, uplights, or spotlights used for decorative or aesthetic purposes, shall be prohibited if the light directly illuminates or is directed to project across property boundaries toward the shoreline and ocean waters, except as may be permitted pursuant to section 205A-71, HRS. All exterior lighting shall be shielded to protect the night sky;
- (24) Where applicable, provisions for protection of beaches and the primary coastal dune shall be established by the permittee, to the

satisfaction of the department, including but not limited to avoidance, relocation or other best management practices;

- (25) The permittee acknowledges that the approved work shall not hamper, impede, or otherwise limit the exercise of traditional, customary, or religious practices of native Hawaiians in the immediate area, to the extent the practices are provided for by the Constitution of the State of Hawaii, and by Hawaii statutory and case law; and
- ~~[(21)]~~ (26) Other terms and conditions as prescribed by the chairperson.

(b) Failure to comply with any of these conditions shall render a permit void under the chapter, as determined by the chairperson or board.

(c) Deviation from any of the conditions, standards, or criteria provided [herein] in this chapter may be considered by the board, only when supported by a satisfactory written justification stating:

- (1) The deviation is necessary because of the lack of practical alternatives;
- (2) The deviation shall not result in any substantial adverse impacts to natural resources;
- (3) The deviation does not conflict with the objective of the subzone; and
- (4) The deviation is not inconsistent with the public health, safety, or welfare.

Failure to secure board approval for a deviation before ~~[such a]~~ the deviation occurs constitutes cause for permit revocation. [Eff 12/12/94; am and comp]
Auth: HRS §183C-3) (Imp: HRS §§183C-4, 183C-6)

§13-5-43 Time extensions. (a) Permittees may request time extensions for the purpose of extending the period of time to comply with the conditions of a permit.

(b) Time extensions may be granted as determined by the chairperson on all departmental permits and on the first request for extension of a board permit of up

September 7, 2010

Roy A. Vitousek III
Direct Line: (808) 329-5811
Direct Fax: (808) 326-1175
E-mail: rvitousek@cades.com

Laura H. Thielen, Chairperson
and Members of the Board
Board of Land and Natural Resources
P. O. Box 621
Honolulu, Hawaii 96809

Re: Board Meeting on September 9, 2010, Amended Agenda Item K-1
Petition for Deviation from Conditions (Rental) in Conservation
District Use Permits for Single-Family Residences at Haena,
Kauai, Relating to TMKs (4) 5-9-002: 18, 21, 22, 35, 39, 41, 43,
44, 50, 51, 52, 61; (4) 5-9-003: 46; and (4) 5-9-005: 21

Dear Ms. Thielen and Members of the Board:

It is frankly astounding that the Department of Land and Natural Resources' Office of Conservation and Coastal Lands ("OCCL") and the Office of the Attorney General ("AG") would make recommendations to this Board relative to Applicant's request for a contested case hearing without referring to or citing the August 18, 2010 Opinion of the Hawaii Supreme Court (Appeal No. 28491) in Kaleikini v. Thielen. This opinion was expressly intended by the Supreme Court to address and correct several of the erroneous positions taken by the AG on behalf of the Chairperson and the Board of Land and Natural Resources ("BLNR" or "Board") in Kaleikini which were identical to the erroneous justifications for the denials of my clients' requests for a contested case hearing in this matter.

The Kaleikini opinion directly contradicts the position taken by the OCCL/AG relative to the instant request for a contested case hearing. The OCCL states in its September 9, 2010, recommendation ("OCCL Recommendation") that the Board has discretion to grant or deny petitioners/owners' request.¹ The Supreme Court stated that if a contested case hearing is required by law and petitioner properly requests a contested case hearing, the only discretion

¹ The OCCL recommendations do not accurately represent the findings of the ICA in the Memorandum Opinion dated June 23, 2010. The OCCL states that the ICA ruled that the Petitioners were not entitled to a contested case hearing, but that the Board "may nevertheless allow a contested case in its discretion." This is not what the ICA ruled. The ICA held that the Board, and not the Chair, was the appropriate entity to consider and decide upon Petitioners' request. The ICA expressed no opinion on the merits of Petitioners' request. The ICA expressly remanded the matter to the Board "for a BLNR determination on Agency Plaintiffs' entitlement to a contested case hearing under HAR § 13-1-29.1."

