

STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Land Division  
Honolulu, Hawaii 96813

April 27, 2012

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

PSF No.: 08OD-068

OAHU

(1) Status of Negotiations for an Easement for Encroaching Seawall and Filled Lands; and (2) Enforcement Action Against TLM Partners Ltd. for, Inter Alia the Removal of the Encroaching Seawall and Filled Lands; situated at Niu, Honolulu, Oahu, Tax Map Key (1) 3-7-002:seaward of 009

BACKGROUND:

On September 26, 2008, item D-9, the Board authorized the issuance of a 55-year term, non-exclusive easement to TLM Partners Ltd. ("TLM") for seawall, lanai, and landscaping purposes. The approval was subject to a lump sum payment consideration. In September 2009, TLM paid the consideration of \$135,080.

TLM did not sign the easement document as requested by the department. In May 2010, TLM requested the cancellation of the easement application and a refund of the money paid by TLM.

TLM's request for cancellation and refund was deferred by the Board at its meetings on June 9, 2011, item D-8, and November 10, 2011, item D-13. At its meeting on January 27, 2012, item D-10, the Board ordered the refund of the easement payment to TLM, and if an easement document is not agreed to within thirty (30) days, asked staff to proceed with an enforcement action against TLM which may involve fines and removal of the wall and any other encumbrances onto State lands. A copy of the January 27, 2012 submittal is attached as **Exhibit A-1-A**.

STATUS OF NEGOTIATIONS<sup>1</sup>:

After the January 2012 Land Board meeting, the Land Division Administrator submitted a request through the State fiscal system for reimbursement of the compensation paid for the easement. \$108,064 was withdrawn from the Department's Beach Restoration special fund and \$27,016 was withdrawn from the OHA account, and the attorney for TLM picked up the refund checks from the Land Division office on March 7, 2012.

In the meantime, the Administrator and TLM's counsel have been communicating over the

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<sup>1</sup> This report on the status of negotiations is as of the date of preparing this Submittal which is early afternoon on April 13, 2012. To the extent progress on the negotiations is made subsequent to the preparation of this Submittal, staff will so advise the Board at the appropriate Land Board meeting.

phone and through e-mail on the issues surrounding the terms and conditions of the easement document, and exactly what the Land Board actually decided and ordered through the required motion and votes necessary, versus simply discussing in open session possible ideas to consider to working towards resolution of certain disputed items. Initially, TLM's position on certain major issues surrounding the real estate or mortgage lien was that the lien would be for:

- No definitive time deadline for payment other than "TLM's" sale which theoretically may never occur as TLM is a legal entity that may survive the passing of the McConnells.
- Subordination to a new 1<sup>st</sup> mortgage with no limit on the amount that could be borrowed.
- No interest or free interest type of loan until TLM the entity decides to sell the property.
- Nonrecourse debt and mortgage—which means the property is the sole source for payment and if upon a sale there is no equity or insufficient equity to pay the State due to a large new 1<sup>st</sup> mortgage balance, then that's it for the State as far as being compensated for the encroachment easement. The State would have no further remedy for payment from TLM or the McConnells personally.

The Administrator continuously objected to the "no deadline for payment" and the subordination to a new 1<sup>st</sup> mortgage for an unlimited amount—which could theoretically end up wiping out all equity in the property and leaving the State uncompensated for the encroachment easement granted. In effect, the State would be legitimizing the encroachment by granting a gratis or free easement. After much discussion and exchanges of various e-mail messages between the Administrator and TLM's counsel, some concessions were made however, the parties were unable to come to a resolution on certain major points of contention which can best be summarized by excerpting portions of the Administrator's April 9, 2012 e-mail to TLM's counsel.<sup>2</sup> The issues below have resulted in a stalemate and from staffs' perspective, are dealbreakers.

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Greg:

1. Deadline.

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*More importantly though, is your client's refusal of a firm deadline for payment. We cannot and will not agree to this--we must continue to insist on a firm deadline. This is especially so since your client is insisting that No Interest accrue and in addition, the fee owner of the property to be secured is not an individual but a legal entity that theoretically could go on beyond the passing of your clients, and possibly for a very long time without an actual sale or transfer of the secured property. The State cannot and will not wait indefinitely for payment for an easement issued to legitimize a an encroachment--especially when you're proposing that No Interest accrue. This is unreasonable and simply unacceptable.*

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<sup>2</sup> A copy of an email from the Land Division Administrator to TLM's counsel, dated March 8, 2012 and attached as Exhibit A-1-B-1, provides the background of the issues regarding the points of contention regarding the terms and conditions of the easement. Subsequently, on April 9, 2012, the Land Division Administrator sent a follow up email in response to TLM's counsel regarding a proposed settlement, which is attached as Exhibit A-1-B-2.

*At most we would be willing to extend the deadline to 10 years, and if agreeable by your client, we would also be willing to recommend that No Interest accrue--but that would be contingent upon a firm deadline of 10 years or less. After that it makes no sense as inflation would substantially eat away at the principle debt owed.*

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2. **Interest.** *For your information our standard interest rate for installment agreements (Land Board approved payment of a debt over time instead of all cash immediately) is currently 7.0 percent annually. But as noted above, unless your client is willing to agree to a deadline of no later than 10 years, then this is really is a nonissue as we won't be able to come to terms for the granting of an encroachment easement with payment over time, and we'll proceed accordingly.*
  
3. **Warranty.** *State does not and will not issue any warranties for an easement. All land disposition documents such as easements and leases are issued as is, where is. As to any reimbursement, there is really nothing to reimburse since the State has not even gotten paid for the easement. The most we may consider is a credit on the indebtedness.*

\*\*\*

*Very truly yours,*

*Russell Y. Tsuji  
Administrator*

Due to the stalemate on the critical issues noted above, and the fact that TLM received its money back and is now apparently very happy with the status quo of having the luxury of an encroaching seawall and filled lands for gratis, staff is pushing forward and recommending that the Board issue an order in the form of injunctive relief by ordering TLM to remove the encroaching area within 180 days. In addition, pursuant to Hawaii Revised Statutes Section 171-6 (12), the Board is requested to authorize the issuance of a fine of \$1000.00, per day, commencing with the date of this Board action, if TLM fails to remove all encroachments to the Department's satisfaction within 180 days. In addition, the Board is requested to order TLM Partners, Ltd. to pay administrative costs to the Department in the amount of at least \$4,295.00 and, if necessary, additional costs incurred by Department for the removal of the encroachment and restoration of the land to its original condition. In removing the seawall and filled lands, TLM shall be responsible to comply with any and all rules, regulations and laws whether County, State or Federal.

This is an enforcement action for the unauthorized use of State lands and is in the form of injunctive relief. The removal of the seawall and filled lands by TLM should not involve or need to involve the use of State funds or lands, and therefore, Chapter 343 requirements for an environmental assessment should be not triggered; provided however, to the extent an environmental assessment or impact statement may be required, then TLM shall be responsible to comply and bear all costs associated therewith.

