# **DRAFT** RULES OF PRACTICE AND PROCEDURE RELATING TO ALL HEARINGS CONDUCTED BY A HEARINGS OFFICER APPOINTED UNDER THE AUTHORITY OF THE COUNTY ENGINEER OF THE COUNTY OF KAUA'I

## GENERAL PROVISIONS

1.0 Purpose. The intent and purpose of the Rules of Practice and Procedure relating to all hearings conducted by a Hearings Officer appointed under the authority of the County Engineer of the County of Kaua'i is to provide a systematic method of conducting hearings in order to insure that all persons and parties will have an opportunity to participate in an open and orderly manner in those cases where specific hearings procedures have not been promulgated by the County Engineer under the authority of the specific ordinance sought to be enforced.

1.1 Definitions. As used in these rules, except as otherwise required by context:

(a) "Agency" means the Department of Public Works of the County of Kaua'i or its authorized representative.

(b) "Contested Case" means a proceeding in which the legal rights, duties or privileges of specific parties are required by law to be determined after an opportunity for agency hearing.

(c) "Department" means the Department of Public Works of the County of Kaua'i or its authorized representative.

(d) "Hearing" refers only to such hearing held by the Hearings Officer immediately prior to a judicial review of a Contested Case as provided in Section 91-14 HRS.

(e) "Hearings Officer" means any person or persons designated and authorized by the County Engineer to conduct a hearing for the purpose of taking testimony and to report his or her findings of facts and conclusions of laws and decision and order.

(f) "HRS" means Hawai'i Revised Statutes.

(g) "Party" means a Petitioner or Petitioners and the Department.

(h) "Person" includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies.

(i) "Petitioner" means a person who seeks to appeal a decision of the County Engineer issued pursuant to his or her authority under the Kaua'i County

Code 1987, as amended, in those circumstances where the Code allows for an administrative hearing.

(j) "Proceeding" means a matter that is submitted to a Hearings Officer designated and authorized by the County Engineer to conduct a hearing for the purpose of taking testimony and reporting his or her findings of facts and conclusions of laws and decision and order.

## GENERAL REQUIREMENTS IN PROCEEDINGS BEFORE THE HEARINGS OFFICER

2.0 Appearance Before the Hearings Officer.

(a) Who May Appear. Any party to a proceeding before the Hearings Officer may appear in his or her own behalf or as an authorized representative of a partnership, corporation, trust or association and an officer or employee of a department or agency of the State or a political subdivision may represent that department or agency in any proceeding before the Hearings Officer. If a party is to be represented by an attorney, that attorney who appears before the Hearings Officer shall be in good standing before the Hawai'i Supreme Court. The Hearings Officer may at any time require any person appearing before him/her, in a representative capacity, to show proof of his or her authority and qualification to act in such capacity.

(b) Code of Ethics. Any person who signs a pleading or brief, enters an appearance at a hearing, or transacts business with the department, by such act represents that he or she is legally authorized to do so and shall comply with the laws of this State and the County of Kaua'i, and the rules and regulations of the department; and further, he or she shall maintain the respect due to the Hearings Officer and shall never deceive or knowingly present any false statements of fact or law to the Hearings Officer.

2.1 Requirements of Filing of Documents.

(a) Time and Place. All pleadings, briefs, submittals, petitions, reports, maps, exceptions, memoranda and other legal papers required to be filed with the Hearings Officer in any proceeding shall be filed with the Hearings Officer at his or her place of business, and shall be served on all parties to the proceeding. Unless otherwise ordered, the date on which the papers are accepted shall be regarded as the date of filing.

(b) Format. All submittals shall be clearly and permanently legible and in such form as may be prescribed by the Hearings Officer. The original

shall be signed in ink by each party or his or her counsel and show the address of such person.

(c) Copies. Unless otherwise required by these rules or the Hearings Officer, there shall be filed with the Hearings Officer, an original and two copies of each submittal thereof. Additional copies shall be promptly provided if the Hearings Officer so requests.

(d) Extensions of Time. Whenever a party is required to file a pleading within the period prescribed or allowed by these rules, by notice given there under or by an order or regulation, the Hearings Officer may (1) for good cause before the expiration of the prescribed period, with or without notice to the parties, extend such period, (2) pursuant to a stipulation between all of the parties, extend such period, and/or (3) permit the act to be done after the expiration of the specified period where the failure to act is clearly shown to be the result of excusable neglect. All requests for continuances, except for stipulations, should be by written motion, unless it is made during the course of a hearing.