EXHIBIT C

Cades Schutte Building
1000 Bishop Street, Suite 1200
Honolulu, Hawaii 96813
Tel: 808.521-9200
Fax: 808.521-9210
www.cades.com

Kona Office
75-170 Hualalai Road, Suite 303
Kailua Kona, Hawaii 96740
Tel: 808.329-5811
Fax: 808.326-1175

involved is to determine whether a procedurally correct request has been made and, if so, to approve the request so the substantive issues raised by the petitioner can be decided through the contested case hearing process. In this case, as in Kaleikini, a contested case hearing is required by law and the Department of Land and Natural Resources (Department or DLNR) concedes that the procedural requirements have been met (see OCCL Recommendation at p. 3) so the request must be granted.

Petitioners Meet Threshold Requirements for Contested Case Hearing

The “required by law” element here is met.

1. The instant Petition for Deviation from Conditions (“Petition”) specifically relates to the conditions imposed by the Board in Conservation District Use Permits issued to the Petitioners. HAR § 13-5-42(c) provides that an applicant may apply to the Board to deviate from the conditions. HAR § 13-5-34(d) relative to “Board Permits” provides that “contested case hearings, if applicable, and as required by law, shall be held as provided in chapter 13-1, subpart 5.”
2. HAR § 13-5-3 and HRS § 183C-8 both provide that “Any final order of the department based upon this chapter may be appealed to the circuit court . . .” For an order of the Department or Board to be appealed, a contested case hearing is required.
3. The Petitioners unquestionably have legally and constitutionally protected property rights in their own homes. The “no-rental” condition being challenged in the Petition purports to place a limit on Petitioners’ property rights, though the limit is not clearly defined in scope. The Petitioners contend that the “no-rental” condition on its face, or at minimum, as it is applied by the DLNR, is illegal, vague, overbroad, in excess of statutory authority, and unconstitutional.

The interest which the Petitioners are seeking to have adjudicated by the Board is the legality of conditions imposed by the Board which purport to limit Petitioners’ use and enjoyment of their homes. Thus, Petitioners “have a legal right, duty, or privilege entitling one to a contested case proceeding.” See HAR § 13-1-29.1

On December 14, 2007, the Board voted to deny the Petition. This decision upheld a Board-imposed restriction on Petitioners’ property rights. The Department concedes that

Petitioners made a timely, appropriate request for a contested case hearing and have standing to appeal.²

The OCCL and AG appear to confuse the Petitioners' request for a contested case hearing with the Board's ruling on the merits of the Petition. The OCCL and AG argue that Petitioners are not entitled to a contested case hearing on their challenge to the "no-rental" condition because the "no-rental" condition is a valid limitation on Petitioner's property rights. They argue that because Petitioners' property rights were already limited by the condition, the refusal to remove the condition does not take away any right. The circular nature of this argument is obvious. Petitioners are using the procedure established by HAR § 13-5-42 to challenge the legal validity of the condition. If the Board rules in Petitioners' favor, the property rights held by the Petitioners before the condition was imposed would be restored. In other words, Petitioners had property rights which the Board took away when it imposed the "no-rental" condition in the Petitioners' conservation district use permits (CDUPs) and which Petitioners are asking the Board to either define the limitations of or restore. For the Department to argue that, "They have no property interest in the change" is totally inconsistent with the undisputed facts.