**RECOMMENDATION:** That the Board:

- A. Pursuant to Hawaii Revised Statutes Section 171-6 (12), authorize injunctive relief through the issuance of an order to TLM Partners Ltd, for the removal of all

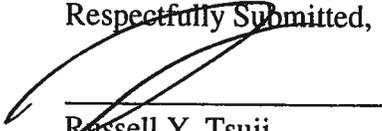
April 27, 2012

encroachments located on public land seaward of Tax Map Key No.: (1) 3-7-002:009, including but not limited to, the CRM wall, wire fence, and filled lands, at its own cost, as shown on the map filed as CSF No. 24735, dated October 22, 2008 and attached herein as **Exhibit A-1-D**, within 180 days of the date of this approval.:

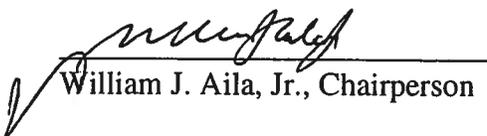
B. Pursuant to Hawaii Revised Statutes Section 171-6 (12):

1. Authorize the imposition of a fine against TLM Partners, Ltd., in the amount of \$1000.00 per day for the violation, commencing on the date of the Board's Order, if the encroachment is not removed to the Department's satisfaction within 180 days as noted above;
2. Order TLM Partners, Ltd. to pay administrative costs to the Department in the amount of at least \$4,295.00; and, if necessary, additional costs incurred by Department for the removal of the encroachment and restoration of the land to its original condition.

Respectfully Submitted,

  
\_\_\_\_\_  
Russell Y. Tsuji  
Administrator

APPROVED FOR SUBMITTAL:

  
\_\_\_\_\_  
William J. Aila, Jr., Chairperson

# **EXHIBIT**

**A-1-A**

STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Land Division  
Honolulu, Hawaii 96813

AMENDED

January 27, 2012

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

PSF No.: 08od-068

OAHU

Resubmittal – Request to Cancel Grant of Term, Non-Exclusive Easement to TLM Partners Ltd. for Seawall, Lanai and Landscaping Purposes, and Request for Refund of Consideration Paid, situated at Niu, Honolulu, Oahu, Tax Map Key: (1) 3-7-002:seaward of 009.

BACKGROUND:

The request was withdrawn from the agenda of November 10, 2011 upon the request of the applicant. Staff brings the request to today's agenda after consulted with the attorney of the applicant.

The subject request was heard by the Board on June 9, 2011, under agenda item D-8. The matter was deferred due to a lack of having the minimum four (4) votes in order to take official action. A copy of the June 9, 2011 submittal is attached as Exhibit I-A for the Board's reference.

At the last meeting in June, a question arose as to one of the comparable easement transactions in the Niu area (item 2 on Exhibit 10 attached to the June Submittal), showing an easement area of 2,197 square feet and a value of \$34,140. However, immediately following the June 9, 2011 Board meeting staff went back into its files and reviewed that transaction and learned that the easement in question was actually only 297 square feet, and not 2,197 square feet (or about \$115 per square foot). The value of the easement of that comparable was actually much higher than TLM's value of \$61.54 per square foot (2195 square feet and a value of \$135,080). Staff immediately informed TLM's counsel of this error.<sup>1</sup>

After the June 9 meeting, staff and TLM's counsel discussed various aspects of this case and exchanged confidential settlement proposals or ideas issued pursuant to Rule 408 of the Hawaii Rules of Evidence. At the end of the day, the parties could not come to terms and it was decided to bring this matter back to the Land Board for a decision.

<sup>1</sup> The land value assessed for real property tax purpose for the abutting TLM lands is \$1,899,000 for 16,317 square feet of land (\$116.38 per square foot), and the land value in the appraisal for the subject easement request is \$1,870,000 or \$114.61 per square foot). As such, the compensation sought for TLM's filled land and seawall easement seems very reasonable at \$61.54 per square foot.

APPROVED BY THE BOARD OF  
LAND AND NATURAL RESOURCES  
AT ITS MEETING HELD ON  
January 27, 2012

EXHIBIT "A" - 1 - A

It is still the staff's position that TLM is required to resolve the subject encroachment by way of a filled land and seawall easement, and that the compensation of \$135,080 is fair and just under these facts and circumstances.<sup>2</sup>

At the last meeting in June, the concept of the State being granted a real property lien in lieu of the cash equivalent for the filled land and seawall easement was discussed. After much discussion internally and with counsel, and in an attempt to reach an amicable resolution of this matter, staff is amenable to either: (1) the execution of an appropriate easement document full cash value of the easement of \$135,080, or (2) the execution of an appropriate easement document and a real property lien that runs with the land encumbering TLM's private lands in favor of the State for the full easement value (\$135,080).

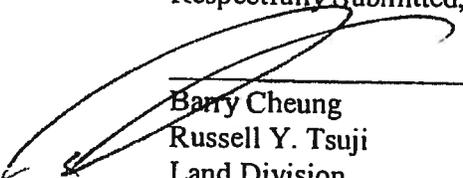
RECOMMENDATION: That the Board:

- A. Deny the request by TLM to cancel the easement request and for a refund of the cash paid for the easement in the amount of \$135,080<sup>3</sup>;

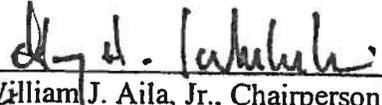
OR

- B. Approve and authorize the Chairperson to execute an appropriate easement document provided that TLM grants to the State a real property lien (and provide to the State a current title report showing all encumbrances on the land and as may be approved as to form by the Department of the Attorney General) that runs with the land encumbering the abutting TLM's private lands for the full easement value of \$135,080, and the return of the cash equivalent of \$135,080 to TLM.

Respectfully Submitted,

  
Barry Cheung  
Russell Y. Tsuji  
Land Division

APPROVED FOR SUBMITTAL:

  
William J. Aila, Jr., Chairperson

<sup>2</sup> After reviewing the prior easement document sent to TLM, staff believes that some of the terms and conditions related to the conservation district may not have been entirely applicable in this case. If requested by TLM, staff is willing to work with TLM and the Department of the Attorney General on attempting to work out terms and conditions that may be more appropriate or acceptable to all parties.

<sup>3</sup> TLM previously paid \$135,080 for the easement and \$55 for the fee for the easement document and map.

Land Board Meeting: January 27, 2012; D-10: See additional page

Land Board Meeting: January 27, 2012, D-10; Amended

**Land Board ordered the return of the money deposited to TLM Partners, Ltd. (TLM) and if an easement document is not agreed to within thirty (30) days, then staff is asked to proceed with an enforcement action against TLM which may involve fines and removal of the wall and any other encroachments onto State land.**

# **EXHIBIT**

**I - A**

STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Land Division  
Honolulu, Hawaii 96813

June 9, 2011

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

PSF No: 08od-068

OAHU

Request to Cancel Grant of Term, Non-Exclusive Easement to TLM Partners Ltd. for Seawall, Lanai and Landscaping Purposes, and Request for Refund of Consideration and Fees Paid, situated at Niu, Honolulu, Oahu, Tax Map Key (1) 3-7-002:seaward of 009

BACKGROUND:

On May 8, 2008 and June 6, 2008, the Department received correspondence from Mr. Donald Clegg, the consultant for TLM Partners Ltd ("TLM" which hereafter shall also include its attorneys, consultants and agents) seeking to acquire an easement for a seawall encroachment and use of State lands. Mr. Clegg's correspondence also included survey maps, photographs, and a "shoreline encroachment information sheet" describing the area it sought to acquire. See Exhibits "1" and "2" attached hereto.

