

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

**December 12, 2008**

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

**REGARDING:** Contested Case Request Regarding Amendments to Conservation District Use Permit (CDUP) OA-2670 for the Construction of a Marina Entrance Channel

**PETITIONER:** Michael Kumukauhoa Lee

**LANDOWNER:** HASEKO (Ewa) Inc.  
/State of Hawaii

**LOCATION:** Honouliuli, Ewa, Oahu  
**TMK:** Portion of Plat (1) 9-1-012  
/Ocean Waters

**BACKGROUND:**

On April 26, 2000, the Board of Land and Natural Resources (Board) approved the first amended Findings of Fact, Conclusions of Law, Decision and Order granting HASEKO a CDUP to construct a marina entrance channel to the Conservation District at Honouliuli, Ewa, Oahu for a proposed 120-acre marina.

On July 13, 2001, the Board approved a request by HASEKO to amend CDUP OA-2670 to reduce the size of the marina from 120-acres to approximately 70 acres. The amendment did not change the size of the entrance channel within the Conservation District.

On August 24, 2007, HASEKO again came before the Board to request a second amendment to CDUP OA-2670 to reduce the size of the marina from 70-acres to 53.76-acres. Action on this matter was deferred as Staff was requested to investigate a possible breach of the Memorandum of Agreement (MOA) that is incorporated in CDUP OA-2670 under conditions #10 and #24. The MOA pertains to the treatment of historic sites on the project site.

On October 26, 2007, the Board found HASEKO in violation of §183C-7, Hawaii Revised Statutes, §13-5-6 of the Administrative Rules regarding non-compliance of Conservation District Use Permit (CDUP) OA-2670 Conditions #10 and #26. Haseko paid all fines and remedied all non-compliance issues under the permit.

On February 22, 2008, HASEKO came back to the Board to again request an amendment to CDUP OA-2670 to reduce the size of the marina from 70-acres to 53.76-acres<sup>1</sup>. During this meeting, the Petitioner verbally requested a contested case hearing. Despite the request, the Board approved the recommendations of staff and granted the amendments to the permit. The Petitioner's verbal request for a contested case was subsequently followed up with a written petition (**Exhibit 1**).

### **Petition for a Contested Case**

In reviewing the petition, it appears that the petitioner's grievance is, "Inadequate and inefficient government regulatory oversight of public trust resources thereby irreparably and unreasonably harming my ability to exercise my traditional and customary native Hawaiian practices. DLNR/SHPD admission that 3-4 years of developer self-monitoring activities and loss and destruction of irreplaceable resources."

The Petitioner would like the issue of the, "Efficacy of DLNR/BLNR in properly identifying, assessing, mitigating natural, cultural and historical resources and traditional and customary Native Hawaiian practice," to be raised as, "Significant Ali'i burial site identified in beach area to be destroyed by construction of marina entrance. Improper regulatory oversight and archaeological investigation of cultural and historic resources."

The relief or remedy being sought by the Petitioner is "Proper identification and protection of historic and cultural sites. Protection of exercise of my religious and traditional and customarily native Hawaiian practices and historical, cultural and natural resources my practices rely upon."

The petition was forwarded to the Land/Transportation Division of the Department of the Attorney General for legal guidance as to determination of the petitioner's qualification to be a party in the requested contested case and whether the Board is required by law to conduct a contested case based on the petition.

### **DISCUSSION:**

HAR §13-1-31(a)(3) provides that persons or agencies shall be admitted as parties to a contested case if they can show that they,

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<sup>1</sup> The amendment request also included the amendment of condition 11 that requires recordation of the CDUP with the deed instrument and condition 22 that requires submission of approved plans for a flood drainage system through the marina development. These amendments do not appear to be the subject of the Petitioner's request.

have some property interest in the land, who lawfully reside on the land, who are adjacent property owners, or who otherwise can demonstrate that they will be so directly and immediately affected by the proposed change that their interest in the proceeding is clearly distinguishable from that of the general public[.]

A three-part test is used to determine whether the plaintiff has the requisite interest in the outcome of the litigation. Sierra Club v. Hawaii Tourism Authority, 100 Haw. 242, 250, 59 P.3d 877, 885 (2002). The plaintiff must show that he, she, or it (1) has suffered an actual or threatened injury as a result of the defendant's conduct; (2) the injury is fairly traceable to the defendant's actions; and (3) a favorable decision would likely provide relief for plaintiff's injury. Id.