Petitioners have a property interest in their homes. They are attempting to enforce those property rights. Petitioners have requested that the merits of their Petition be considered through the contested case process. Petitioners have met the legal threshold for a contested case hearing and the merits of their Petition (i.e., whether the "no-rental" condition is legally valid and should be removed or modified) should be determined by the Board through the contested case hearing process. Because Petitioners have demonstrated that they have rights entitling them to a contested case proceeding, the Board does not have the discretion to deny the request.

OCCL Argues that the Board has Discretion to Deny Request

Nevertheless, the OCCL and AG argue that the Board has discretion to deny the request. In other words, the OCCL argues that Petitioners are entitled to a contested case hearing only if the Board in its discretion allows a contested case hearing. This means that Petitioners' ability to appeal the Board's adverse decision relative to their property rights is subject to the Board deciding whether or not to allow a contested case hearing.

² The DLNR states, "The department does not dispute that owners would have standing for a contested case." OCCL Recommendation @ p.3. To have standing, a party must have "injury in fact." PASH v. County Planning Commission, 79 Haw. 425, 434 (1995). The elements of "injury in fact" are: (1) an actual or threatened injury (2) which is traceable to the challenged actions and (3) is likely to be remedied by favorable judicial action. See Akau v. Olohana Corp., 65 Haw. 383, 388-389, 652 P2d 1130 at 1134. By conceding that Petitioners have standing, the Department concedes that Petitioners have an actual or threatened injury traceable to the Board's denial of the Petition. Thus, the Department concedes that Petitioners have property interests which were adversely affected by the Board's decision denying the Petition.

Again, this issue was considered and decided by the Supreme Court in Kaleikini. There, the AG argued that because the statute in question (HRS § 6E-43(c)) said “determinations of the OIBC may be administratively appealed to a panel . . .” (emphasis added) that a contested case hearing was not “required” and could be denied in the discretion of the Chair.

The Supreme Court disagreed and said:

1. the word “may” referred to the petitioner and gave the petitioner the discretion to request a contested case hearing; and
2. it would be absurd for the legislature to give citizens a right to a contested case hearing where their rights are implicated in an agency decision then give the agency the discretion to deny the citizen access to judicial review.

Here, the Petitioners are homeowners. They clearly have a legitimate, constitutionally protected property interest in the possession, use, and enjoyment of their homes. Petitioners’ property rights were restricted by an undefined condition imposed on their CDUPs by this Board. Petitioners allege that the condition is illegal and unconstitutional and should be removed or modified. Petitioners are following the specific procedure set out in DLNR rules to address modification of conditions in CDUPs (HAR § 13-5-42). This rule provides that this Petition is directed to and must be decided by this Board. HAR § 13-5-34(d) says that in considering applications for Board permits the Board shall hold a contested case hearing if applicable.³ DLNR rules provide that adverse decisions of the Board may be appealed under HRS chapter 91. Appeals under HRS chapter 91 are from contested case hearings. BLNR rules set out the proper procedure for Petitioners to request a contested case hearing. The DLNR concedes that the Petitioners made a proper request and have standing.

Thus, the Board should:

1. approve the request for a contested case hearing;
2. order the parties to mediation under HRS § 91-8.5; and
3. if mediation fails, hold a contested case hearing.

³ If this was an application for a CDUP and the applicant objected to the no-rental condition and requested a contested case hearing, the Board would unquestionably grant a contested case hearing. The request to remove an allegedly vague, undefined condition should have the same effect and clearly a petitioner who makes a timely request should be granted a contested case hearing.

OCCL is Currently Proposing to Amend HAR § 13-5-42 (5)

It is important to note that OCCL is currently proposing amendments to HAR § 13-5-42 to modify and make more specific the “no-rental” condition. This is further evidence that the condition, as written, is overbroad, vague, in excess of statutory authority, and/or unconstitutional.

The most fair and appropriate action would be to provide an opportunity for the parties to discuss, then for the Board to decide whether the existing condition as written in Petitioners’ CDUPs is valid and appropriate or whether it should be rescinded in total or modified.