In 1999 the Board of Land and Natural Resource (Land Board) established a policy to allow the disposition of shoreline encroachments by either removal or issuance of an easement. In carrying-out this policy, the Department established criteria to guide decision-making over specific cases. The criteria are as follows:

1. Protect/preserve/enhance public shoreline access;
2. Protect/preserve/enhance public beach areas;
3. Protect adjacent properties;
4. Protect property and important facilities/structures from erosion damages; and
5. Apply "no tolerance" policy for recent or new unauthorized shoreline structures

In this instance, staff concurred with TLM's consultant that the legitimization through an easement would be appropriate. Thereafter, on September 26, 2008, under agenda item D-9, the Land Board approved TLM's request and staff's recommendation for the issuance of a 55-year term, non-exclusive easement to TLM for seawall, lanai and landscaping purposes. A copy of the September 26, 2008 submittal is attached as Exhibit "3". Parts of the Land Board requirements were as follows:

**EXHIBIT "A"**

CONSIDERATION:

One-time payment to be determined by independent or staff appraisal establishing fair market rent, subject to review and approval by the Chairperson.

APPLICANT REQUIREMENTS:

Applicant shall be required to

- 1) Pay for an appraisal to determine one-time payment; and
- 2) Provide survey map and description according to State DAGS standards and at Applicant's own cost (previously submitted).

TLM paid for the appraisal and agreed to the appraisal amount. By letter dated September 8, 2009 (Exhibit 4), TLM paid the appraised value of \$135,080.00 for the term easement and submitted survey maps of the subject encroachment area of 2,195 square feet.<sup>1</sup> The Department of Attorney General drafted the easement document. Staff sent the document to TLM in January 2010.

TLM still holds the legal easement document and has not returned the executed document to the Department. Nevertheless starting in May 2010, TLM, through its attorneys has been asking staff to cancel the easement and return the money it paid.<sup>2</sup> For various correspondence between TLM's attorneys and the Department, see Exhibits "5a through 5d" through "6a through 6c," respectively.

At TLM's insistence, staff agreed to present this matter to the Land Board.

SUBJECT PROPERTY AND THE ENCROACHMENT:

The subject property is located in the Niu Beach Lots subdivision. This area was subdivided in 1927. See attached subdivision map, Exhibit 7. TLM's property includes Lot 28 as shown on this map. The shoreline at the time is shown on the map. The approximate azimuths and distances of the shoreline are stated on the map.

The easement covers 2195 square feet of land makai of the 1927 shoreline and a seawall on the makai end of this new land. The seawall is about 35 to 40 feet makai of the record boundary. Staff believes the area between the record boundary and the seawall is filled.

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<sup>1</sup> TLM's private survey maps are part of Exhibit "1" and "2" attached hereto, and for the Land Board's information, attached as Exhibit "9" are additional photographs of the encroachment area from the appraisal report.

<sup>2</sup> The money for these shoreline encroachments, especially for a seawall and use of State lands, typically is initially split 20% to OHA, and 80% to the Beach Fund administered by the Office of Conservation and Coastal Lands. Here, since the money was received by the Beach Fund in or around January of 2010, it is very likely the money has already been set aside by OCCL to help pay for its beach nourishment project at Waikiki Beach.

Such filled land and the seawall is an encroachment.

There are several bases for staff's position. A 1949 aerial photograph shows that the seawall had been constructed by that time and was located makai of an existing sandy beach – that is makai of the then shoreline. Exhibit 8. Some time after the seawall was built on territorial / state land, the area behind it was backfilled. This is apparent from staff's site visit when it was noted that the height of the seawall is about 6 feet higher than the submerged lands (which consists of a rocky shoreline). The land mauka and inside the seawall sits at least 5 feet above the submerged lands that is situated outside and seaward of the seawall.<sup>3</sup> This is clear indicia and evidence that the area was filled in the past. Moreover, other property owners within this particular neighborhood have sought to legitimize various encroachments in the form of easements as well. See Exhibits "10" and "11" which includes a spreadsheet showing various lot owners in the surrounding area and a map of those who obtained or are seeking an easement to legitimize encroachments and unauthorized uses of State lands.

TLM itself indicated that the area behind the seawall was "fill." See specifically para. 6 of Clegg's letter dated June 6, 2008 (Exhibit "2") and enclosures, and see generally, Clegg's letter dated May 8, 2008 (Exhibit "1").

#### REMARKS:

The Land Division staff has been consulting with the Department of the Attorney General, as well as the shoreline certification crew consisting of members from the Land Division, Office of Conservation and Coastal Lands and the State Surveyor's Office. Staff and the Department of the Attorney General do not believe TLM is entitled to cancel its easement which was issued to legitimize the seawall encroachment and unauthorized fill on State lands.

Here, we have TLM or its agent requesting to legitimize the encroachment through an easement for the seawall and filled land area. We have TLM's offer, Land Board's acceptance, and performance by TLM of providing the necessary survey maps, payment of the appraisal fee, and the payment of the appraised value of the easement. Staff and the Department of Attorney General consider the easement is a completed transaction. TLM's request to cancel the easement is and should be treated exactly as would any such request. In such a case, the easement can only be canceled if alternative arrangements are made to resolve the encroachment.

Staff therefore recommends that the Land Board deny TLM's request to cancel the easement unless and until TLM works with staff to make satisfactory alternative

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<sup>3</sup> See photographs of the area attached to Don Clegg's letter dated June 6, 2008 (Exhibit "2") and the photographs from the Appraisal Report attached hereto as Exhibit "9".

June 9, 2011

arrangements to resolve the encroachment.<sup>4</sup>

If and when such arrangements are made, then a portion of the payment for the easement may be retained to account for unauthorized use of state land.<sup>5</sup>

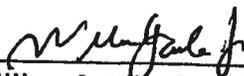
**RECOMMENDATION:** That the Land Board deny the request by TLM to cancel the easement and request for a refund of the consideration and fees for a total amount of \$135,135.00 regarding the grant of term, non-exclusive easement unless and until alternative arrangements to resolve the encroachment are presented to and approved by the Land Board.

Respectfully Submitted,



Barry Cheung  
Russell Y. Tsuji  
Land Division

APPROVED FOR SUBMITTAL:

  
William J. Aifa, Jr., Chairperson

<sup>4</sup> This scenario often arises when processing shoreline certification applications. Applicants with shoreline encroachment problems must "resolve the encroachment" before the Department will certify the shoreline. Resolving the encroachment will either involve seeking the approval from the Department and Land Board to legitimize the encroachment through an easement as was done in the instant TLM case, or removal. HAR 13-222-19 [Encroachment upon State land and unauthorized shoreline improvements]. In this case, removal will likely lead to substantial erosion on the subject property and possibly neighboring properties.

<sup>5</sup> Easement commencement date upon Land Board's approval (September 26, 2008) through June 9, 2011 which is about 32-33 months or so, over a 55-year term easement. The encroachments have clearly been in existence for at least as long as and perhaps longer than the Land Board approval of September 26, 2008.

