

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

DATE: FRIDAY, NOVEMBER 9, 2012
TIME: 9:00 A.M.
PLACE: KALANIMOKU BUILDING
LAND BOARD CONFERENCE ROOM 132
1151 PUNCHBOWL STREET
HONOLULU, HAWAII 96813

Chairperson William Aila called the meeting of the Board of Land and Natural Resources to order at 9:06 a.m. The following were in attendance:

MEMBERS

William Aila, Jr.
Jerry Edlao
Rob Pacheco

Dr. Sam Gon
David Goode

STAFF

Ed Underwood/DOBOR
Dan Quinn/PARKS
Sam Lemmo/OCCL

Keith Chun/LAND
Russell Tsuji/LAND
Maria Carnavaele/AQUATICS

OTHER

Linda Chow, Deputy Attorney General
Ivan Nishiki, M-4
Bruce Lenkeit, J-1
Darren Akiona, J-1
Rick Prahler, M-3
Ron Gibson, E-2
Kaponono, E-2
Steve Ozark, E-2
Sidney Fuke, K-1
Bob Rekman, K-1
Iwi Kalua, K-1

Ross Smith: M-1, 2, 5
Keith Kiuchi, J-1
Dave Cooper, J-1
Craig Curren, J-1
Jessie Wo, M-3
Willie K., E-2
Linda Wong, E-2
Jim Linknen, E-2
John Gapp, K-1
Maureen Gapp, K-1
Jeff Hand, K-1

{NOTE: Language for deletion is [bracketed], new/added is underlined.}

Item A-1 October 12, 2012 Minutes

Approved as submitted (Goode, Gon)

Item A-2 October 26, 2012 Minutes

Item A-2 was not ready.

Item M-1 Issuance of Revocable Permit to Federal Bureau of Investigation for Inconsistent Use (non-aeronautical), Honolulu International Airport, Honolulu, Oahu, Tax Map Key: (1) 1-1-72:5

Ross Smith representing Department of Transportation (DOT)/Airports told the Board that the building they are using for aeronautics will be used for storing emergency supplies which is why the inconsistent use. Staff asked to issue this permit.

Item M-2 Amendment No. 1 to State Lease No. DOT-A-91-0017 Federal Express Corporation, South Ramp, Honolulu International Airport, Honolulu, Oahu, Tax Map Key: (1) 1-1-72:58

Item M-2 is for a permanent parking lot for Federal Express.

Item M-5 Consent to Assignment of State Lease Nos. DOT-A-96-0029, DOT-A-05-0007, DOT -A-06-0012 and DOT-A-09-0003, Helicopter Consultants of Maui, Inc. to Branford Castle, Inc., Kahului Airport, Maui, TMK: (2) 3-8-01: portion of 19; Honolulu International Airport, Oahu, Tax Map Key: (1) 1-1-72:79; Lihue Airport, Kauai, TMK: (4) 3-5-01: portion of 8

In item M-5, the applicant is to looking to buy new fuel efficient and quieter helicopters. Staff asked the Board's consent.

Member Gon moved to approve items M-1, M-2 and M-5. Member Goode seconded that. All voted in favor.

Unanimously approved as submitted (Gon, Goode)

Item M-4 Issuance of a Sublease to BWB Consultants, Inc. dba Grand Café & Bakery for a Restaurant, Bar and Grill, including Related Activities such as Catering for Events; Retail and Office Use at the No. 1 Capitol District (formerly the Hemmeter Building), Honolulu, Oahu, Tax Map Key: (1) 2-1-17-001.

Ivan Nishiki, Program Manager for Department of Accounting and General Services (DAGS) conveyed item M-4 which is to replace the previous tenant who left in September and he related some background. The lease is for 5 years. The terms and conditions are still under negotiations. Staff asked for consideration for approval.

Unanimously approved as submitted (Goode, Gon)

Item J-1 Approve Revised Development Plans for Waikiki Landing Project at Ala Wai Small Boat Harbor (AWSBH); Exempt Waikiki Landing Project from City and County of Honolulu Special Management Area Permit Requirements; Apply the State Preemption of City and County of Honolulu Land Use Ordinance; Approve Lease of Fast and Submerged Lands at AWSBH; Grant Non-Exclusive Term Easement of Adjacent Fast Land at AWSBH; Amend Development Agreement with Honey Bee USA, Inc. dated December 17, 2009; Extend Development Agreement; Authorize Subdivision; Grant Non-Exclusive Access Easements; Authorize Deregistration from State of Hawaii Land Court; Approve Right-of-Entry; Kalia, Honolulu, Oahu, Hawaii. Tax Map Key Nos: (1) 2-6-010:003 (por), 005 & 016; 2-3-37:020

Approve Amendments to Harbor Lease No. H-87-25 at AWSBH to Hawaii Prince Hotel Waikiki LLC as affecting Proposed Waikiki Landing Project; Approve Termination of Settlement Agreement and Indemnification Agreement with Hawaii Prince Hotel Waikiki LLC, Kalia, Honolulu, Oahu, Hawaii. Tax Map Key No. (1) 2-6-010:003 (por); 2-3-037:012.

The Board may go into Executive Session pursuant to Section 92-5 (a)(4), Hawaii Revised Statutes, in order to consult with its attorneys on questions and issues pertaining to the Board's powers, duties, privileges, immunities, and liabilities.

Written testimonies from Dave Cooper and Bruce Lenkeit were distributed to the Board.

Ed Underwood, Administrator for the Division of Boating and Ocean Recreation (DOBOR) briefed the Board members on item J-1 asking to approve the 65 year lease to Honey Bee to build out the boat yard and the fuel dock at the Ala Wai small boat harbor as well as the submerged lands. He will give the highlights of the September 14th briefing. He asked to amend the existing lease with Hawaii Prince to maintain the existing public restroom in the area and exempt the project from the City's SMA requirements which they are able to with the Statute. Mr. Underwood said there were two late comments – the project includes 14,051 square feet lands that are part of Ala Moana Blvd. which is owned by DOT so Honey Bee is seeking a lease or easement from DOT and would like to make an oral recommendation that any lease approved by the Board today is subject to DOT's approval of a lease or easement for those lands. Regarding this easement with the Hawaii Prince he deferred to Keith Chun.

Keith Chun representing Land Division said that staff got a letter from the Hawaii Prince and the City & County, Planning and Permitting that Hawaii Prince has an SMA permit as well as a Waikiki Special District Use permit imposes the obligation for them to build and maintain this

restroom. Hawaii Prince is willing to transfer those obligations to Honey Bee only as long as the City agrees that doesn't affect their SMA permit. Staff received a letter from the City saying it looks ok, but they will process a formal application from Hawaii Prince to confirm that or do other administrative. The problem here is we are asking our master lease not be issued until we get the prior consent from Hawaii Prince which is going to be based on the City's approval. If the City says they are not going to process and give an approval until there is an executed master lease. It's a chicken and egg thing. What we would like to recommend is that the lease be issued without the prior consent of Hawaii Prince and we will keep the same thing. The easement for the area for the restroom, we won't issue that until they get the prior consent and we will not amend the Hawaii Prince lease without the prior consent. It is just the lease being issued. Right now we are saying it will not be issued without the prior consent.

Member Edlao said to approve the lease contingent upon the City. Mr. Chun said the lease imposes the obligation on Honey Bee to build restrooms and keep it open for the public if the City doesn't consent to demolishing the existing one. He doesn't care whether they build 2 more or not.

Keith Kiuchi representing Honey Bee displayed some pictures and testified relating some background history and issues about the stairs and the bulkhead wall questioning structural integrity. He related who the contractors and engineers are. Mr. Kiuchi displayed a diagram/site plan of the bathroom project that is ADA (Americans with Disabilities Act) compliant and both will be open to the public. He also presented a diagram of the boat repair yard that the EPA (Environmental Protection Act) rules are stricter and more stringent requiring the adoption of best management practices. They are in negotiations with a new board yard repair operator. One of the DMPs they plan to adopt is a pressure wash pad that discharges into the canal using a state of the art storm water filtration system and complies with the EPA. On the fuel dock (diagram) Mr. Kiuchi talked about the Hawaii Canoe and Kayak Team. He presented an artist rendering of the project which is a Hawaii Mission design and the fuel dock building is to look like a ship in the harbor. Hawaiian Dredging is the contractor and he showed some aerial renderings and photo with respect to the rest of the buildings. He displayed the subdivision map and the challenges of surveying the area including the water. It is a benefit to DLNR in the future with defined roads and lots that staff never had. Not only is Honey Bee repairing the deterioration, but they are adding value. On the final sub-division maps he related the DOT titles and that DLNR owns most of it. They are complying with all of the terms of the Waikiki Special District. Under the County LUO, in a public precinct the parking and height are up to the director of DPP. He distributed photos of the Canoe House that it wasn't a Hawaiian sense of place and they made the change.

Member Goode asked if it DPP does it internally and Mr. Kiuchi said it was a third party review company and DPP goes over it. Member Goode said that's for the permit and asked how it was done at DPP for aesthetic architectural review. Mr. Kiuchi said it would be done at the planning level to review it. Member Goode asked whether they had architectural background and was curious what it was. Mr. Kiuchi acknowledged that what was designed complies with the Waikiki District Special Rules like the setbacks.