The Petitioners have been trying to have this issue addressed by the Board for years. Rather than stand up and deal with the issues, the OCCL and AG have placed procedural roadblocks and made legal arguments which Petitioners have been required to Court to address.

Petitioners suggest that a better, more fair, and more cost-effective approach would be for the Board to approve the request for contested case hearing, refer the matter to mediation, and ask the OCCL to try to be consistent in how it proposes to deal with the “no-rental” condition.

AG Previously Advised the Board that it Could Not Hold a Contested Case Hearing

When the Petition was before the Board in October 2007, Board Member Ron Agor made a motion to refer this matter to a contested case and to encourage mediation. The AG’s response was to tell the Board that a contested case would result in incurring expenses and that the Board should defer and seek a formal opinion from the AG’s office with regard to the issues rather than going to a contested case (see Colin Lau’s statement in Transcript of Board Meeting (“Tr.”), October 26, 2007, at p. 32). The Board deferred the matter to its December 14, 2007, meeting at which time Deputy AG Vince Kanemoto advised the Board that there was no opportunity for a contested case hearing with respect to a petition for deviation. See December 14, 2007, Tr. at p.18. Now the OCCL and AG a minimum concede that the Board can grant the Petitioners’ request for a contested case hearing with respect to the Petition, but now urge the Board to deny the request based on an erroneous argument that it has discretion to hear the Petition. As discussed above, Petitioners believe the Board must grant a contested case hearing. However, even if the Board does have discretion, if the Board grants the request for contested case hearing, the parties can move forward with attempting to resolve the real substantive issues presented by this Petition rather than create yet another appealable issue.

It would be a shame after almost three (3) years to have to go back to the Circuit Court (and possibly an appellate court appeal) before this Board takes the simple and obvious step of considering the merits of the Petition through the contested case process. The Petitioners have already been required to expend substantial amounts of time and fees to correct the erroneous

September 7, 2010

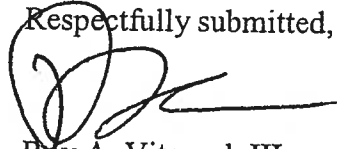
Page 6

positions taken by the AG on behalf of the Board. It would be manifestly unfair for the Board to refuse to consider the Petitioners' request to deviate from the existing condition at the same time the OCCL is prepared to amend this same condition.

Petitioners also amend their Petition to include substantive due process and equal protection claims with respect to the undefined and vague "no-rental" condition.

Thank you for your attention to this matter.

Respectfully submitted,

A handwritten signature in black ink, appearing to be "Roy A. Vitousek III", written over a circular stamp or seal.

Roy A. Vitousek III

for

CADES SCHUTTE

A Limited Liability Law Partnership

encl. Por. 10/26/07 Tr.
Por. 12/14/07 Tr.

cc: Samuel J. Lemmo, Admin., OCCL
William J. Wynhoff, Dep. Atty. Gen.

**MINUTES FOR THE
MEETING OF THE
BOARD OF LAND AND NATURAL RESOURCES**

DATE: FRIDAY, OCTOBER 26, 2007
TIME: 9:00 A.M.
PLACE: KALANIMOKU BUILDING
LAND BOARD CONFERENCE ROOM 132
1151 PUNCHBOWL STREET
HONOLULU, HI 96813

Chairperson Laura Thielen called the meeting of the Board of Land and Natural Resources to order at 9:07 a.m. The following were in attendance:

MEMBERS

Ms. Laura Thielen
Mr. Ron Agor
Dr. Samuel Gon III

Mr. Timothy Johns
Mr. Jerry Edlao
Mr. Robert Pacheco

STAFF

Mr. Russell Tsuji, Land
Mr. Edwin Matsuda, Engineering
Mr. Dan Polhemus, DAR
Ms. Kimberly Mills