Petitioner does not meet the first part of the test as he cannot show actual or threatened injury as a result of the requested action. Petitioner's request for a contested case concerns the impact to the traditional and customary resources in the area, in particular he alleges that "significant Ali'i burial site identified in beach area to be destroyed by construction of marina entrance." The action that was before the Board, to reduce the size of the marina, would not impact the construction of the marina entrance. It was to stay exactly the same. The action before the Board would not impact the area of concern to the Petitioner, namely the channel entrance.

Although arguably Petitioner may meet the second part of the test, that injury suffered by Petitioner, if any, is traceable to the applicant, Petitioner does not meet the third part of the test. The third part of the test is that a favorable decision would likely provide relief for plaintiff's injury. In this case, a favorable decision would be the denial of the pending request by the Board. The result would be that the Applicant would be required to build a larger marina rather than a smaller one. This result would not provide any relief to Petitioner's claimed injury, namely the impact on an Alii burial site in the beach area of the marina entrance. As stated, the marina entrance was to stay the same whether the amendment was granted or not.

Petitioner also contends that he has been injured by "improper regulatory oversight and archaeological investigation of cultural and historic resources" and that the lack of regulatory oversight and allowing the developer to self-monitor its activities has led to the loss and destruction of irreplaceable resources." It is not clear how a decision by the Board to deny the request to reduce the size of the marina would provide the relief sought by Petitioner, namely, the proper identification and protection of historic and cultural sites upon which his practices rely.

#### **RECOMMENDATION:**

That the Board of Land and Natural Resources deny Michael Kumukauoha Lee's request for a Contested Case regarding amendments to Conservation District Use Permit (CDUP) OA-2670 for the Construction of a Marina Entrance Channel located at Honouliuli, Ewa,

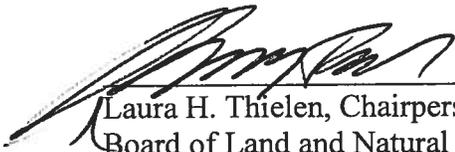
Oahu as the amendments to CDUP OA-2670 shall not affect the size of the entrance channel and therefore shall not change the nature, character, and extent of activity within the Conservation District that had been previously approved on April 26, 2000.

Respectfully submitted,



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

Approved for submittal:



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

BOARD OF LAND AND NATURAL RESOURCES

PETITION FOR A CONTESTED CASE HEARING

2008 FEB 29 P 2:23  
STATE OF HAWAII  
NATURAL RESOURCES  
DIVISION

1. Name Michael Kumukavaha Lee Phone [REDACTED] Fax [REDACTED]

2. Address [REDACTED], Ewa, HI

Email Address [REDACTED]

3. Attorney (if any) \_\_\_\_\_ Phone \_\_\_\_\_

4. Address \_\_\_\_\_

Email Address \_\_\_\_\_

5. Subject Matter: BLNR Mtg. 2/22/08 to Construct a Marina Entrance Channel at Honolulu HASEKI  
Amendments to Conservation District Use Permit OA-2670

6. Date of Public Hearing/Board Meeting February 22, 2008

7. Legal authority under which hearing, proceeding or action is being made §13-1-31 HAR  
Supreme Ct. Kohala vs. Planning Director, County of Hawaii, Section 1-1, 7-1 HRS,  
Ka Pūākai o Ka Aina v. Land Use Commission

8. Nature of your specific legal interest in the above matter, including tax map key of property affected: Plat(1)9-1-012, Established Native Hawaiian Traditional Cultural Practitioner in Ewa region protected by Constitution, HRS and judicial opinion

9. The specific disagreement, denial or grievance with the above matter: Inadequate and inefficient government regulatory oversight of public trust resources thereby irreparably and unreasonably harming my ability to exercise my traditional and customary Native Hawaiian practice

10. Outline of specific issues to be raised: loss and destruction of irreplaceable resources.  
DLNR/SHED admission that 3-4 years of developer self-monitoring activities and  
Efficacy of DLNR/BLNR in properly identifying, assessing, mitigating natural, cultural and historical resources and traditional and customary Native Hawaiian practice

11. Outline of basic facts: Significant Ahi burial site identified in beach area to be destroyed by construction of marina entrance. Improper regulatory oversight and archaeological investigation of cultural and historic resources.

12. The relief or remedy to which you seek or deem yourself entitled: Proper identification and protection of historic and cultural sites. Protection of exercise of my religious and traditional and customary native Hawaiian practices and historical, cultural and natural resources my practices rely upon  
(If there is not sufficient space to fully answer any of the items above, use additional sheets of paper.)

The above-named person hereby requests and petitions the Board of Land and Natural Resources for a Contested Case hearing in the matter described above. Dated: 1-29-08

Michael Kumukavaha Lee  
**EXHIBIT 1**