Mr. Chun said I need to clarify some of the statements especially with what you are saying they are complying with it. What the intent is to meet a lot of the design standards in the Waikiki Special District; however what we are asking the Board is in creating the LUO under the legislation under the Waikiki Special District there are certain uses that DPP said are not allowed. Some of the retail, etc. and that is where the exemption comes in that allows these uses otherwise they wouldn't be asking for it. The Board needs to understand in exercising thus. What we are doing as far as development standards as to height, set back, uses – it's been recommended that the lease contain conditions restricting the developer, but it would be conditions similar to the adjacent parcels whether the Hawaii Prince or what have you. It is a resort mix use precinct and consistent with the ones surrounding except for the fact that zoning allows up to a 350 foot height limit and we are not allowing them to do that. We are restricting it to 75. We are imposing these types of restrictions in the lease as less condition.

Member Goode noted in the submittal its asking for consideration with regards to initial rents and he asked for some background on the bulkhead. Mr. Kiuchi said they pointed out their construction costs have increased and have been paying the \$480,000 development fee up through July 1st and from there the rents kick in. The other rent concession they asked for is credit for their environmental remediation work done. They spent a total of \$130,000 at the end of the day once they complete the remediation. Three tests were done on the boatyard repair site where DOH (Department of Health) gave a letter of no further action, but there is work to be done at the fuel dock site. Member Goode asked you are cleaning up our mess and Mr. Kiuchi said it needs to be done and they welcomed the challenge.

Bruce Lenkeit testified he is a boat owner/harbor resident and referred to Dave Cooper's testimony agreeing with it. There are issues with the submittal – transparency, integrity, some misrepresentations and issues that Dave speaks about. Mr. Lenkeit related issues regarding the public restrooms built by Hilton, non-compliance by DLNR for not following up and correcting things, no ADA access and he described the restroom facilities as a broom closet. The lights are turned off which is a civil liability hazard. Another example of DLNR not following up is the parasailing permit ticket booths which was on an August agenda item and noted the issues with that. Mr. Lenkeit challenged the Board to make their administrator, Mr. Underwood accountable. He is not opposed to the Honey Bee project, but there are many things that are flawed and there are rulings this Board has made saying no on, but are still in the contract. DLNR has a history of not following up on good faith issues. Mr. Lenkeit also noted near collisions and asked the Board to put these in writing.

Dave Cooper testified that a weeks' time is not sufficient to review the submittal. The RFP says up to 55 years and this lease says 65 years and made references to the RFP criteria not being met. If you change the ground rules other bidders would come out. The Legislature changed the rules after the RFP where it was legal than it became illegal. The Land Board has to look at the benefits to honor the request before you to wave all the requirements to protect the interest of the people. They reported the seawall 4 years ago and only now addressing. The environmental assessment is not valid for the project as it continues. The work docks which are being rebuilt under a Federal grant which was put together by DOBOR to rebuild that dock. Lease these docks to the commercial operator which means the request that went in was less than honest. In 2008, there shows docks and submerged lands available for lease as part of the RFP. Before the

grant request went in to develop those docks for recreational use by the Federal government somebody wasn't very honest. Other people might have used that money for other purposes and the \$500,000 isn't going into the same kitty to be redistributed again. Honey Bee was perfectly happy to do this project and Mr. Cooper doesn't see any benefits to the State if we slide Honey Bee in. We need more time before you make a decision.

The Chair said we have received your written testimony. The fact that we can rent submerged lands and get additional revenues that goes to the boating fund program isn't that a good use of the submerged lands? Mr. Cooper said he didn't say that. You could do that before and that the developer bid the contract on, you could lease the land and you could get income from the land which the developer agreed to go and get everything that is required....Chair Aila said your statement earlier was you didn't see any additional benefits to the public. Mr. Cooper said he doesn't see any additional benefits to the public with the Honey Bee proposal and he proposed to remove it from the rules and regulations from which it started to the new set of rules now available (153 and 197). He doesn't see any benefit because they are still committed to give you the same amount of money every month for the same thing, but what have you gained? The Chair said it's making the project more financially viable to pay the rent is not a benefit to the public? Mr. Cooper said that Honey Bee has not at any time said they are suffering a hardship because of the rules under which they did this contract. Mr. Kiuchi's presentation was a cheerleading thing with the hardships and is not the business decision we are having here today.

Darren Akiona testified that he first was involved with this project since Peter Young's time and this project has been vetted many, many times in the community. There were people opposed to this project from day one. This RFP was put out by DLNR, they looked at it and they decided they could go with the parameters of the RFP to make a sustainable project at the Ala Wai. Looking at the Ala Wai today and 4 years ago the deterioration on those 2 sites continues. There is not a question that those two (2) sites need considerable operating which has to come from DLNR. The Legislature and the Feds are not going to give you the money for that which has to come from DLNR and was the strategy 4 years ago when the RFP came out. Mr. Akiona has heard the opposition's concerns and he thinks they did a good job of addressing it. The Legislature changed the law and did not change by some individual going to them asking for 153 or 157. The Legislature changed that to enhance revenues of State properties because these properties under agencies were not able to enhance the value of those properties to help underwrite the cost of State facilities. Believe it or not Ala Wai is a State harbor, but the people there think they own it. It doesn't belong to anybody that there are jurisdictional rights to this harbor. The harbor has not changed since the 1960s and has not been upgraded. The fuel dock is the same since Gilligan's Island time. This harbor is in desperate need of operating. Nobody questions that, not even the residents in the harbor. The question is what you are going to put in there. We came in with a proposal and as you know there was a wedding chapel in there and they screamed foul, but they didn't tell you the Hawaii Yacht Club and the Waikiki Yacht Club does weddings and they are already at the harbor. It was more a jurisdictional thing with some people in the harbor to keep the harbor the way it is. The Board and staff know the harbor cannot continue in its present state and situation and came out with the RFP. If the law changes to make a better development and profitable development they are going to change. The challenge to achieve the rent on this site is not easy. The competition they face with Ala Moana Center and the hotels to find a tenant to pay the premiums they are going to pay you go to put out

a good product. The revenue from both sites is \$15,000 a month and when this project is completed DLNR should be getting in the area of \$600,000 a year if not more. It is almost a 300% increase if your property is going to produce. What do you get? A new and better boatyard where the EPA and DOH won't come down to shut you down when you reopen because they will. The discharge from the old boatyard was way over which is why it got shut down. We have a fuel dock area that needs extensive repairs and that is not going to come out of the State budget. It is going to come from revenues from this project. He understands the opposition here and that some people don't like that the law changed, but it's going to change this year, next year. When the Legislature is in session no life, liberty or property is safe and that is reality. So they made a strategic change to increase the value of State owned lands, especially in the harbors because the Legislature determined the value and use of the lands were underutilized for what they could give back to the agencies. He encouraged the Board to move forward and approve this. Your staff has been very diligent in making sure that language is inserted in the lease that controls what you can or cannot do. The opposition says well, they are not enforcing the lease and that is not Honey Bee's issue, it is an administrative issue. We worked diligently with your administration. (Member Pacheco arrived.) Mr. Akiona had told Mr. Underwood there is no way you can ask for that kind of rent and there is a reason why the other developer pulled out because he thought he couldn't hit the mark set by DLNR. We (Honey Bee) think we can hit that mark that we have a plan. At this point the project is almost 75% leased out because that is a prime area in Waikiki. Leaving it as is an empty boatyard and fuel dock, good luck because that is all you have. The fuel dock operator will ask for concessions next year because the fuel dock is falling into the water and will say you got to repair it. They support making this work for the public that the Ala Wai Boat Harbor is owned by the people of Hawaii. Not one interest group that hangs around that harbor.

Craig Curren representing the Hawaii Canoe and Kayak Team testified that they are excited by this project relating the children heading to the Olympics in 2016 and the need for a professional facility to train these athletes at a world class level. Honey Bee has been generous in working with their non-profit. He related having camps here and asked to move forward.

Member Gon made a motion for the Board to go into Executive Session pursuant to Section 92-5(a)(4), HRS to consult with our attorney on questions and issues pertaining to the Board's powers, duties, privileges, immunities and liabilities. Member Goode seconded that. All voted in favor.

10:05 AM EXECUTIVE SESSION

10:24 AM RECONVENED

Member Gon made a motion to approve staff's recommendation as submitted and was seconded by Member Goode.

Member Edlao asked whether anybody else was requesting to redo this because of the changes wanting to bid. Mr. Underwood said staff has had no contact with anybody wanting to bid on it.

Member Pacheco said he was excited to see this project move forward.

Mr. Chun asked to include in that recommendation that the lease be allowed to be issued without the consent of DOT. Chair Aila asked whether the Board members were ok with that and they were. He took the vote and all the Board members voted in favor.

Unanimously approved as submitted (Gon, Goode)

Item D-8 Request for Consent to Mortgage, General Lease No. S-5228, Wilfred Kaupiko, Lessee, Milolii-Hoopuloa, South Kona, Hawaii, Tax Map Key: 3rd/8-9-014:058.

Russell Tsuji, Administrator for the Land Division presented item D-11 noting that it was unusual to mortgage a business off site. Subsequent to their submittal submission for approval Kaupiko submitted testimony asking that this be for his business off site and that some of the money he had borrowed be used in paying his house. The lease does not say consent to mortgage or restricted to mortgage and he leaves it up to the Board noting there is no restriction.