(e) Amended Pleadings. All pleadings may be amended at any time prior to the hearing. Amendments offered prior to the hearing shall be served on all parties and filed with the Hearings Officer. All parties shall have the opportunity to answer and be heard on amendments filed after the hearing commences, and the Hearings Officer shall decide whether such amendments shall be allowed.

2.2 Service of Process.

(a) By Whom Served. The Hearings Officer shall serve copies of all orders, notices and other papers issued by him or her, together with any other papers that are required by law. All other papers shall be served by the parties filing them.

(b) Upon Whom Served. All papers served by either the Hearings Officer or any party shall be filed and served upon all parties through their counsel if they have retained counsel and shall contain a certificate of service attesting to such service. Any counsel entering an appearance subsequent to the initiation of such proceeding shall notify all other counsel of record and all parties not represented by counsel of such fact.

(c) Service Upon Parties. The final decision and order, and any other paper required to be served by the Hearings Officer upon a party, shall be served upon such party or his/her counsel of record.

(d) Method of Service. Service of papers shall be made personally or, unless otherwise provided by law, by mail to the last known address of the party or his/her counsel of record.

(e) When Service is Complete. Service upon parties other than the Hearings Officer shall be regarded as complete upon mailing or upon personal service unless otherwise specifically directed by the Hearings Officer.

(f) How Made. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the Hearings Officer.

(1) Service upon the attorney or upon a party shall be made (a) by delivering a copy to the attorney or party; or (b) by mailing it to the attorney or party at the attorney's or party's last known address; or (c) if no address is known, by leaving it with the clerk of the court; or (d) if service is to be upon the attorney, by facsimile transmission to the attorney's business facsimile receiver.

(2) Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at the attorney's or party's office with a clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Facsimile transmission means transmission and receipt of the entire document without error with a cover sheet which states the attorney(s) to whom it is directed, the case name and case number, and the title and number of pages of the document.

(3) Service by mail is complete upon mailing. Service by facsimile transmission is complete upon receipt of the entire document by the intended recipient and between the hours of 8:00 a.m. and 5:00 p.m. on a week day. Service by facsimile transmission that occurs after 5:00 p.m. shall be deemed to have occurred on the next week day.

(4) Service by facsimile transmission shall be confirmed by a certificate of service which declares that service was accomplished by facsimile transmission to a specific phone number, on a specific date, at a specific time.

2.3 Times.

(a) Computation. In computing any period of time prescribed or allowed by these rules, by order of the Hearings Officer, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included unless it is a Saturday, a Sunday or a holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday or a holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays and holidays shall be excluded in the computation. As used in this rule, "holiday" includes any day designated as such pursuant to section 8-1 of the Hawai‘i Revised Statutes.

(b) Enlargement. When by these rules or by a notice given thereunder or by order of the Hearings Officer an act is required or allowed to be done at or within a specified time, the Hearings Officer for cause shown may at any time in his or her discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

## APPEALS FROM DECISIONS OF THE COUNTY ENGINEER

3.0 Applicability. These rules shall apply to all actions under the Kaua'i County Code 1987 as amended, that allow an administrative appeal before a Hearings Officer to review an order or decision of the County Engineer.

3.1 Standing. Only aggrieved parties have standing to appeal an action under these rules.

3.2 Submission of Appeal.

(a) The petition for appeal shall be submitted to the County Engineer and shall be filed within thirty (30) days of the decision issued by the County Engineer. The petition shall contain the following:

(1) The name, address and telephone number of the appellant.

(2) The identification of the property and the appellant’s interest therein.

(3) The particular provision of the grading, grubbing and stockpiling ordinance or regulation in question.

(4) All pertinent facts.

(5) The action of the County Engineer.

(6) The reasons for the appeal, including a statement as to why the appellant believes that the County Engineer's action was in violation of the applicable law, or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, or is arbitrary, or capricious, or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

(7) Petitions not in conformance with these requirements shall be rejected by the County Engineer.