Mr. Sam Lemmo, OCCL
Mr. Paul Conry, DOFAW
Mr. Wade Ishikawa, DAR
Ms. Dawn Heggart, OCCL

OTHERS

Mr. Colin Lau, Deputy Attorney General
Ms. Linda Chow, Deputy Attorney General
Mr. Bill Wynhoff, Deputy Attorney General
Mr. Robert McKnight, D-1
Mr. Dawson Miura, D-5
Mr. Francis Nishimura, D-8
Ms. Yvonne Izu, K-3
Mr. Harrilyn Kameenui, D-7
Mr. Ray Iwamoto, M-4

Mr. Dennis Niles, J-1
Mr. Mark Robinson, J-1
Mr. Randy Vitousek, K-1
Mr. George Wood, D-5
Mr. Bob Schnider, D-4
Mr. Gerald Park, K-2
Mr. Henry Curtis, M-4
Mr. Allan Murakami, K-3

{Note: language for deletion is [bracketed], new/added is underlined}

Item A-1 Minutes of September 28, 2007

Member Edlao recused himself

Member Agor: Madame Chair, I move to put the request for deviation into a contested hearing case.

Mr. Lau: I'm sorry. I thought you were considering a deferral at one point with regard to the motion for the petition for the deviation.

Chairperson Thielen: You got to keep up Colin. We were considering a lot of things. I think more recently

Member Johns: That's why I asked that first.

Mr. Lau: I just don't remember Mr. Vitousek actually making the request for a contested case on the deviation.

Mr. Vitousek: No. Actually, this is the Board action pursuant to 13-1-28.

Mr. Lau: Got it.

Mr. Vitousek: The Board is making that motion.

Chairperson Thielen: And in the event come December 31 there's a staff recommendation for enforcement at that point there will probably be a request for a contested case hearing or the Board may make a motion to do one and then we would recommend consolidating.

Mr. Lau: Ok. What I'm wondering about is if you're going directly to a contested case then you are going to be incurring a number of expenses, and there's going to be a lot of procedural deadlines that will be coming up. If you're deferring this item for this discussion and I don't know whether you might seek an opinion from or formal advice from my office with regards to the issues involved that might avoid some of the, this, rather than going directly into contested case mode.

Chairperson Thielen: One of the questions that's been raised is whether we could do, entertain a petition for a deviation once an enforcement action is recommended by the staff and so

Mr. Lau: Basically the deviation, the conditions that are being contemplated aren't exactly the same as the ones that are the enforcement right?

Mr. Vitousek: Yes.

Chairperson Thielen: Yes. So could we

Member Johns: We don't know that, yet.

Member Johns: So any rental then would be considered a violation of that provision. It's not just...

Chair Thielen: I think we have to go back to the AG's office to determine whether residential means a commercial prohibition because even if you own your residence, you don't own it the bank owns it, you're paying mortgage on it. So there is a difference between primary residence and short term rentals.

Member Johns: And that's where I was going. Is it one year, six months, one month, one week, one day, one hour – where does it shift to commercial. I'm just asking how do we determine that?

Mr. Lemmo: I defer to the Chairperson. I thought if that you were exchanging money, that you're taking money from someone using your home that would constitute - that would meet the definition of commercial use under our rules.

Chair Thielen: Again, I think we have to go back to the AG's office on that. I know there is case law on because local jurisdictions are dealing with this issue, when does something count residential and when does something count as short term. Month-to-month has been the delineation line for our jurisdiction as well as others.

Member Johns: Anything greater than month-to-month is considered residential and not necessarily commercial.

Mr. Lemmo: I've heard that's a good dividing line.

Member Agor: Kauai County defines it as that.

Chair Thielen: There are a number of people here to testify. There are 3 people who signed up who noted they are from Kauai and have a flight back to Kauai is there anybody else? Jeff Chandler, Leah Suesen and Caren Diamond - is there anyone else here who has a flight back? Bo Blair. Any questions for staff?