The Board members commented that there is a gray area and referred to Appendix A. That he is using his equity in the business to secure the residential.

Member Pacheco made a motion to approve as submitted. Member Edlao seconded that. All voted in favor.

Unanimously approved as submitted (Pacheco, Edlao)

Item M-3 Request for Public Hearing, Amendment to Waive State's Right to Use or Occupy the Surface of the Property to Mine and Remove Minerals during the Term of the Ground Lease of Prior Board Action of August 12, 2011, Item D-4, Consent to Lease of Lands Under Governor's Executive Order No. 4345 to Hawaii Housing Finance and Development Corporation, Kaka'ako, Honolulu, Oahu, Tax Map Key: (1) 2-1-051:042 and 043

Rick Prahler, Development Branch Chief of HHFDC (Hawaii Housing Finance and Development Corporation) testified asking the Board to approve our holding a public hearing on some language changes to the lease that we executed on the Halekauwila Place Affordable Rental Project. We have a lender who raised some concerns about the standard language and we have not run into this before, but the concern is the standard language on minerals rights appears to them to give the State the ability to come in while the project is under construction or constructed to disturb the surface to look for minerals. We don't have a history of that and we are proposing some language. We are not looking to waive the State's rights for the minerals on the property. We are looking to modify the language so the State will not have a unilateral right to come in and disturb the surface of the site to look for minerals. We have posted for a public hearing on November 30th. The plan is to come back to the Board's December 14th meeting to request approval for the modification of the lease language. Jessie Wo was here representing the developer and if you have questions of the lender.

Member Goode said the terms they are asking to amend is universal and this is the first time for this request. Jessie Wo representing the developer explained that the lender is PNC Bank on behalf of HUD for an affordable housing loan. PNC Bank is not a local bank and is not accustomed to this and requested modifying the language for the State to relinquish its right to occupy the surface that would include any potential impacts to construction or completed work.

Member Goode asked if the State were to occupy wouldn't there be any compensation to the tenant. Mr. Wo said there is language in the standard ground lease that would provide for compensation to any impacts to the development, but the lender is still concerned with any impacts beyond like taxes credits, investments and concerns around that. Member Goode noted that will be compensated that you can't stop the compensation at some point because all those impacts have to be addressed. Mr. Wo agreed saying absolutely its existing within DLNR's standard fees, but PNC Bank requested we make this change.

Chair Aila asked what would be the impact to the project if they not grant this. Mr. Wo said he don't know what the impact would be. They provided for the standard title endorsements that relates to this issue and most lenders in Hawaii are comfortable with, but PNC credit approval to get his language changed does that impact their ability to close the financing for the project and that is something under discussion. Mr. Prahler said worst case they would pull out as lender and the project would stall until they found another lender who would be comfortable with the language. Chair Aila pointed out we would have to look all the language that occurred in Hawaii with this language and the impacts, the non-impacts to those projects. You are asking the Board to do something that has never been done before and there is precedent that we are concerned about.

Member Goode said other states have similar language regarding mineral rights. Mr. Prahler said no that Hawaii is rather rare than most other states where mineral rights belong to the property owner. That is something that can be separated out and gave Texas as an example. Canada has where minerals rights remain with the state not with the country or individual owners. That is a different thing for us.

Member Goode said he was confused that they are recommending HHFDC hold a public hearing and they hold this hearing and get comments. He asked does this mean HHFDC is granted authority. Mr. Prahler said no they would have to come to the Board for approval. Our Deputy AGs spoke to each other and this is the process they laid out that they have to go through the public hearing process.

Member Pacheco pointed out in the submittal the testimony at the hearing will be submitted by HHFDC for consideration in our decision on that request. We are only approving a public hearing correct? Mr. Prahler said that is correct. That is all they are asking for today.

Member Goode said he was not comfortable with this that it sets a big precedent. It is his opinion to not waste your time with a public hearing that they are asking the Board to go down a path that they've only done for conservation easements and maybe another case with the Federal government, but all the banks are accustomed of having this.

Member Pacheco made a motion for the Board to go into Executive Session pursuant to Section 92-5(a)(4), HRS to consult with our attorney on questions and issues pertaining to the Board's powers, duties, privileges, immunities and liabilities. Member Gon seconded that. All voted in favor.

10:35 AM EXECUTIVE SESSION

10:41 AM RECONVENED

Member Goode made a motion to not allow the organization go to public hearing. Member Edlao seconded it.

Member Goode said his comments earlier still stands. The project developers and lender with underwriters need to contact Land Division who better understands how it works here in Hawaii. Lots of local and international lenders have worked here successfully, but he can't see the State's interest as minuet as it may be or as minuet as the risk is for this to open the floodgates.

Member Gon said that small nature of the risk needs to be communicated very clearly of the property and what lies under that. Essentially limestone and basalt is not a matter of concern large enough to take to public hearing to change the language. Member Pacheco said in light of setting a precedent for this with all the standard leases we have out there minimal risk to the applicant yes, but it is nothing where we to be probably giving away by doing this. Setting precedent would not be appropriate. Member Gon agreed saying it would be a potential can of worms of administrative dealing with changing those standard leases. Chair Aila said it has never stopped any development in Hawaii.

All voted in favor to deny this.

Denied (Goode, Edlao)

Item E-2 Request by the Diamond Head International Music Festival, Inc., to Use Diamond Head State Monument Once a Year for Two Years for a Two-Day Diamond Head Crater Celebration Music Festival

Dan Quinn representing State Parks related some background on item E-2 that staff came before asking for approval noting the cumulative conditions. The Diamond Head Advisory Group is opposed to these events which is not inconsistent with the Board's approval of the master plan which included a provision to approve with consideration a visitor center size reduction and to accommodate occasional public gatherings in the crater. The promoter is here. The event is not firmly scheduled and it's not wise to mention who the performer might be.

Member Edlao asked whether there were any concerns over the previous years' events. Mr. Quinn said no, there were no major problems except for the weather with 40 days of rain, but other than that there were no major problems. A tremendous amount of logistics of transporting large numbers of people in and out, the closing down the crater before it got too late at night. They kept the park open half-way through the day of the concert then the regular visitors cleared

out and the concert goes start to come in. It was really well run. The earlier problems in the 1960s and 70s were resolved by the conditions imposed by the Board.

Promoter Ron Gibson testified thanking the Board for allowing this request for a permit for 2013 and 2014. We agree with what Dan said in the submittal noting there were no problems. Now there is a renewed interest with folks going down to Australia and can't do it without a permit.

Member Gon asked whether he was aware of the recommendation(s) and cognizant of it. Mr. Gibson acknowledged that saying yes that they have a proven record of doing events and want to get on track where these events are held annually and bring worldwide entertainment to draw that industry here and expose Hawaii's talent internationally. The culture and non-profit part is very important to us. These concerts were not a waste of time that they are constantly working with the various venues.

Wille K testified in support of the Diamond Head Crater Festival that if it wasn't for it he wouldn't be the rock 'n roll person he is today and asked to make it happen.

Member Gon related some of his memories of the first Crater Festivals.

Kapono Ka'ahue testified that he did play at the Crater that Hawaii has a lot of great talent and should set this platform for great things for quality talent from Hawaii coming to the world.

Member Gon commented how the Diamond Head Crater Festival kicked off the first C&K album. Kapono said and yes having fun doing that with everyone, too.

Linda Wong, Chair of the Diamond Head Neighborhood Board testified that she has been to the previous Diamond Head Festivals before and she was impressed how they handled the 40 days of rain with wood walkways and it was safe and everybody was happy. It was very well done and each year it seems to improve with music, better vendors, shuttles and access. We should have the young kids of today experience it, too. It's a great venue.

Steve Ozark representing Caterer to the Stars testified about all the benefits to the public and businesses. Ron does an amazing job, high quality and no problems which is an amazing worldwide event.

Jim Linkner, a recording engineer and producer testified relating how he worked the 1970s Crater Festivals. Ron has brought this to a professional level both locally and nationally to Hawaii which is a vital to our industry and our State on a professional level.

Unanimously approved as submitted (Gon, Edlao)

Item D-11 Amend Prior Board Action of November 10, 2011, Item D-15 by Allowing Payment of the Consideration in Installments; Grant of Term, Non-Exclusive Easement to Robert E. Cambra and Agnes K. Freitas Trust for Seawall and Filled Land Purposes, Kaalaea, Koolaupoko, Oahu, Tax Map Key: (1) 4-7-014:seaward of 010.

Mr. Tsuji conveyed item D-11 that initially we approved the easement at a one-time payment for an encroaching seawall where the appraisal came out to \$62,600 and the applicant requested to pay it in installment and that is all staff is asking the Board.

Robert Cambra testified that he didn't expect to pay this having to build a house and paying in 3 payments over 3 years he could handle that. He asked maybe something can be done with the 7% interest rate. Mr. Tsuji said we are not the bank that the bank could give you a better rate. .

Member Edlao asked since this is an exceptional case is there any leeway. Mr. Tsuji said Mr. Cambra could mortgage it if he wanted to. It's just he'd hate to get into the banking business, but he does appreciate him rectifying the encroachment.