3.3 Appointment of Hearings Officer. Upon receipt of the petition for appeal, the County Engineer shall within a reasonable time thereafter appoint a Hearings Officer who shall not be an employee of the Department of Public Works. The Hearings Officer shall afford the petitioner and all other parties an opportunity to be heard. Such hearing shall be conducted in conformity with the applicable provisions established herein for contested case hearings before the Hearings Officer.

3.4 Hearings Officer Action.

(a) A Hearings Officer appointed by the County Engineer pursuant to these rules and other applicable law shall render his or her decision within sixty (60) days of the close of the evidentiary portion of the hearing.

(b) A longer period to render any decision by the Hearings Officer may be permitted by agreement of all parties.

3.5 Decision and Order. The decision and order of the Hearings Officer shall contain findings of fact and conclusions of law and be submitted promptly to the parties to the action.

## HEARING PROCEDURES

4.0 Hearings Officer.

(a) In all appeals of a decision of the County Engineer in the administration of the Kaua'i County Code 1987 as amended, in which a Hearings Officer has been appointed by the County Engineer said Hearings Officer shall preside at the hearing.

(b) The Hearings Officer shall control the course of the hearing, administer oaths, receive evidence, hold appropriate conferences before or during

hearings, rule on all objections or motions, receive offers of proof, fix the time for the filing of submittal, dispose of any other matter that normally and properly arises in the course of a hearing, and take all other actions authorized by law that are deemed necessary to the orderly and just conduct of the hearing.

4.1 Parties. The Department of Public Works and the petitioner shall in every case be parties to such proceedings.

4.2 Continuance. The Hearings Officer may, for good cause, postpone or continue any hearing from day to day, or to a later date, or to a different place without notice other than the announcement thereof at the hearing.

4.3 Ex Parte Communication. No person whether or not a party to a hearing before the Hearings Officer shall communicate ex parte regarding any subject matter of the proceeding with the Hearings Officer.

4.4 Notice of Hearing.

(a) The notice of hearing shall be served upon all parties at least fifteen (15) days prior to the hearing date, unless otherwise provided by law.

(b) The notice shall contain the appropriate information as required in HRS, 91-9.

4.5 Waiver of Procedure. Any procedure pursuant to these rules may be modified or waived by stipulation of the parties and informal disposition may be made of any hearing by stipulation, settlement, agreement, consent order, or default.

4.6 Prehearing Conference. The Hearings Officer may hold a prehearing conference with the parties for the purpose of formulating or simplifying the issues, arranging for the exchange of proposed exhibits or proposed witness testimony, setting of schedules, exchanging names of witnesses, limitation of number of witnesses, and such other matters as may expedite orderly conduct and disposition of the proceeding.

4.7 Requests for Transcripts. Unless otherwise provided by law or specifically ordered by the Hearings Officer, it shall not be necessary to transcribe the record unless required for purposes of rehearing or court review. Should a party to a hearing under these rules desire that transcripts be provided when not otherwise required, the party may, prior to commencement of hearing, either; (1) deposit an amount sufficient to cover transcribing and printing costs as prepared by a certified court reporting service; (2) provide a certified court reporting service at the hearing; (3) enter into an agreement with the County that will address the preparation and printing costs of transcripts.

4.8 Limiting Testimony. To avoid unnecessary cumulative evidence, the Hearings Officer may limit the number of witnesses or the time for testimony upon a particular issue.

4.9 Stipulation as to Findings of Facts, Conclusions of Law. Nothing in these rules shall prohibit parties from entering into appropriate stipulations as to findings of fact, conclusions of law, and conditions, if any, concerning the subject petition for appeal.

(a) A petitioner who desires to enter into a stipulation shall prepare a stipulation as to any and all findings of fact, conclusions of law, and conditions, if any, concerning the subject petition.

(b) All parties shall sign the proposed stipulation as to any or all proposed findings of fact, conclusions of law, and conditions and a proposed decision and order, if at all, and shall submit such stipulation to the Hearings Officer seven (7) days prior to the hearing date, unless otherwise permitted by the Hearings Officer.

(c) The Hearings Officer may require the parties to submit additional evidence concerning the stipulation and proposed decision and order.

(d) The Hearings Officer may approve the proposed decision and order by amending or adopting the proposed decision and order.