**EXHIBIT**

**LIST**

## Exhibit List

### TLM—Seawall Encroachment and Filled Lands Case

<u>Exhibit No.</u>	<u>Description</u>
1	Don Clegg letter dated May 8, 2008
2	Don Clegg letter w/Enclosures dated June 6, 2008
3	Land Board Submittal dated September 26, 2008
4	TLM's letter dated September 8, 2009 paying \$135,080.00 for the term easement for the encroachment
5a	TLM's Counsel's letter to DLNR dated May 3, 2010
5b	TLM's Counsel's letter to DLNR dated July 30, 2010
5c	TLM's Counsel's letter to DLNR dated November 2, 2010
5d	TLM's Counsel's letter to DLNR dated December 9, 2010
6a	DLNR's letter to Counsel dated May 24, 2010
6b	DLNR's letter to Counsel dated October 18, 2010
6c	DLNR's letter to Counsel dated November 29, 2010
7	1927 Subdivision Map
8	1949 Aerial Photograph of the area
9	Photographs from Appraisal Report
10	Spreadsheet showing various lot owners in the surrounding area that have sought or obtained easements for various types of encroachments
11	Map of showing various lot owners in the surrounding area that have sought or obtained easements for various types of encroachments

# **EXHIBIT**

**1**

PHONE (BUS): (808) 536-5695  
FAX: (808) 599-1553



**ANALYTICAL PLANNING CONSULTANTS, INC.**  
928 NUUANU AVENUE, SUITE 502 • HONOLULU, HI 96817

RECEIVED  
DIVISION

2008 MAY 12 A 9:03

May 8, 2008

Mr. Morris Atta, Acting Director  
Land Division  
Department of Land and Natural Resources  
State of Hawaii  
P.O. Box 621  
Honolulu, HI 96809

Dear Mr. Atta

Mr. Tom McConnell is the owner of the property at 5677 Kalaniana'ole Hwy., TMK 3-7-002:009. It is our understanding that the State of Hawaii owns a strip of land, 2,195 sq. ft. in area, located between the makai boundary of Mr. McConnell's property and the ocean. Mr. McConnell wants to purchase/lease the strip of land from the State prior to doing some reconstruction of the existing house.

Enclosed is map prepared by a licensed Land Surveyor which shows the McConnell property and the purchase/lease area. Mr. McConnell is aware of the hold on the sale of ceded lands and if purchase is not possible at this time, would like to proceed with a lease.

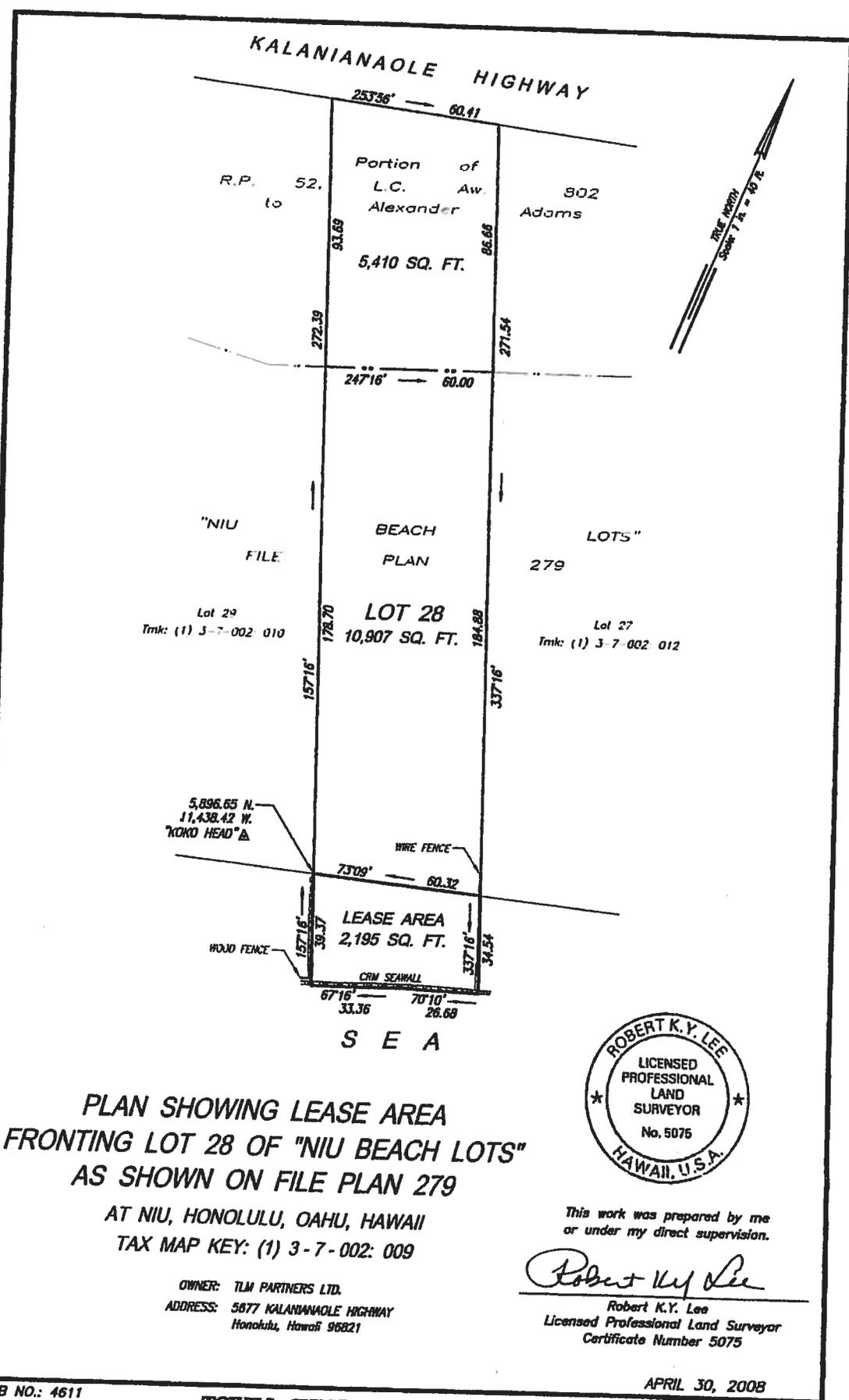
I have discussed this with Mr. Al Jodar of your staff who suggested that I submit this request to your office. If there are any questions please contact me at 536-5695.

Sincerely,

Donald Clegg  
President

**EXHIBIT " 1 "**

J:\L.C.\SURVEY CAD FILES\2008\4611\DWG\4611\_LOT28\_EASE.DWG



**PLAN SHOWING LEASE AREA  
FRONTING LOT 28 OF "NIU BEACH LOTS"  
AS SHOWN ON FILE PLAN 279  
AT NIU, HONOLULU, OAHU, HAWAII  
TAX MAP KEY: (1) 3-7-002: 009**



*This work was prepared by me  
or under my direct supervision.*

*Robert K.Y. Lee*

Robert K.Y. Lee  
Licensed Professional Land Surveyor  
Certificate Number 5075

JOB NO.: 4611  
FB. NO.: 1789  
8.5" X 14" = 0.8 Sq. Ft.