Chair Aila asked whether he was ok with the submittal's interest rate as it stands. Mr. Cambra said yeah.

Member Pacheco asked where he came up with 7% from whether it was based on market. Mr. Tsuji said it's based on the installment agreement with the re-openings and related the time when they had the rent re-openings and the rate went up where situations like these come up

Member Edlao asked whether this was an exceptional case. Mr. Tsuji said he is able to mortgage and ask to pay in installments. He would hate to get into banking and appreciates him rectifying the encroachment.

Member Goode said 5% would be better that it's really tough when you make 7% for everybody and made a motion to accept staff's recommendation. Member Pacheco seconded it. All voted in favor.

Mr. Tsuji said to Mr. Cambra the easement like the lease if he does get a better rate from the bank as that the Board consent to a mortgage and pay off this entire loan.

Unanimously approved as submitted (Goode, Pacheco)

Item K-1 Conservation District Use Application (CDUA) HA 3626 for a Single Family Residence (SFR) and Related Improvements by John and Maureen Gapp Located at Maku`u, Puna, Hawai`i, Tax Map Key: (3) 1-5-010:032

Testimonies from Julie Leialoha, Maureen Gapp and Theresa Donham were distributed to the Board members.

Sam Lemmo representing Office of Conservation and Coastal Lands (OCCL) distributed a handout and noted the difficulty of this case relating some background on item K-1 that the parcel was created by the County. Staff decided to go through the application process. The applicant had knowledge of this in the onset and bought the lot in this condition. Staff suggested the applicant locate the house in the agricultural area. The lot is split zoned, 2/3 of mauka area is agricultural State zoned and the seaward 1/3 is conservation district. The County indicated they will give them a building permit for the Ag area so staff asked them to raise the SMA until they

provide some alternative sites. They consulted the archaeologist who suggested it would be difficult to locate the house in the Ag area because of the preservation of the lands. There are 6 sites they want to preserve with burials and 2 features which are mapped out. Their position is putting the house in the Ag area is preservation of sites and they spoke with State Historic Preservation Division (SHPD) about it and the buffer areas, but staff still stands by their recommendation. Mr. Lemmo described the driveway and the site. His position is relocating the house in the Ag area will shorten the drive way up with less impact and maybe reduce the size of the structure given the preservation sites. The 2 main issues are 1. the invalid sub-division and 2. there is an alternative to place the house in the conservation district. Mr. Lemmo did want to amend the part of the report that talks about the second violation. There was a violation that occurred years back taking many years to resolve. Apparently the planner who was working here verbally indicated that they had met all the requirements that he hadn't known that before today's meeting and he will take that comment as true. And, we have don't have to take issue with the old unauthorized grading, mitigation plan and he would seek their permission to strike the second violation from the record.

Member Gon asked to consider that one violation was done before the owners acquired the land. We received testimony from Julie Leialoha in support the owner's proposal and said a FONSI was already issued by the Board and approve the assertion for a CDUA and asked to explain the context of that. Mr. Lemmo acknowledged that and explained that staff issued the FONSI with reservations to qualify the environmental document with information disclosure and was not a decision to rule.

Member Pacheco asked Mr. Lemmo recommended approve in the Ag zone knowing the archaeological sites and if he weighed solely in the context of the conservation district or are you looking at the sites and whether a house site would impact those sites more in the conservation district. Mr. Lemmo said he hasn't been there and he looks at the information and he sees impact both ways. They have a practice of avoiding conservation because it is generally more sensitive – ecosystems, environments, hazards. He recommended to put the home as far back from the ocean as possible and doesn't see compelling reasons to use the conservation area or sacrifice it. He doesn't see a net gain for preservation or archaeology and burials with the driveway around them. That would be eliminated by putting the house in the Ag area.

Member Goode asked in 1999 the County approved the subdivision which is a lot minor adjustment to consolidate 2 lots to create and made 1 lot to go in the conservation area. A lot line adjustment is clear it should have had some consultation or approval from DLNR, but potentially from the Board. He asked if that type of action can be administratively handled or would it be a Board action. Mr. Lemmo said the complicated part is it's not an identified use and wouldn't apply because they don't allow private sub-divisions or partitions of conservation. There is 1 lot encompassing the conservation area and now we have 2 lots increasing density which is double density which is against the policy and against our rules.

Member Goode said the County of Hawaii admitted they made an error and that they will rectify it work with us. He didn't see any correspondence from the County in the submittal. This shouldn't exist with its current boundaries and someone made a mistake and it wasn't the current

owners and it's not this Board's or this Division's. Someone made an error and someone needs to pay for it.

Sidney Fuke, planning consultant for the applicants distributed binders and testified that there were a lot of issues and appreciated staff asking John Gapp to come up.

John Gapp, the applicant testified having lived in Kalapana's community which was destroyed by lava in 1990. In 2002, they found this piece of land which was similar to what his family had in Kalapana and bought it intending to recreate their former home and fishing grounds. People who respect the land and sea are good protectors of them.

Mr. Fuke explained that in 2005 they cleared the land and was cited by DLNR in addressing their concerns. In the process of building in the agricultural area they discovered a lot of archaeological features in this area where they had a study done and the archeologist said it was not feasible to build in the agricultural area. He referred to his binder Exhibit 1, Exhibit 2 and described what the parcel looked like and the real property taxes that were bought in 2002. The applicant was unaware that when they purchased the property that this was an unauthorized subdivision, they just bought it. As your staff discovered when they applied for the CDUA this year.

Member Pacheco asked whether title search... Mr. Fuke said it didn't bring it up. As you look at Exhibit 3, there is a letter from the Planning Department saying somebody screwed up and maybe we screwed up which was the County. They would like to work together with his agency to help rectify the situation and looked for any guidance the State may provide. It was no fault of the Gapps or the other property owners. It's unfair to hold them (the Gapps) hostage for something they totally had nothing to do about it, but there was a considerable amount of funds expended by both parties just by virtue of how much the land was purchased. As the Gapps were trying to address all the archaeological and the fine issue and have to pay \$6,000 to the Board because of illegal activity occurring on the conservation district. In addition to that, the applicant spent over \$60,000 for different technical studies, coastal erosion study and you ask what might be a possible remedy. Mr. Fuke said he thinks the appropriate party should be the Planning Department should apply for a defacto...prepare an environmental assessment and take it to have the Board to approve this defacto. On paper, legally, you will have 2 lots and have the respective property owners as property owners sign off on whatever the Planning Department will do that essentially is a decision between the Board and the Planning Department. Exhibit 4 and 5 go away because like Mr. Lemmo indicated there is no longer an issue, but the Gapps have paid out a fine of \$6,000 for the illegal grubbing activity and they were supposed to submit a maintenance plan. Exhibit 6 is a letter from the applicant's wife, Maureen to DLNR saying they need a little bit more time to submit the maintenance plan. On Exhibit 6 is the botanical survey done by Julie Leialoha. It was clear to him that this was like a maintenance program because when you look at recommendation #1 which is to eradicate all the naturalized and invasive species and secondarily re-vegetate the slopes. Exhibit 7 is page 17 of staff's recommendation and perhaps this is no longer appropriate because this relates to the maintenance plan issue, but the reason why no plans were forthcoming and OCCL lost track of the case was because the Gapps were going to try to build further from the shoreline and at that time they didn't know it was going to be in the Ag district because they knew where the conservation and ag district boundaries were and were

going to try to build in the ag district which is shown in Exhibit 8. The Gapps applied to the County, they got the SMA permit for an exemption to construct the single family residence in the ag district and in the course of trying to do something over there then they discovered there were a lot of things that it shouldn't happen there which is found in Exhibit 9 which is the archaeological report and it shows you all the different sites on the property and interestingly, the highlighted bulldozed area is where the former dwelling was and what the Gapps were trying to do way back when they were cited was to trying to remove a lot of the rubbish, but obviously its' in the conservation district and so they were cited for the violation. It became an archaeological nightmare for the Gapps to cite the dwelling in the ag district. Mr. Fuke introduced Bob Rekman who is the consulting archaeologist to share his thoughts relative to the feasibility over the appropriateness of constructing something in the archaeologically preserved area.