Member Johns: We need to go into executive session, but is there an opportunity for a contested case on this particular Board action?

Vince Kanemoto: Not for denial of a deviation. We can discuss that if you want.

Member Johns: That's what's in front of us today, is a denial of a deviation.

Chair Thielen: If there's a legal question about this then perhaps we need to go into executive session and if it's something that may address some of the comments that may be coming before us we really want to time it before the testimony rather than after.

December 20, 2010

Mr. William J. Aila, Jr.
Interim Chairperson
Board of Land and Natural Resources
P.O. Box 621
Honolulu, Hawaii 96809

Roy A. Vitousek III
Direct Line: (808) 329-5811
Direct Fax: (808) 326-1175
E-mail: rvitousek@cales.com

RECEIVED
DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII
DEC 21 A 10:08

Re: Petition for Deviation from Conditions (Rental) in Conservation
District Use Permits for Single-Family Residences at Haena,
Kauai, Relating to TMKs (4) 5-9-002: 18, 21, 22, 35, 39, 41, 43,
44, 50, 51, 52, 61; (4) 5-9-003: 46; and (4) 5-9-005: 21

Dear Chairperson Aila and Members of the Board:

In its meeting on October 28, 2010, the Board of Land and Natural Resources voted unanimously to hold a contested case hearing relative to the above-referenced Petition to Deviate from Conditions. This office represents the Petitioners who requested a contested case hearing (see enclosed copy of Petition for a Contested Case Hearing minus exhibits).

Please consider this a request, pursuant to HRS § 91-8.5 (copy enclosed), to enter into mediation between Petitioners and the Department relative to the issues which would be considered in the contested case hearing.

Specifically, Petitioners request that the Department agree to participate in a facilitated mediation, using a professional mediator. To our knowledge, the Board has not yet appointed a hearings officer to conduct the contested case hearing. Petitioners would be willing to consider utilizing the same individual as mediator and hearings officer. Petitioners would hope that the mediation could be held soon so as to avoid or limit unnecessary costs to both parties.

It is Petitioners' sincere hope that through mediation the parties could enter into a meaningful dialogue directed toward limiting, if not completely resolving, the issues presented in the Petition.

C S

Cades Schutte Building
1000 Bishop Street, Suite 1200
Honolulu, Hawaii 96813
Tel: 808.521-9200
Fax: 808.521-9210
www.cades.com

Kona Office
75-170 Hualalai Road, Suite 303
Kailua Kona, Hawaii 96740
Tel: 808.329-5811
Fax: 808.326-1175

EXHIBIT 2

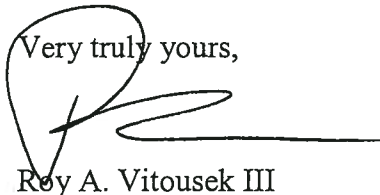
Mr. William J. Aila, Jr.

December 20, 2010

Page 2

As always, if you have any questions or require additional information, please contact me.

Very truly yours,

A handwritten signature in black ink, consisting of a large, stylized 'R' followed by a horizontal line.

Roy A. Vitousek III

for

CADES SCHUTTE

A Limited Liability Law Partnership

RAV:tmt

Enclosures

cc: Samuel J. Lemmo, Administrator, OCCL (w/encs.)



STATE OF HAWAII
BOARD OF LAND AND NATURAL RESOURCES

PETITION FOR A CONTESTED CASE HEARING

RECEIVED

NOV 22 10:13

DEPT. OF LAND
& NATURAL RESOURCES
STATE OF HAWAII

Case No.	Date Received
Board Action Date / Item No.	Division/Office

INSTRUCTIONS:

1. 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

2. 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://hawaii.gov/dlnr/rules/Ch13-1-Official-Rules.pdf>). Please review these rules before filing a petition.
3. 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.
4. 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.