**TOWILL SHIGEOKA & ASSOCIATES, INC.  
LAND SURVEYORS**

APRIL 30, 2008  
2153 N. KING STREET  
SUITE 308  
HONOLULU, HAWAII 96815

# **EXHIBIT**

**2**



PHONE (HUS): (808) 536-5695  
FAX: (808) 599-1553

**ANALYTICAL PLANNING CONSULTANTS, INC.** RECEIVED  
928 NUUANU AVENUE, SUITE 502 • HONOLULU, HI 96817  
LAND DIVISION

2008 JUN -6 P 3:33

June 6, 2008

RECEIVED  
LAND DIVISION

08ad-068

Mr. Morris Atta, Acting Director  
Land Division  
Department of Land and Natural Resources  
State of Hawaii  
P.O. Box 621  
Honolulu, HI 96809

Attn: Mr. Al Jodar

Dear Mr. Atta

Mr. Tom McConnell is the owner of the property at 5677 Kalaniana'ole Hwy., TMK 3-7-002:009. It is our understanding that the State of Hawaii owns a strip of land, approximately 2,195 sq. ft. in area, located between the makai boundary of Mr. McConnell's property and the ocean. Mr. McConnell wants to purchase the strip of land from the State prior to doing some reconstruction of the existing house or constructing a new home. Mr. McConnell is aware of the hold on the sale of ceded lands and if purchase is not possible at this time would like to proceed with a long term lease.

Enclosed are the following:

1. Completed "Shoreline Encroachment Information Sheet".
2. Aerial Photo of the property and surrounding area dated Nov. 17, 1954. The photo shows a seawall at the makei end of the property. There appears to be a second wall mauka of the seawall which would be at the current makai boundary of the parcel. The distance on the photo from this wall and the street matches this distance on the surveyors map, and the distance from this wall to the sea wall on the photo matches this distance on the surveyors map. This latter is the area that the owner is asking to purchase or lease.
3. Aerial photo of the property and surrounding area dated Jan. 20, 1961. Unfortunately the resolution on this photo is not as good as the 1954 photo, however there appears to be a seawall at the makai end of the property on the State land. The second wall mauka is obscured by the vegetation.

**EXHIBIT "2"**

4. Photo from the ocean of the sea wall encroachment in front of the existing house. Photo taken May 2008.
5. Photo from the ocean of the abutting seawall encroachments. Note that every property has a sea wall. In, fact there are sea walls makai of every parcel along Niuiki Circle. Photo taken May 2008
6. Photo taken from the house showing much of the "fill" area. Photo taken May 2008.
7. Google satellite photo of property and surrounding area. Photo taken 2007 or 2008.
8. Tax map
9. Map prepared by a licensed land surveyor of the McConnell property and the proposed purchase/lease area.
10. Topographic Survey of parcel 6 (Lot 28) and the encroachment.

If there are any questions please contact me at 536-5695.

Sincerely,

  
Donald Clegg  
President

SHORELINE ENCROACHMENT INFORMATION SHEET  
Department of Land and Natural Resources  
State of Hawaii

June 3, 2008

#1: Applicant:

TLM Partners Ltd.  
1568 Calzada Avenue  
Santa Ynez, CA 93460  
Thomas E. McConnell, Linda M. McConnell;  
General Partners  
Tel: (805) 686-1489 home, (805) 264-5510 mobile,  
(805) 922-2250 office, (808) 373-4544 home Hawaii

#2: Location:

5677 Kalaniana'ole Hwy  
Honolulu, HI 96821

TMK: (1) 3-7-002:009 Lot 28 File Plan 279

#3: Approximate Size of Encroachment: 2,195 sq. feet

#4: Approx. Date of Encroachment:

Unknown but prior to November 17, 1954 (see aerial photo showing seawall existing at site as of this date).

#5: Date of Previous Shoreline Survey:

Unknown

#6: Identification of Adjacent Development and Surrounding Land Use:

See aerial photo. Existing residential properties adjacent to both sides of site. All properties in area have existing seawalls.

#7: Identification of Surrounding Artificial Coastal Structures:  
Existing seawalls. See photos.

#8: Assessment of Beach Resources:

Poor. Area has no beach.

#9: Assessment of Public Access:

Poor. Area has no public access and no public parking.

#10: Effect of Removing Encroachment on Upland Development and Surrounding Uses:

Removing existing seawall would result in rapid erosion of land areas behind existing seawalls on adjacent properties, loss of existing mature shoreline palm trees and other vegetation, and other unknown damage.

#11: Would Removal of Encroachment Improve Beach Processes and Public Access:

No. The area has no beach, no public access, and no public parking.