Bob Rekman, the consulting archaeologist testified that he did the archaeological inventory survey for this property and also the cultural impact assessment. The Preservation Planning was done by a different entity, but he could speak to all of that. An archaeological inventory survey is where they find all these sites out there and we make a determination on the significance and we propose treatment recommendations. It doesn't depend on what the development is on whether a site is or is not significant whether you are building a house or a hotel. There is a lot of flexibility at least at the beginning of the project they build a lot of flexibility in. As a professional you know what the standards are with DLNR as what it's going to be and what they are willing to say is significant, but you document it well enough that it doesn't require any further work. We recorded 9 sites out there and most are discrete areas referring to the site map. One site occupies the entire parcel almost which is a big scattering of agricultural features. If you are looking at that map there are 55 agricultural features on this property and because we documented them we could get a determination from SHPD that no further work would be required. It doesn't mean necessarily that the landowner would then want to bulldoze all of that stuff and in the case of this landowner he was quite sensitive to that and didn't want to disturb the archaeological features that are on this property. The map is showing you the preservation areas, but it is not showing a carpet of archaeological features across that part of the property which seem to terminate the closer you get. The current proposed location of the house will impact 3 of those archaeological features, but leave the other 52 intact and that is the impetus. There is another letter saying culturally perhaps better location, but not worrying about ag or conservation zoning, but the property itself is the best location based on the archaeological features the house would be down there. They did a cultural impact assessment which does matter where the development is because you are assessing the impact on the culture that a single family dwelling would have or a multi-family hotel would have, the actual development doesn't matter. The cultural impact assessment was prepared for the location of the house in that place. Had there been a cultural impact assessment prepared for a proposed location of the house situated in another place – next to burial sites or in the area of burial sites and an interesting old school site perhaps there might been a different result of the cultural impact assessment in terms of the location of the property the might be more impact there. During the cultural impact assessment he spoke to the folks that were consulted during the burial treatment plan process which was done by a different firm. One of the people was glad that it wasn't going to be in that area because the Gapps redesigned the driveway as a result of that consultation to be a circular driveway wrapping around one of the preservation areas so the descended families, many of whom were elderly folks had an easier access to visit the burial sites because this is a very

difficult terrain to walk on. What looks like a short distance of across is up and down with big cracks and that is where a lot of these burials are, in big cracks walled closed. Having done the inventory it is necessary and wouldn't surprise him especially in this central area...if the house was in place there it would be mass excavation if you were to build a house there and would have to bulldoze all the way up to the preservation buffers of the site that are to be preserved destroying ag sites. It wouldn't surprise him if another inadvertent burial had come up.

Member Pacheco asked whether the area is pohoehoe and Mr. Rekman confirmed that pohoehoe tumulus, blisters and the grave sites are in open crack blisters and are all built up. They are all historic with roofing tin on top with rocks built up. From a cultural and archaeological perspective not looking at the conservation and ag districts, the best location would be out of this zone of archaeological sites in the area that has been disturbed already and that was their recommendation.

Member Gon asked whether the disturbed area of concrete slabs might belong to families that placed those burials. Mr. Rekman said he wasn't sure.

A lady (Maureen Gapp) testified that in the 1940s tax records show a house in there with 50 years of tax and then it stopped. The top burial was the old Maku'u School and they are trying to find the descendants of those who the land was originally deeded to were Meau. Mr. Rekman said the school teacher's name was Meau and he had a land grant here. This was probably his house and the school yard here. The records don't show where the school was, but the historic record talked about people coming down a trail turning here and going there and they proposed this was the school and the teacher lived there. It could have been relatives of his. There was indication based on items placed in these cracks with the burials it was a ranching family. There was a brand that he found and he tried to track down who the brand belonged to and nobody recognized it. It was really hard to track down. The families got to still be buried there.

Member Gon asked its a little makai of the agriculture boundary and did you get a chance to take a look at those. Did they end because they were disrupted by ocean waves or maybe tsunami? Mr. Rekman said it ends naturally because there is a flow change. There are other features on that Mr. Lemmo had a memo where there were some petroglyphs. We know all about those, but the reason they weren't recorded as part of the property is because they are not part of the property. They are makai of the shoreline on State land. Member Gon asked whether at times it's under water. Mr. Rekman confirmed that at high tide. The archaeology branch chief says most of the ag zone is an area modified with ag features and these are not recommended for preservation, but it would be good for the applicant to do a past preservation for the ag zone just for the ones designated and that was the strategy.

Member Gon asked between the 1968 high water mark and the current one is that real or does he think it is a survey of the rising of the high water mark. The Island of Hawaii is subject to subsiding events and such like that. Member Pacheco pointed out the 1975 earthquake dropped the shoreline there. Mr. Rekman said he would have to let the geologist speak to that and Member Pacheco referred to Lockwood's report, Exhibit 12, on that and maybe he addresses it in there. Mr. Fuke acknowledged that Lockwood does and Mr. Fuke wanted to go into that more systematically. He referred to Exhibit 12, page 7, in summary over a 58 year period prior to the

'75 earthquake there were no changes to the rocky shoreline or coastal berm over this 58 year period. No measurable erosion has taken place. Any future changes in shoreline position would be related to changes relative to the area and not to erosion. This is a requirement as far as your CDUA requirement and so this is why we have to step back and do a study. Given the situation they would be glad to do that. Either relative to the archaeological one as Dr. Lockwood indicated if this property was all conservation area and looking purely as a site planning purposes one would logically conclude that the best place to build you house is where the Gapps are proposing because this is an area that formally had a residence on it and you would prohibit any construction on the mauka portion. And if the concern is that area is within an agricultural district and conceivably go to the County to ask for another building permit in the ag district he would strongly recommend if that is a concern it would be a condition of the approval that limits the number of dwellings there any structures to the makai portion to one dwelling per property and not additional. Conceivably by zoning sometimes the County may not look into it like how the unauthorized subdivision occurred, but if there is a restriction on the property than its clear. The other thing we talked about the coastal hazard ...

It was asked by Member Goode whether the adjoining parcel has the same types of features and Mr. Rekman said yes although he hasn't walked on it, but he assumed the adjoining parcel would have the same distribution of features. That there is no reason that it wouldn't.

Mr. Fuke said Exhibit 10 is the zoning map for the County of Hawaii which shows you the special relationship of where this property is which he highlighted that sea of lots is called Hawaiian Paradise Park. Where that intersection to that property is a 1/2 to a 1/3 of a mile and is relatively close. This whole subdivision either use water catchment system or they have a well which is what the Gapps intend to do and is pretty common in this area. Member Goode asked in this map where it's in green and says AG1, AG2 and Mr. Fuke confirmed it was that all zoned AG1 by the County. If a person was unfamiliar with the State Land Use District process and just looks at a County zoning map it would be erroneous to believe he could do something. Member Goode said the County is not paying attention to their zoning that the 300 foot route they should have a 300 feet line for conservation and wouldn't make the mistake they made and Mr. Fuke agreed. The lady (Ms. Gapp) said the maps were wrong and the County has since replaced them. The County dismissed that line after she showed them the map. Mr. Gapp said that the red line for conservation wasn't on the maps. Mr. Fuke said fortunately because of the technology, GIS, they now have a way to superimpose the zoning line and the State conservation line, but when they bought the property it was like looking at a map and nothing was computerized. Exhibit 11, he threw in with the hope that the Board might consider this situation. This was comparable to an approved conservation district use permit for the general area although this is farther and more remote, but it's in the Puna District of Wa'awa'a and is the same subzone that in the event the Board would agree to approve the permit and the request they are ...Member Pacheco said that is the one to reduce the size of the house. Member Gon said the vegetation maintenance...Mr. Fuke said that house was reduced to some 2000 odd square feet. In that regard, the rest of the conditions like our general conditions that the Board normally imposes and perhaps the added condition that the property be restricted to 1 dwelling so there would be no mistake that somebody would build in the ag district.

Member Pacheco asked if they can to split into these into two for the sake of discussion. You have the whole subdivision stands legally and the other issue is the house appropriate for the conservation district. He was wondering if he could get comments to take the subdivision issue aside from it all and look at the house permit in the conservation district by itself unless you do the whole property with the features that are there. Another part of our Department looking to say it would be nice to save these resources. Mr. Lemmo said like he said the 6 sites are preservation for burials and the other 2 sites they could possibly protect. SHPD has laid out its recommendation and that can be done either way he thinks if you look at it in that perspective. Putting the house in conservation may make SHPD concerned in putting the house in some other location in ag has some concerns. Although, there are the other archaeological sites probably would be data recovery or something. He thinks long driveways are big impacts and he is just not on-board with the idea that putting the house in the conservation area preserves the integrity of the archaeological and cultural sites. Plus it's an area subject to subsidence.

Member Gon spoke saying looking at the report it concurs with your conclusion that there was several gauges with highest risk marks for certain items with regards to tsunamis, storms and sea level change. Anything to volcanic seismic is high. On a scale of 1 to 4, 4 is something to be concerned about.

Mr. Lemmo said to follow up Member Pacheco – he thinks this is a nice site for the house in terms of aesthetically speaking which describes that small lava ledge and that is one of the driving things as well. It's interesting that he hears them saying that they would agree with the condition to occur in the ag district because theoretically if you were to build something in the conservation district with a building permit down to build in the ag area tomorrow as well and do a CPR effectively max the place out for residential use. I don't think we have the authority to tell them not to build something in the ag area, personally. The County would have to agree to that.

Member Gon said to make it a condition of something because the way the staff's recommendation as you stated all we can do is to agree to it or not. If we decided not to agree to it then it would require a more detailed set of recommendation to approve let's say with a set of conditions. None of which we have and probably don't have the time to hammer out now, but we could ask for in the future. The lady (Ms. Gapp) said they said in the past that they agreed to make the entire lot conservation and then you would have oversight. Member Pacheco pointed out that you would need the Land Use Commission to do that and would be for another meeting. Mr. Gapp said if you were to walk that property you would designate the mauka side conservation and makai side ag or whatever because its already been bulldozed, it had the old house on it with rubbish all over. It's a shame you have to follow a line on a map and that is not the way the property is. Member Gon said he sympathizes with his statement relating walking through Nanawale Forest nearby and surveying other areas that the values that you see don't necessarily match with the conservation/ag districts. He appreciated his statement that he would treat the whole thing as conservation. We don't have the power to do that, but I appreciate that you are willing to comply with the area as if it was zoned conservation district. Mr. Fuke said I think is the concern is having any structures or improvements within the currently ag designated area as he suggested earlier they are limiting it to only 1 dwelling. Having it recorded in their

deed and also with the Bureau of Conveyances. If they clear in both notices to everyone then there is that restriction.