4.10 Order of Hearing Procedure. At the commencement of the hearing, the Hearings Officer may read the notice of hearing and then briefly outline the procedures to be followed, which shall be in the following manner:

(a) Presentation of Evidence. The petitioner shall first present evidence and shall be subject to questioning by the department and the Hearings Officer. The Department may then make a presentation and be subject to questioning by the petitioner and the Hearings Officer.

(b) Cross-Examination. Each party shall have the right to conduct such cross-examination of other parties and their witnesses as may be required for a full and true disclosure of the facts. The order of cross-examination and re-cross shall be determined by the Hearings Officer. The Hearings Officer shall have the right to question each party after completion of re-cross by the other parties.

(c) Rebuttal Evidence. Each party shall be afforded the opportunity for rebuttal in the same order as item 4.10 (a) above.

(d) Close of Hearing. Upon completion of all testimony and evidence submitted by each party and their witnesses, the Hearings Officer shall close the evidentiary portion of the hearing.

(e) Request to Submit Proposed Findings of Fact, Conclusions of Law, Decision and Order. A party may, after the close of the evidentiary portion of the hearing request the opportunity to submit proposed Findings of Fact, Conclusion of Law, Decision and Order. If such a request is made, the Hearings Officer shall also allow all other parties to submit proposed Findings of Fact, Conclusion of Law, Decision and Order. Should a party not submit a request at such time, the party's right to submit such document shall be deemed waived and the Hearings Officer may commence with appropriate decision-making action. If a request is made, the Hearings Officer may continue the docket and set a timetable for the conduct of the post-hearing proceedings pursuant to these rules.

4.11 Co-Counsel. No more than two (2) counsel may appear for any party at any proceeding before the Hearings Officer. Where a party is represented by more than one counsel, only one of the counsel shall be permitted to cross-examine a witness or to state any objections or make closing arguments.

4.12 Requests for Subpoenas.

(a) Subpoenas of Witnesses. Requests for the issuance of subpoenas requiring the attendance of a witness for the purpose of taking oral testimony before the Hearings Officer shall be in writing, and shall state the reasons why the testimony of the witness is believed to be material and relevant to the issues involved. Only parties or the Hearings Officer may request the issuance of a subpoena.

(b) Every subpoena shall state the title of the proceeding for which it is to be issued, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified.

(c) Subpoenas Duces Tecum. Requests for the issuance of subpoenas for the production of documents or records shall be in writing; shall specify the particular document or record, or part thereof, desired to be produced; and shall state the reasons why the production thereof is believed to be material and relevant to the issues involved.

(d) Who May Issue Subpoenas. Subpoenas may only be issued by the Hearings Officer. No subpoena shall be issued unless the party requesting the subpoena has complied with the provisions herein and gives the names and address of the desired witness. Signed and sealed blank subpoenas shall not be issued to anyone. The name and address of the witness shall be inserted in the original subpoena, a copy of which shall be filed in the proceeding. Subpoenas shall show at whose instance the subpoena is issued. The parties at whose instance a subpoena is

issued shall arrange for service thereof, and shall file a return and an acknowledgment of service thereon.

(e) Fees and Mileage. Witnesses summoned shall be paid the same fees and mileage as are paid witnesses in Circuit Courts of the State of Hawai‘i and such fees and mileage shall be paid by the party at whose instance the witness appears.

(f) Oath. Witnesses shall be sworn under oath or affirmation prior to testifying.

4.13 Consolidation. The Hearings Officer, upon his/her own initiative or upon motion may consolidate for hearing or for other purposes, or may contemporaneously consider, two or more proceedings which involve substantially the same parties or issues which are the same or closely related if he/she finds that such consolidation or contemporaneous consideration will be conducive to the proper dispatch of its business and to the ends of justice and will not unduly delay the proceedings.

4.14 Substitution of Parties. Upon motion and for good cause shown, the Hearings Officer may order substitution of parties, except that in the case of death of a party, substitution may be ordered without the filing of a motion.

4.15 Motions.

(a) Timing. Motions may be made before or during a hearing unless otherwise directed by the Hearings Officer. Untimely motions may be made for good cause shown.

(b) Form; Contents. All motions, other than those made during a hearing, shall be made in writing to the Hearings Officer and shall state the relief sought and shall be accompanied by a declaration or legal memorandum setting forth the grounds upon which they are based.

(c) Service of Motions. The moving party shall serve a copy of all motions on all other parties and shall file with the Hearings Officer the original with proof of service.