A. PETITIONER (If there are multiple petitioners, use one form for each.)		
1. Name Haena Hui Hou (see list of members/properties attached hereto)	2. Contact Person Roy A. Vitousek III, Cades Schutte LLP	
3. Address 75-170 Hualalai Rd., Ste. B-303	4. City Kailua-Kona	5. State and ZIP HI 96740
6. Email rvitousek@cades.com	7. Phone 808-329-5811	8. Fax 808-326-1175

B. ATTORNEY (if represented)		
9. Attorney Name Roy A. Vitousek III	10. Firm Name Cades Schutte LLP	
11. Address 75-170 Hualalai Rd., Ste. B-303	12. City Kailua-Kona	13. State and ZIP HI 96740
14. Email rvitousek@cades.com	15. Phone 808-329-5811	16. Fax 808-326-1175

17. Board Action Being Contested

See Exhibit A - C attached hereto: letters dated 12/19/07 (Request for Contested Case

Hearing); and 7/15/10 and 9/7/10 further supporting request for contested case hearing.

18. Board Action Date

December 14, 2007 and November 12, 2010

19. Item No.

December 14, 2007: K-5

November 12, 2010: K-2

20. Nature and Extent of Petitioner's Interest That May Be Affected by the Board Action

See Exhibits A - C attached hereto.

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

See Exhibits A - C attached hereto.

22. Any Relief Petitioner Seeks or Deems Itself Entitled to

See Exhibits A - C attached hereto.

23. How Petitioner's Participation in the Proceeding Would Serve the Public Interest

See Exhibits A - C attached hereto.

24. 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

See Exhibits A - C attached hereto.

☒ 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.

Roy A. Vitousek III
Petitioner or Representative (Print Name)


Signature

11/18/10
Date

Petitioner Haena Hui Hou

Petitioner Members and Properties

- (4) 5-9-002: 021 (Bart, Earl G. Trust)
- (4) 5-9-002: 022 (Stice, Gary D., et al.)
- (4) 5-9-022: 035 (Murcia-Toro Inc.)
- (4) 5-9-002: 051 (Faye, Diane G. Trust, et al.)
- (4) 5-9-002: 061 (Tiernan, Michael J., et al.)
- (4) 5-9-003: 046 (Myers, Pieter S.)
- (4) 5-9-005: 021 (Moran, Mark G., et al.)

CWest's Hawai'i Revised Statutes Annotated Currentness

Division 1. Government

■ Title 8. Public Proceedings and Records

■ Chapter 91. Administrative Procedure (Refs & Annos)

⇒ [§ 91-8.5]. Mediation in contested cases

- (a) An agency may encourage parties to a contested case hearing under this chapter to participate in mediation prior to the hearing subject to conditions imposed by the agency in rules adopted in accordance with this chapter. The agency may suspend all further proceedings in the contested case pending the outcome of the mediation.
- (b) No mediation period under this section shall exceed thirty days from the date the case is referred to mediation, unless otherwise extended by the agency.
- (c) The parties may jointly select a person to conduct the mediation. If the parties are unable to jointly select a mediator within ten days of the referral to mediation, the agency shall select the mediator. All costs of the mediation shall be borne equally by the parties unless otherwise agreed, ordered by the agency, or provided by law.
- (d) No mediation statements or settlement offers tendered shall be admitted into any subsequent proceedings involving the case, including the contested case hearing or a court proceeding.
- (e) No preparatory meetings, briefings, or mediation sessions under this section shall constitute a meeting under section 92-2. Any mediator notes under this section shall be exempt from section 92-21 and chapter 92F. Section 91-10 shall not apply to mediation proceedings.

CREDIT(S)

Laws 2003, ch. 76, § 1.

LIBRARY REFERENCES

Alternative Dispute Resolution 🔑 440, 472, 481.
Westlaw Topic Nos. 25Tk440; 25Tk472; 25Tk481.

HRS § 91-8.5, HI ST § 91-8.5

Current with amendments through 2010 Regular and Special Sessions.

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