Mr. Rekman said he didn't do the historic preservation plan, but they could amend that and re-write the plan to put that area into preserve and would be a perpetual thing. Member Gon said there are several different options to create that conservation easement to allow archaeological features and that would apply to you and any other future owners.

Member Pacheco asked on the subdivision the letter from the County submitted here said they screwed up her and will work with you, what happened there with you at their office. Mr. Lemmo said staff talked to the County and asked them what happened. Why did you do this and that is why they generated the letter.

Member Pacheco asked what do they stand on legally. There is this limbo on the lot and is that lot recognized by the County, but not by the State is that... Mr. Lemmo said he didn't know that this is so unusual a situation that he is not a lawyer there might be other legal issues, but clearly the Board has jurisdiction over this issue as it relates to the conservation area and that jurisdiction was over stepped and in that way it's invalid in his mind. But, he could be wrong that there could be an issue of precedent here for some court district.

Mr. Fuke said that all they know is back in 1999 after the subdivision was authorized illegally approved since then tax map keys were assigned and real property taxes were paid during that whole period and at least one of the properties changed hands twice and in this case the Gapps were the first and only buyer. The other one changed twice which is why he had to put it in. The boundary implications behind not going through the process and if you just take it as it is and say no violation that you will unravel everything it will probably be messy. He understands where his staff is coming from that there is a need to on paper rectify that. Since the County was responsible in initially approving it then they should be held accountable for filing the appropriate application, the environmental assessment to the Land Board. Mr. Lemmo said we can't process it. It is not a use that we can even consider. The lady (Mrs. Gapp) said she made DLNR aware of the subdivision in 2003. Staff has a letter from me telling them that property was subdivided. During their due diligence they took my letter and outlined everything out of that letter, but ignored that portion. In 2003, before we sent \$65,000 for our permit they could have told me then. You should have copies of that letter. Mr. Fuke distributed a letter from the lady.

Member Pacheco made a motion for the Board to go into Executive Session pursuant to Section 92-5(a)(4), HRS to consult with our attorney on questions and issues pertaining to the Board's powers, duties, privileges, immunities and liabilities. Member Gon seconded that. All voted in favor.

11:35 AM EXECUTIVE SESSION

12:06 PM RECONVENED

Member Pacheco said the Board agrees with their attorney that the subdivision talked about got some serious legal issues and we don't have the answers to them. He asked what the time frame was. Mr. Lemmo said if a decision isn't made today it is automatically approved in a couple days. Member Pacheco said what the Board is asking the applicant is to agree to an extension of the deadline. Mr. Lemmo said they would have to withdraw that they can't around it with an extension that he has never ever done anything like that. Member Pacheco asked even with the applicant's approval. Mr. Lemmo said unless with a contested case hearing to extend it. Ms. Chow said she would have to go and look at the rules. Mr. Lemmo said based on the situation there a couple ways to do this. Extend the 180 days process where one is required and the other is through a contested case hearing.

Member Edlao suggested deferring this for another month or so. Member Gon said it would automatically approve.

Mr. Fuke said you mentioned a contested case hearing as the only means to continue this. Can we request that with the understanding that if things get resolved they can proceed. Chair Aila said that is what they will consider.

Member Pacheco asked but, if they do that and withdraw it is automatically approved is that correct. Is that the way it works? The Chair said or they could extend is another way it could work. Mr. Lemmo said another solution is for them to voluntarily withdraw and we will just restart the clock on a new application. Member Pacheco asked then they will use what they have and there is nothing new? Member Gon asked won't there be additional costs on their part? Mr. Fuke asked don't we have to go through the EA process right? Member Gon said no you don't have to do an EA. Mr. Fuke asked isn't there the additional submittal fee of \$2500. Member Pacheco asked whether they can waive that. One Board member thinks they can. Ms. Chow said that a contested case is cheaper because it only costs a \$100 bucks for the petition. The Statute does actually say what Mr. Lemmo said. That is the case that it cannot be extended past a 180 days unless an EIS is required or have a contested case. Mr. Lemmo pointed out that this is pretty harsh. Deny the application if no contested case without prejudice or something. They have the contested case and basically the decision is stayed until they come to some resolution on the contested case. He feels not worrying about making a decision and extending it via a contested case because they could argue it later on that it was automatically approved. Ms. Chow said yes.

Mr. Fuke asked if the Board has the power to waive the \$2500 fee. Mr. Lemmo said the rule doesn't specifically provide for a waiver - only for State projects. Ms. Chow questioned that saying can't we sometimes for good cause. Like when people can't afford it. Mr. Lemmo said that was for contested case fines. Ms. Chow agreed to that and apologized.

Member Edlao said he is one who is for fees, but he would be willing to waive the fee.

Chair Aila asked if they do the contested case hearing they would have to address the fine. Ms. Chow said it would be \$100 for contested case petition fee. Member Pacheco asked we're talking about a hearings officer and the whole process. Could they do a mediation of some sort? Ms. Chow said yes, you can do a settlement in a contested case. Mr. Lemmo said you don't have

to go hire a hearing officer, you can figure out a way to deal with it and come back to the Board with a settlement.

Chair Aila said we need time to deal with the subdivision issue for our attorneys to consult with the County's attorneys on how to resolve this subdivision issue. A contested case gives us the time to do so. If you guys are inclined to agree this then that seems like the only way to move forward at this point.

Member Edlao said a contested case via mediation as opposed through a hearings officer. Ms. Chow said it would be a contested case, but contested cases can be resolved in different matters through mediation or settlement or ...Mr. Lemmo said we could just talk about it and resolve it. Mr. Fuke said the applicant has a right to file a contested case hearing. If they make a request and prior to the real contested case portion things are resolved we just elect to withdraw the contested case request and in the meantime we bought the required amount of time. Member Pacheco said then it would come back to the Board for approval. Ms. Chow acknowledged that. Ms. Gapp said then we have to fly back again and have to take time off from work.

Mr. Gapp asked if they withdraw from a contested case then their rejection stands. Ms. Chow said no, the withdrawal would be based on a settlement and wouldn't actually be a withdrawal. Mr. Fuke said you preserve your right to argue the case, but if there is going to be a contested case process and alternatively there is a resolution then you can withdraw that. Ms. Chow said even if they decide to just withdraw it that doesn't mean they couldn't come back and put in another application for a CDUP if they change their mind on how they want to design it or anything like that. Mr. Lemmo said the easiest thing is for them to withdraw it.

Member Gon asked the main reason for the recommendation to deny was the hazards and the size. Mr. Lemmo said number 1 is the subdivision and 2nd alternative is placing the house in the conservation district.

Member Pacheco said in addressing the applicant what we are trying to do is the least costly way for us to move forward to do due diligence on the subdivision thing. I also would like the opportunity to go look at the site myself on the ground. We are hoping we could get an extension because if we are forced to move this time it is very likely the Board will deny it if we go with staff's application. Ms. Gapp asked whether you are denying it because of the subdivision issue or whether it's the site of the house. Member Pacheco said for me it would be the subdivision issue. Mr. Gapp said so the time you need to resolve the subdivision issue that is between you and the County and we are not involved in that process.

Mr. Fuke asked if they requested the contested case hearing that the filing fee be waived and that the applicant understands that if in the event that they withdraw the subdivision application then it doesn't forfeit the automatic approval time because they didn't make a decision within the 180 day period. The request for contested case is filed with the understanding that this defacto extended 180 days. It's not like having a contested case and we make the case that you guys have the actual. It can be done with that understanding. Member Gon pointed out that if the 180 days would have it automatically approved and so this Board's action would be to deny and then you would follow up with a contested case and we would waive fee. That would afford us all the

time to resolve the subdivision issues. Ms. Chow said if you are going to preserve your right to claim your right to automatic approval then the Board may just deny it outright right now because I don't think an automatic approval is suggested. Mr. Fuke said that is what he is saying that the applicant would agree to this by requesting the contested case they are not preserving the right to an automatic approval. Ms. Chow said they are not preserving their right, yes.

Member Pacheco said they are basically agreeing to go to contested case hearing here it stops the clock. Mr. Fuke said yes, and they won't come back to hold you guys to the 180 days. Member Gon said it wouldn't because we are actually in denial right now. Member Pacheco said we don't necessarily need to make a decision. Ms. Chow said under the Statutes for a CDUA you have to make a decision within a 180 days or it's automatically granted. So the decision is to grant or deny the decision. Member Goode said you could also approve with conditions. Member Gon said if we approve the conditions we are not in any position to state the details of those conditions. Member Pacheco said you are right. If we don't render a decision, we have to make a decision. That is the best we can offer you guys.

Mr. Fuke asked it was his understanding that you request for a contested case hearing then it preempts the Board from making a decision, right? Ms. Chow said no. Not under our rules because of the CDUP Statute you have to make a decision.