**R.M.TOWILL**  
**PHOTO # 1255-4**  
**DATE: 11-17-54**



R.M.TOWILL  
PHOTO # 2238-21  
DATE: 1-20-61





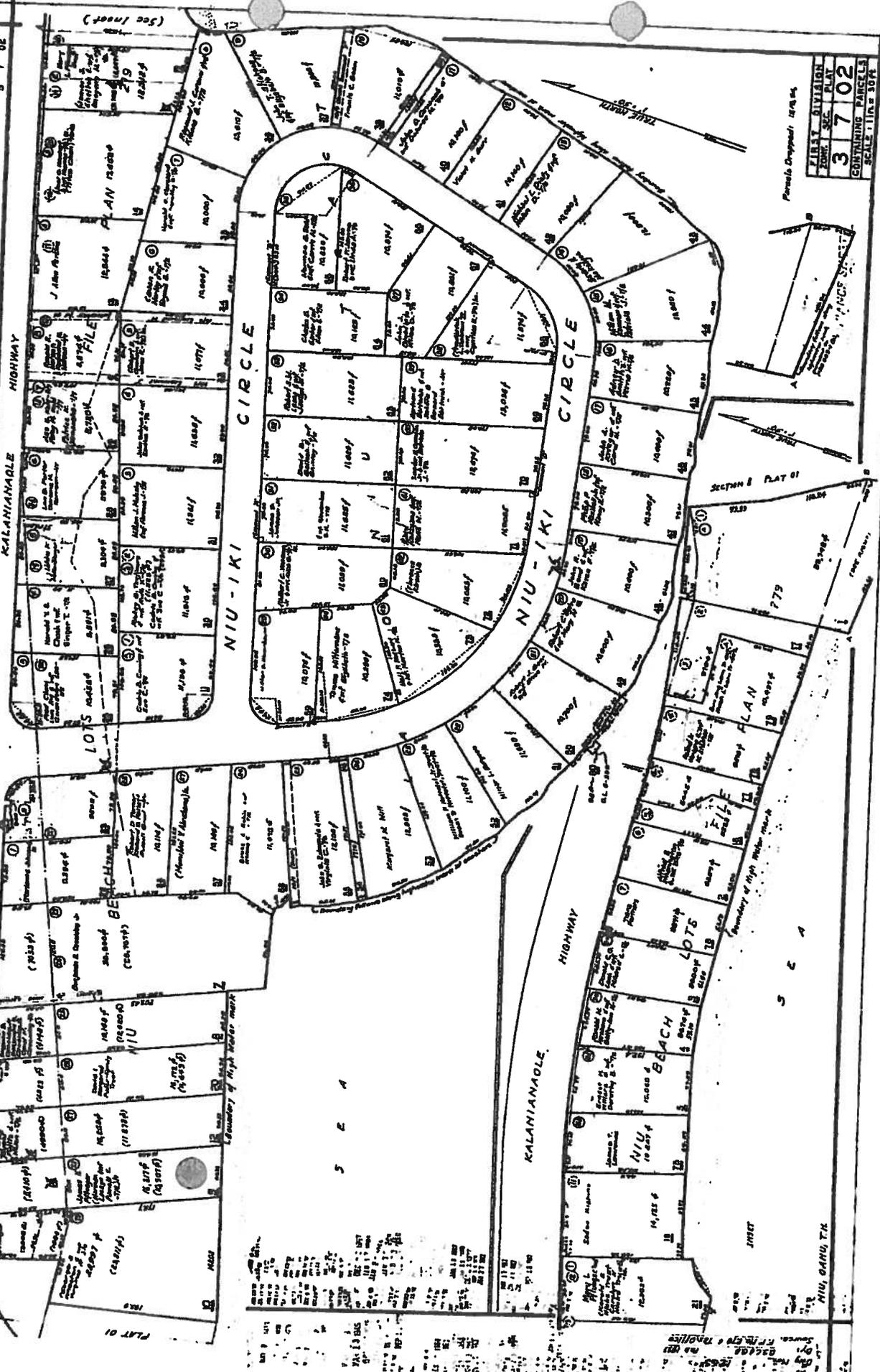




5677 Kalaianaoale Hwy, Honolulu, HI 96821



8 7 02



FIRST DIVISION  
 3 7 02  
 CONTAINING PARCELS  
 SCALE 1 INCH = 20 FEET

Plat No. 1000  
 Date of Plat 10/10/1914  
 Filed for Record 10/10/1914  
 Recorded 10/10/1914  
 Office of the Registrar of Deeds  
 Honolulu, Hawaii

PLAT

KALANIANAOLE HIGHWAY

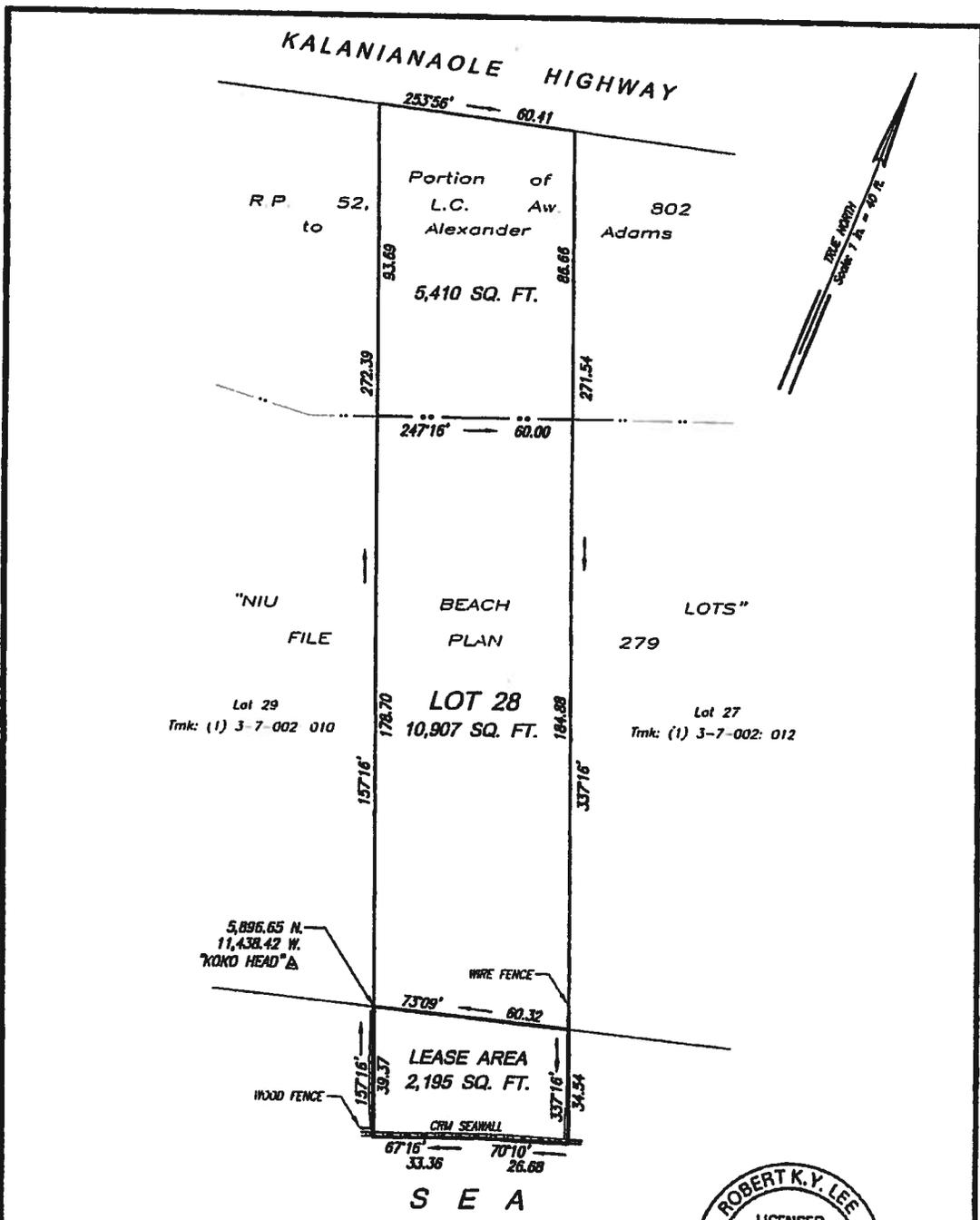
NIU-IKI CIRCLE

KALANIANAOLE HIGHWAY

SECTION 1 PLAT 01

Source: R.F. 1000 & 1001  
 Plat No. 1000  
 Date of Plat 10/10/1914  
 Filed for Record 10/10/1914  
 Recorded 10/10/1914  
 Office of the Registrar of Deeds  
 Honolulu, Hawaii

J:\L.C.\SURVEY CAD FILES\2008\4611\DWG\4611\_LOT28\_EASE.DWG



**PLAN SHOWING LEASE AREA  
FRONTING LOT 28 OF "NIU BEACH LOTS"  
AS SHOWN ON FILE PLAN 279  
AT NIU, HONOLULU, OAHU, HAWAII  
TAX MAP KEY: (1) 3-7-002: 009**