(d) Memorandum in Opposition. A memorandum in opposition or declaration shall be served on all parties, and the original and proof of service shall be filed with the Hearings Officer within seven (7) days after being served with the motion. The Hearings Officer may order the memorandum in opposition to be filed earlier than the seven (7) day period.

(e) Waiver. Failure to serve or file a memorandum in opposition to a motion or failure to appear at the hearing may be deemed a waiver of objection to the granting or denial of the motion. A party who does not oppose the

motion shall notify the Hearings Officer and opposing counsel or party promptly.

4.16 Evidence.

(a) Form and Admissibility. The Hearings Officer shall not be bound by the Hawai‘i Rules of Evidence relating to the admission or rejection of evidence, but may exercise his/her own discretion in such matter with a view towards insuring that justice is served.

(b) Burden of Proof. Except as otherwise provided by law, the party initiating the petition to appeal shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence.

(c) Exclusion of Irrelevant Material. As a matter of policy, the Hearings Officer shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.

(d) Ruling. The Hearings Officer shall rule on the admissibility of all evidence.

(e) Objections and Exceptions. When objections are made to the admission or exclusion of evidence, the ground relied upon shall be stated briefly. Formal exceptions to rulings are unnecessary and need not be taken.

(f) Offer of Proof. An offer of proof for the record shall consist of a statement of the substance of the evidence to which the objection has been sustained.

(g) Prepared Testimony. With the approval of the Hearings Officer, a witness may read into the record his/her testimony on direct examination. Before any prepared testimony is read, unless excused by the Hearings Officer, the witness shall deliver copies thereof to the Hearings Officer, and all counsel or parties. If the Hearings Officer deems that substantial savings in time will result, a copy of the prepared testimony may be received in evidence without hearing, provided that copies thereof shall have been served upon all parties and the Hearings Officer to permit proper cross examination of the witness on matters contained in said prepared testimony.

(h) Documentary Evidence. If relevant and material matter offered in evidence is embraced in a document containing other matters, the party offering it shall designate specifically the matter so offered. If other matter in the document would unnecessarily encumber the record, the document will not be received in evidence, but at the discretion of the Hearings Officer, the relevant and material matter may be read into the record or copies thereof received as an exhibit. Other parties shall be afforded

opportunity to examine the document, and to offer in evidence other portions thereof believed material and relevant.

(i) Exhibits.

(1) Form-Size. Exhibits shall be clearly and permanently legible and in such form as may be prescribed by the Hearings Officer. Exhibits shall be bound or folded to the respective approximate size, where practical. Wherever practicable, sheets of each exhibit shall be numbered and data and other figures shall be set forth in tabular form.

(2) Copies. When exhibits are offered in evidence, and when practicable the original and two (2) copies shall be furnished to the Hearings Officer with a copy to each party to the proceeding, unless such copies have been previously furnished or the Hearings Officer directs otherwise.

(j) Official Notice of Facts. Official notice may be taken of such matters as may be judicially noticed by the courts of the State of Hawai'i. Official notice may also be taken of generally recognized technical or scientific facts within the Department's specialized knowledge when parties are given notice either before or during the hearing of the material so noticed and afforded the opportunity to contest the facts so noticed.

(k) Additional Evidence. No supplemental evidence shall be accepted into the record after the evidentiary portion of the hearing is closed unless agreed to by the parties and approved by the Hearings Officer.

4.17 Post Hearing Procedures.

(a) Order of the Hearings Officer:

(1) Upon completion of taking of evidence, the Hearings Officer shall prepare a report setting forth the findings of fact, conclusions of law, and the reasons therefore, and an order, and shall submit the report of the proceeding and the record thereof to the Department.

(2) The record shall include the petition, notice of hearing, motions, rulings, orders, transcript of the hearing, if required, documentary evidence, stipulations, findings of fact, or other documents submitted by the parties, objections to the conduct of the hearing and the report of the Hearings Officer and all other matters placed in evidence.

(3) The Hearings Officer shall cause a copy of the report to be served upon all parties to the proceedings.

(4) Any party aggrieved by a final decision and order by the Hearings Officer or by a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief is entitled to judicial review thereof under Chapter 91 of the HRS; but nothing in this section shall be deemed to prevent resort to other means of review, redress, relief, or trial de novo, including the right of trial by jury, provided by law.