Chair Aila said this buys us time to deal with the subdivision. Member Pacheco said there are 2 ways – this contested case way or a withdrawal of the permit and a resubmittal which is more costly. Mr. Fuke asked so the Board still has to make a decision before we can go to contested case. Member Pacheco and Ms. Chow acknowledged that yes. Mr. Fuke asked you need something to contest and asked about waiving the fee. Mr. Lemmo said it is not allowed in the rule. Member Pacheco asked what it means if it isn't allowed in the rule. Does it imply we are not able to do it? Does it need authority in the rules to do that then? Ms. Chow said if the rules say that you shall pay \$500 then you shall pay. Mr. Gapp said they paid already. So after staff resolves the subdivision issue you'll come back and do this all over again. Member Edlao said come back for the decision. Member Pacheco said when they come back the deal would've been made and agreed upon. Mr. Fuke said he is trying to understand the process. If a decision is made today which seems like it will be denied and then we would request for a contested case hearing and the contested case hearing will be between the Board and the applicant. Ms. Chow said actually the Department and the applicant. Mr. Fuke said say something favorable will be worked out then it would go back to the Board and you would have to reconsider the original denial and then...Ms. Chow said yes. Member Gon said any conditions that maybe tagged onto the approval will have a chance to hear both sides because the Board is not prepared to speak on. Mr. Lemmo said why say things we don't have to and just deny. If Member Pacheco wants to go and look at the site then leave your options open. Ms. Chow agreed.

Member Gon made a motion to approve the application for a single family residence with conditions to be set working with the staff and the Chair. Member Goode seconded that for discussion.

Member Gon said some of the conditions could be to work with County and it doesn't have to come back to the Board if staff works out the questions about the footprint and other adjustments. It's to the Chair and wouldn't have to come back to the Board again.

Mr. Fuke said is it possible on that basis then the conditions being subject to the Board's approval at a subsequent meeting since we've taken action on the primary application. Member Gon said he supposes if you want the Board's approval, but he was willing to have staff work out with the applicant and have the Chair agree to those conditions because for their standard conditions is subject to any conditions put on by the Chair.

There was further discussion whether the issues with the County would be solvable, but might not be. Ms. Chow said it is a legal issue. The question is not resolving it with the County. It's a question of resolving it with authority. Who has to the authority to do what? Member Gon said if that is not resolved they can't move forward then. Mr. Lemmo said they may make some sort of agreement with the County. Ms. Chow pointed out if you have no authority to make the agreement its illegal. That's the problem. And, I don't know what the answer is right now. I don't know what the authority is right now. I cannot say whether you can or cannot come to an agreement with the County on those issues. Member Gon said it is an unresolved issue, but I am going to press the case by not going back on his motion.

Member Pacheco said our conservation district rules allow for single family residences and he has always been a proponent of providing that opportunity as much as possible. He always sides with the rights of the property owner as much as possible as long as they do the framework and in that sense he supports his motion, but the question of the subdivision as a Board member he can't vote in favor of that not understanding whether the vote I make is a legal vote or not.

Member Gon said he said conditional on the...Member Pacheco asked if we approve your motion Member Gon said it can't move forward. Member Pacheco asked then the 180 days is done with anyway. What recourse do we have to deny for the permit not to be valid? Ms. Chow said that is the same question. If you made a decision and its illegal you then fall into the automatic approval area. Member Edlao asked that would be his concern because if the subdivision cannot be resolved then is it automatically approve. What happens? Do they have to reapply? Ms. Chow said there is a similar situation back in the HELCO power plant where the Board did a vote and was later moved as illegal because we didn't have sufficient number of votes and then we deemed automatic approval. The Statutes were changed subsequent to that regarding the Boating requirements which avoid that situation, but I think this is a similar situation where you acted in good faith and you made a decision that was not valid decision then you are in the automatic approval situation and there is some precedent for that.

Member Gon said if they took no action it would be automatically approved. This issue would still be unresolved and would be later found to be illegal. Ms. Chow said it would be automatically approved with no conditions because you automatically approved as is. No conditions. Mr. Gapp said one way or another the subdivision issue has to be worked out regardless of approving...

Member Edlao said he would feel more comfortable to ask for a denial, waive the fees and work it out with the County to legalize this subdivision thing. He feels more comfortable going that route rather than Member Gon's route. Ms. Chow said you would have automatic approval with no conditions. Member Edlao said it would be good for the applicants, but no conditions.

Member Pacheco said approve what because there is still no subdivision and that is what Member Edlao is asking. If they move to forward with this motion and find out it cannot be resolved what happens?

There were more discussions whether illegal and with no conditions, that the applicant was pushed into this and that the government should resolve this. Mr. Lemmo and Member Pacheco went over the history on that and that the house should be built.

Member Gon withdrew his motion and Member Goode seconded that.

Chair Aila summarized the process to request a contested case and follow up. Mr. Fuke asked in the request if the Board were inclined to deny it without prejudice. Member Gon pointed out we just had that discussion and it is in the minutes. Mr. Lemmo said to strike the second violation.

Board member Pacheco moved to approve staff's recommendation striking the second violation in the submittal and if the applicant requests a contested case hearing that the filing fee be waived. Member Gon seconded that. All voted in favor.

Mr. Fuke asked on behalf of the Gapps he request for a contested case hearing and the Chair said to submit it in writing within 10 days.

Unanimously approved as submitted (Pacheco, Gon)

Item F-1 Request for Authorization and Approval to Issue a Papahānaumokuākea Marine National Monument Conservation and Management Permit to the Monument Co-Trustee Representatives of the U.S. Department of the Interior, U.S. Fish and Wildlife Service; U.S. Department of Commerce, National Oceanic and Atmospheric Administration; and State of Hawai'i Department of Land and Natural Resources, for Access to State Waters to Conduct Conservation and Management Activities

Maria Carnavaele representing Division of Aquatic Resources conveyed item F-1 that the Board had seen this before. The difference is to allow the managers to achieve goals and to consider renewal of the previous work.

Member Gon said he appreciated staff coming here that this Board is used to seeing these. Maybe it's not necessary to have all the managers be back here and thanked her.

Member Edlao said it shows him the importance of taking care of that area.

Unanimously approved as submitted (Gon, Edlao)

Item E-1 Delegation of Authority to the Chairperson to Establish a Reasonable Schedule of Visiting Hours and Authority to Close or Restrict Public Use of All or Portions of Any State Park When Necessary for the Protection of the Area and/or the Safety and Welfare of Persons or Property, Pursuant to Hawaii Administrative Rules, Section 13-146-4(a)

Mr. Quinn related some background on item E-1 that the Maui issue is to have the Chairperson set the hours per the Hawaii Administrative Rules (HAR) as presented.

Member Pacheco asked whether there wasn't some emergency action and Mr. Quinn confirmed there was. Land Division had all rules delegated to the Chairperson years ago. Member Pacheco asked on whose authority. Mr. Quinn said in the rules and he read it. To manage the park and delegated from the Board to the Chair.

Member Pacheco asked whether staff is closing Hapuna and Mr. Quinn acknowledge they are and that the Chair has the authority to set the hours. Member Pacheco asked whether this was a language housekeeping item and it is per Mr. Quinn.

Iwi Kalua testified saying there are problems with this without consulting with the public or the Board. It affects communities and is detrimental to their future.

Member Goode asked for future the chairperson what recourse or process is involved. Ms. Chow said they could come back to the Board and ask the evaluation be revoked. It has come back on the agenda to the Board either through Parks or a division.

The Board members pointed out the safety and welfare or protection of the area rationale that the Chair would have to see what immediate dangers there are and why.

Iwi Kalua asked about Kealakekua issues and Chair Aila pointed out that is not before the Board today.

There was some Board discussions about harbors, trails and how via Na Ala Hele trails get closed and each division has the authority to close in times of public safety. Member Pacheco had the concern of being open ended in terms of the time frame.

The Board discussed closures with NARS and the periods of time and maybe come back to the Board for review. But, Sacred Falls they would never know if it would ever reopen and they discussed that. Ms. Chow said she is hearing Member Pacheco's suggestion that the delegation to the Chairperson for a limited closure and after that the Board could act to say it should be a permanent closure as far as to deal with emergency situations for health, safety and welfare of the environment, but the Chair should have the ability and should be delegated to the Chair specifically for him to do a closure for up to 6 months, 9 months, 90 days, whatever is appropriate. If he wants it to go longer than that then it should go to the Board.

Mr. Kalua asked whether the timeframe is set now and Ms. Chow said yes that it should be because of the delegation.

Member Pacheco asked on how the Statute reads now that the Chair could close a place and he can set hours already and the Department has taken that action and what we are doing is mentioning the Chairperson in the Administrative Rules. Would this supersede the part it says only managers of State Parks to only the Chairperson or could a State Park administrator come in and shut down a place immediately for public safety? Mr. Quinn said they continue to take immediate temporary action based on the weather or situation like shark attacks. Member Edlao read the rule and that it says temporary. Ms. Chow said the issue is the rule already exists and the rule says the Board's authorized representative. I think what Parks is asking for is the Board needs to authorize its representative and what he is asking for is the Board to authorize the Chairperson as the representative to be able to take actions under this rule. Hearing what Member Pacheco's concern was or suggestion was that the authorization be for the Chairperson to be able to be the representative for purposes of closure for up to 6 months or whatever. It's just a question of authorizing the representative and who that representative is and to get the specific authorization of the Board to act on this rule.

Member Pacheco asked in the context of Kealahou, if we vote to approve this are you looking at using that authority then to do a limited closure at Kealahou Bay or is that something yet to come before the Board. The Chair said they are asking the Board to clarify that the Chairperson has the authority to close sections of the park for periods of time. It's being done now and this restricts what can or cannot occur. We are looking for additional flexibility. Just for clarification, the authority already exists that this is authority to close portions of the park rather than the entire park. They are looking for flexibility to address any State park. He doesn't want to shut the whole thing down if he doesn't have to.

Jeff Hand representing the kayak operators at Kealahou Bay testified understanding closing the bay for health and safety issues, but the authority question is odd to him. To give someone authority to close something down that it doesn't justify that citing a chairperson who only interested in business would affect public policy giving it to one individual. Chair Aila said the Chairperson already has that. It just clarifies that to give the Chair more opportunities to be more selective about portions that may be closed and portions that are not. If not the only thing he has is to close the entire park down that doesn't give me the flexibility he thinks is necessary. Mr. Hand said coming from the outside he doesn't see the danger to public safety and welfare and should be something the Board should look at other ways rather than one single person.

Member Pacheco said he was trying to see the intent of this what prior situations and conditions that require immediate and effective decisions for the public. As considering Kealahou...

Chair Aila said if the discussion would help you to understand just under a year ago he was requested to go to Kealahou Bay to address multiple issues – including illegal kayaking, illegal drug dealing, extortion, the misuse of Ka'awaloa and reports of people harassing dolphins. The plan that is put forward today is to address all of those issues all at one time. I had 2 community meetings and in those community meetings I shared with the residents and there were kayak people there that the range of opportunities to deal with those problems could range from shutting down Kealahou Bay to other things. In the 11 months he had to assess the situation to take a look at all of those things. I already have the authority to close the park down and to say the Board has given the authority to the Chair to close the park down and say zero hours. I

would rather not be tied to only that opportunity because of the remaining other parts of Kealakekua Bay have be resolved since then.

Member Edlao said he doesn't think what is before us is Kealakekua Bay and we are going off track that we are talking about all State parks. Kealakekua Bay's issue will come up before the Board when it does come up. Member Pacheco said he doesn't think we would be seeing this if it wasn't for Kealakekua Bay and it is completely separate. Chair Aila noted this has been used to close Iolani Palace.

There was some discussion and clarification between Mr. Kalua and the Chair that the Chairperson has the authority now to close any State park - the whole park. This clarification will resolve that issue.

Member Pacheco made a motion for the Board to go into Executive Session pursuant to Section 92-5(a)(4), HRS to consult with our attorney on questions and issues pertaining to the Board's powers, duties, privileges, immunities and liabilities. Member Edlao seconded that. All voted in favor.

1:10 PM EXECUTIVE SESSION

1:19 PM RECONVENED

Member Pacheco said under advisement of the AG's office the Chairperson has the authority and has already been delegated by the Board to set a number of hours which includes no hours at all. Whereas it was unclear whether you can have a geographic determination so on the advice of the AG was to make that explicit and that is better clarity for me. In the matter of Kealakekua, the Chair would agree to hold a briefing at a Board meeting on the proposed management plans, the Department's plans. Chair Aila said on an upcoming meeting.

Unanimously approved as submitted (Goode, Edlao)

Item E-3 Request for Approval of Aqua Engineers Inc. as the Selected/Sole Bidder and to Execute a Contract for Services to Operate and Maintain the Water Systems at Kōke'e State Park and Polihale State Park, Kōke'e State Park Wastewater Treatment Facility, and the Kōke'e State Park and Wailua River State Park (Wailua Marina Section) Sewage Pumping Stations on Kaua'i

Mr. Quinn presented item E-3 that the contract amount was for about \$150,000 and additional \$100,000 for call out and after hours emergency type work.

Unanimously approved as submitted (Gon, Edlao)

Item D-3 Deny Request for Extension of Lease Term Made Pursuant to Act 207, Session Laws of Hawaii 2011, General Lease No. S-3621 Crescent City

Properties, Inc., Lessee, Waiakea, South Hilo, Hawaii, Tax Map Key: 3rd/2-2-49:06.

Mr. Tsuji asked to withdraw item D-3 to December.

DEFERRED

Item D-4 Sale of Storm Drainage Easement Reservations 1 and 2 in Favor of the State of Hawaii to Robert Glenn Bloom, Jr. and Bebi Latiefa Bloom, Paukaa, South Hilo, Hawaii, Tax Map Key:3rd/2-7-20:14.

Mr. Tsuji referred to the testimony in opposition. It is our easement granted to the State on private property for a storm drain and there is no public access.

Member Pacheco asked whether it could be used for public access and Mr. Tsuji and Ms. Chow both said no. Mr. Tsuji asked to approve as submitted.

Unanimously approved as submitted (Pacheco, Edlao)

Item D-6 Grant of Perpetual, Non-Exclusive Easement to Ernest J. Freitas, Jr., Trustee Under Revocable Trust Declaration dated December 20, 1990, for Access and Utility Purposes, Waimea, South Kohala, Hawaii, Tax Map Key: (3) 6-4-030: Portion of 014.

Mr. Tsuji distributed to the Board the 2 amendments and he read on page 3 of the remarks, paragraph 2, that it be stricken in its entirety and replaced with the following as read. On the recommendation section add a new recommendation 3.e. which he read. The ditch is under an EO (Executive Order) to DOA. The DOA and the applicant got into a law suit which was resolved by a settlement. DOA has a term easement with Mr. Freitas. This is so DOA has a say in the bridge that will cross over their EO.

Member Goode asked whether Mr. Freitas was ok with all this. Mr. Tsuji said he hasn't heard from him and DOA apologized they couldn't make it.

Member Pacheco said the concern is whatever bridge is put in is capable of handling heavy machinery. Mr. Tsuji said DOA wanted to make sure about the location of the bridge too. Mr. Freitas may not like those conditions.

Member Gon wondered why they weren't here and Mr. Tsuji said he just got these conditions yesterday.

There were some discussions about Mr. Freitas not being here.

The Board:

Member Gon made a motion to defer and was seconded by Member Pacheco. All voted in favor.

Deferred (Gon, Pacheco) Land Board indicated they had wanted to know Mr. Freitas' position on the amendments staff received from the Department of Agriculture (DOA); so they asked staff to incorporate the DOA amendments into a revised submittal and reschedule before the Board, meanwhile also sending the revised submittal to Mr. Freitas for comments.

- Item D-1** Grant of Perpetual, Non-Exclusive Easement to Board of Water Supply, County of Kauai, for Construction, Installation, Reinstallation, Use, Maintenance, Repair, and Removal of Two Water Meters and Appurtenant Water Pipelines, Valves, and Related Waterworks Equipment; Lihue Town, Lihue, Kauai, Tax Map Key: (4) 3-6-005:011 por.
- Item D-2** Issuance of Right-of-Entry Permit to B T Kuwahara LLC for the Purposes of Conducting an Environmental Assessment, Keonepoko Homesteads, Puna, Hawaii, Tax Map Key: 3rd/1-5-07:55.
- Item D-5** Issuance of Right-of-Entry Permit to Hawaii Explosives & Pyrotechnics, Inc. for Set up and Firing of Aerial Fireworks Display on December 31, 2012, Ouli, South Kohala, Hawaii, Tax Map Key: 3rd/6-2-02: seaward of 04.
- Item D-7** Request Approval to Exchange the Vehicle Access Location fronting Kuakini Highway on Lands under Governor's Executive Order No. 3821 to Department of Accounting and General Services, Makai portion Keauhou 1, North Kona, Hawaii, Tax Map Key:3rd/7-8-07:61.
- Item D-9** Issuance of Right-of-Entry Permit to Hawaii Explosives & Pyrotechnics, Inc. for Aerial Fireworks Display Purposes at Honolulu, Lahaina, Maui, Tax Map Key:(2) 4-2-004: seaward of 015.
- Item D-10** Issuance of Right-of-Entry Permit to Hawaii Explosives & Pyrotechnics, Inc. for Set up and Firing of Aerial Fireworks Display on November 20, 2012, Waikiki, Honolulu, Oahu, Tax Map Key: (1) 2-3-037:021 (Portion).
- Item D-12** Issuance of Right-of-Entry Permit to K & S Helicopters, Inc. dba Paradise Helicopters and Croman Corp. for Safety Zone Relating to the Building Maintenance Work on the Adjacent Private Property on November 12 and 19, 2012, Makaha, Waianae, Oahu, Tax Map Key: (1) 8-4-004:006 seaward.

Mr. Tsuji had no changes for the rest of the items.

Unanimously approved as submitted (Pacheco, Gon)

Adjourned (Pacheco, Edlao)

There being no further business, Chairperson Aila adjourned the meeting at 1:30 p.m. Recording(s) of the meeting and all written testimonies submitted at the meeting are filed in the Chairperson's Office and are available for review. Certain items on the agenda were taken out of sequence to accommodate applicants or interested parties present.

Respectfully submitted,



Adaline Cummings
Land Board Secretary

Approved for submittal:



William J. Aila, Jr.
Chairperson
Department of Land and Natural Resources