*This work was prepared by me  
or under my direct supervision.*

*Robert K.Y. Lee*

**Robert K.Y. Lee**  
Licensed Professional Land Surveyor  
Certificate Number 5075

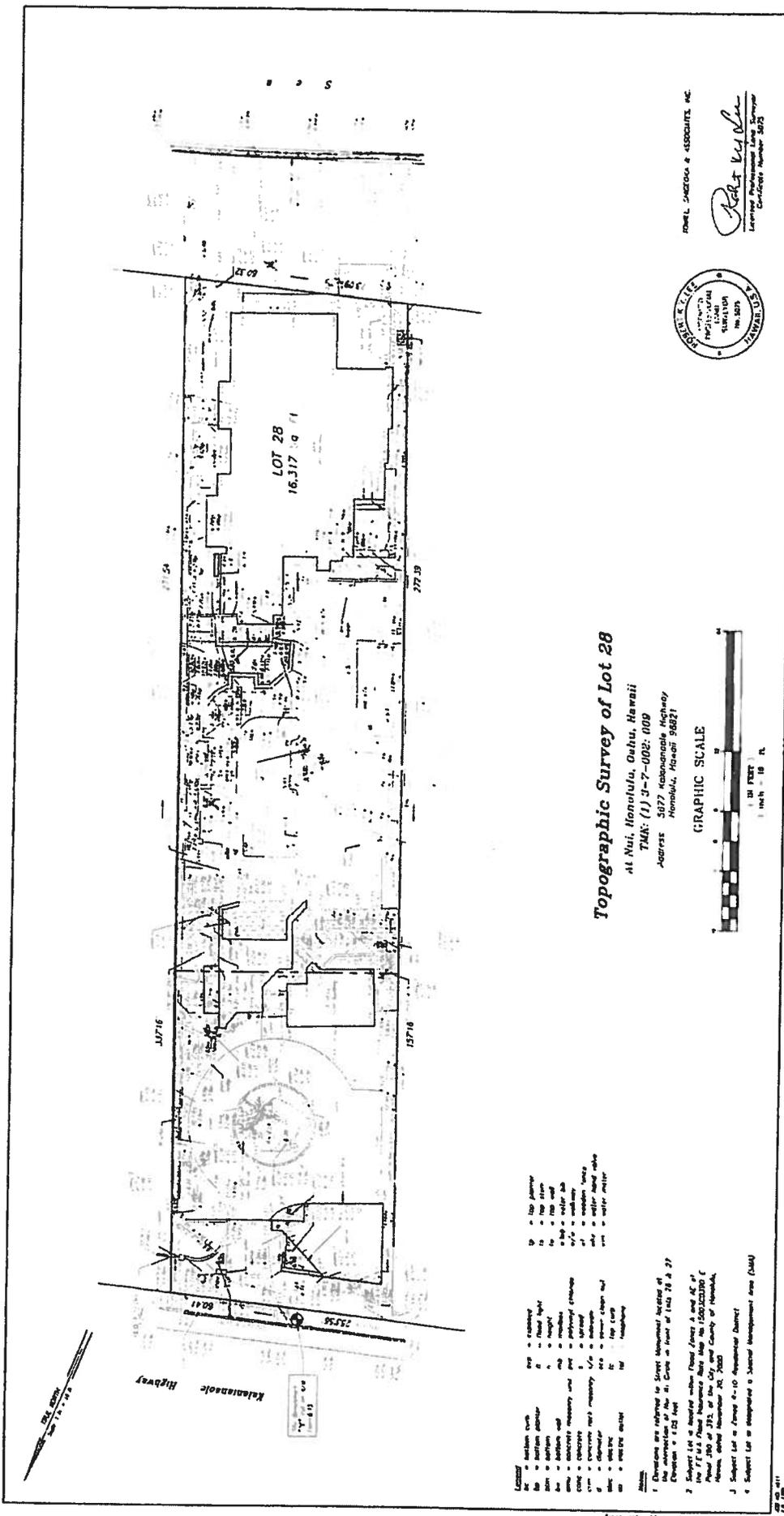
**OWNER: TLM PARTNERS LTD.**  
**ADDRESS: 5677 KALANIANA'OLE HIGHWAY**  
**Honolulu, Hawaii 96821**

**APRIL 30, 2008**

**JOB NO.: 4611**  
**FB. NO.: 1789**  
**8.5" X 14" = 0.8 Sq. Ft.**

**TOWILL SHIGEOKA & ASSOCIATES, INC.**  
**LAND SURVEYORS**

**2153 N. KING STREET**  
**SUITE 308**  
**HONOLULU, HAWAII 96813**



**Topographic Survey of Lot 28**

At Hui, Honolulu, Oahu, Hawaii  
 TMA: (1) J-7-002: 009  
 Address: 5077 Kahananapa Highway  
 Honolulu, Hawaii 96821



ROBERT KEY & ASSOCIATES, INC.  
 Robert Key  
 Licensed Professional Land Surveyor  
 Certificate Number 5075

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- 3 - Station
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- 99 - Station
- 100 - Station

1. All dimensions are referred to Street Measurement System of Hawaii.  
 2. Subject Lot is located within Parcel 1000 & 1001, etc., of the 77.5 Acre Parcel Insurance Area Map No. 150022300 (Plate 100 of 101, of the City and County of Honolulu, Hawaii, dated November 20, 2003).  
 3. Subject Lot is Parcel 4-10 Assessment District.  
 4. Subject Lot is designated a Special Management Area (SMA).

TOWILL SUGROKA & ASSOCIATES, INC.  
 LAND SURVEYORS

10/20/04

# **EXHIBIT**

**3**

0800-068

STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Land Division  
Honolulu, Hawaii 96813

September 26, 2008

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

Ref:08od-068

Oahu

Grant of Term, Non-Exclusive Easement to TLM Partners LTD  
for Seawall, Lanai and Landscaping Purposes, Niu, Honolulu,  
Oahu, Tax Map Key: 3-7-02: 09 seaward.

APPLICANT:

TLM Partners LTD, whose mailing address is 1568 Calzada Avenue,  
Santa Ynez, California 93460.

LEGAL REFERENCE:

Section 171-13, Hawaii Revised Statutes, as amended.

LOCATION:

Portion of Government lands of Honolulu located seaward of Tax  
Map Key: 3-7-02: 09, Niu, Honolulu, Oahu, as shown on the  
attached map labeled Exhibit A.

AREA:

2,195 square feet, more or less, to be determined by DAGS Survey  
Division.

ZONING:

State Land Use District: Conservation

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act

DHHL 30% entitlement lands pursuant to the Hawaii State  
Constitution: YES \_\_\_\_\_ NO  x

CURRENT USE STATUS:

Unencumbered with encroachments.

APPROVED BY THE BOARD OF  
LAND AND NATURAL RESOURCES  
AT ITS MEETING HELD ON

September 26, 2008

EXHIBIT "3"

CHARACTER OF USE:

Right, privilege and authority to use and occupy the subject area for the purpose of using, maintaining, repairing, replacing and removing existing seawall, lanai and landscaping area purposes, under and across State-owned land.

COMMENCEMENT DATE:

To be determined by the Chairperson.

CONSIDERATION:

One-time payment to be determined by independent or staff appraisal establishing fair market rent, subject to review and approval by the Chairperson.

EASEMENT TERM:

Fifty-five (55) years.

CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

Office of Conservation and Coastal Lands (OCCL) staff cited evidence that the subject seawall is contiguous with the neighbors' walls on either side, which were in existence before 1964, and is considered a pre-existing use prior to the enactment of Chapter 343. Inasmuch as this action contemplates the use and maintenance of pre-existing structures or features on State lands, this action is exempt from the provisions of chapter 343, HRS, as amended, pursuant to Exemption class #1 of the Approved EIS Exemption List for the Division dated April 28, 1986.

DCCA VERIFICATION:

Not applicable. The Applicant as a landowner is not required to register with DCCA.

APPLICANT REQUIREMENTS:

Applicant shall be required to

- 1) Pay for an appraisal to determine one-time payment; and
- 2) Provide survey map and description according to State DAGS standards and at Applicant's own cost (previously submitted).

REMARKS:

The applicant is planning to do some reconstruction on the property. Part of the building permit process triggers a shoreline certification process. The survey map reveals an encroachment of the seawall, portion of the dwelling's tile lanai and a landscaped

area with a total area of about 2,195 square feet (see Exhibit B-1 & B-2).

The Office of Conservation and Coastal Lands (OCCL) staff has determined that the issuance of an easement for the encroachments would have no adverse impacts on natural resources, including beach resources and therefore has no objections to the issuance of an easement (see OCCL letter, Exhibit C).

Applicant has not had a lease, permit, easement or other disposition of State lands terminated within the last five years due to non-compliance with such terms and conditions.

Staff also recommends imposing a \$500 fine, pursuant to Section 171-6(12)HRS, for the encroachment constructed without prior authorization by the State.

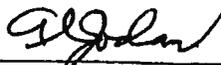
A request for comments was made to various agencies. The Department of Hawaiian Home Lands, Department of Land and Natural Resources, Water Resource Management Division and the Board of Water Supply had no objections or no comments. The Office of Hawaiian Affairs provided comments regarding the \$500 fine and the 55-year term easement (see Exhibit D). Staff notes that the 55-year term easement is a standard condition that has been approved for earlier seawall easements with similar issues while the \$500 fine is what the Board had consistently imposed in these cases.

RECOMMENDATION: That the Board:

1. Impose a \$500 fine for illegal encroachment, under Section 171-6(12).
2. Authorize the subject requests to be applicable in the event of a change in the ownership of the abutting parcel described as Tax Map Key: (1) 3-7-02:09, provided the succeeding owner has not had a lease, permit, easement or other disposition of State lands terminated within the last five (5) years due to non-compliance with such terms and conditions.
3. Subject to the Applicant fulfilling all of the Applicant requirements listed above, authorize the issuance of a term non-exclusive easement to TLM Partners LTD, covering the subject area for seawall, lanai and landscaping area purposes under the terms and conditions cited above, which are by this reference incorporated herein and further subject to the following:
  - A. The standard terms and conditions of the most current term shoreline encroachment easement document form, as may be amended from time to time;

- B. Review and approval by the Department of the Attorney General;
- C. The easement shall run with the land and shall inure to the benefit of the real property described as Tax Map Key: 3-7-02:09, provided that when the easement is sold, assigned, conveyed, or otherwise transferred, the Grantee shall notify the Grantee's successors or assigns of the insurance requirement in writing, separate and apart from this easement document;
- D. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State; and
- E. Any shoreline hardening policy that may be adopted by the Board prior to execution of the grant of easement

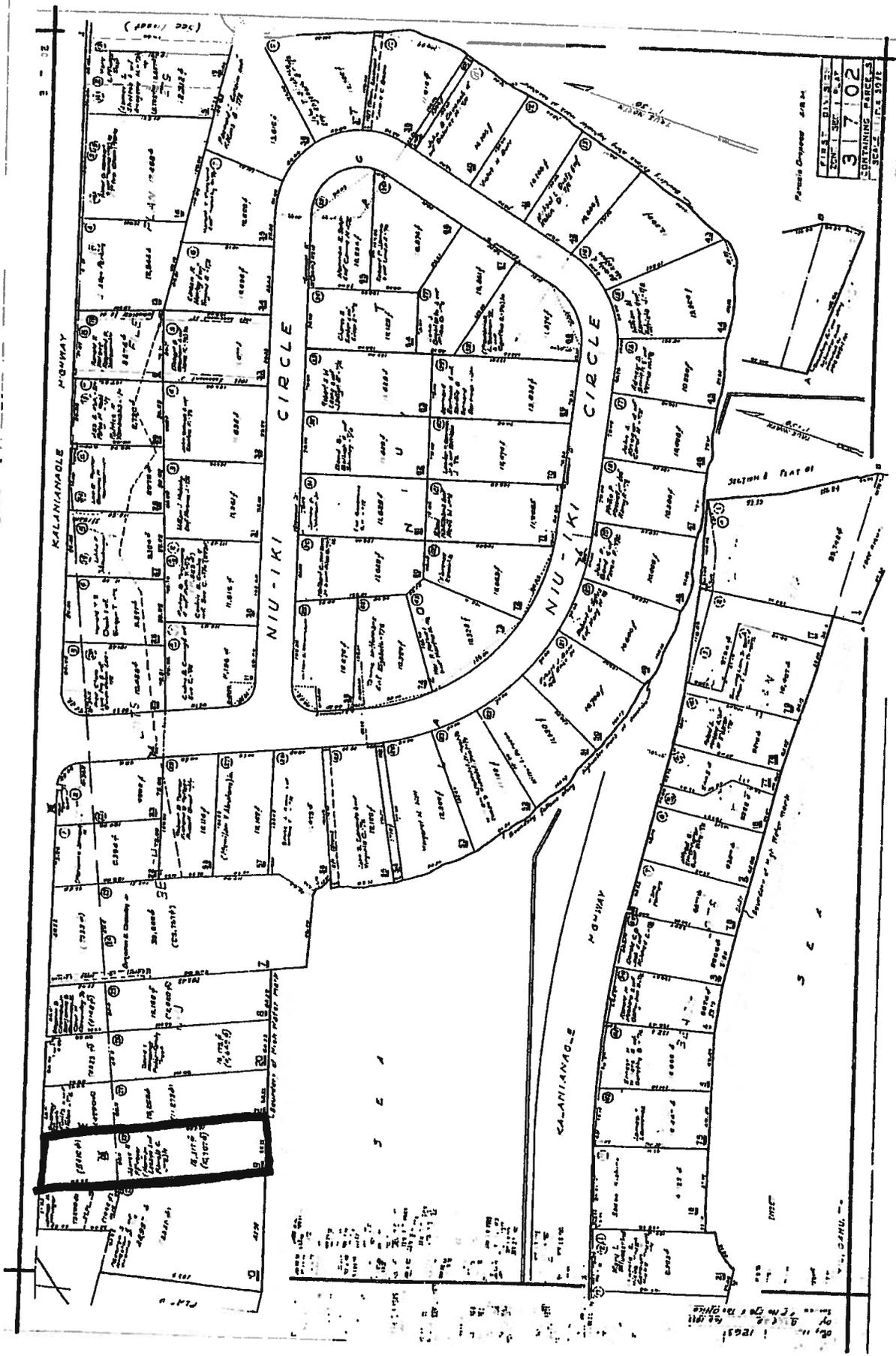
Respectfully Submitted,



Al Jodar  
Land agent

APPROVED FOR SUBMITTAL:

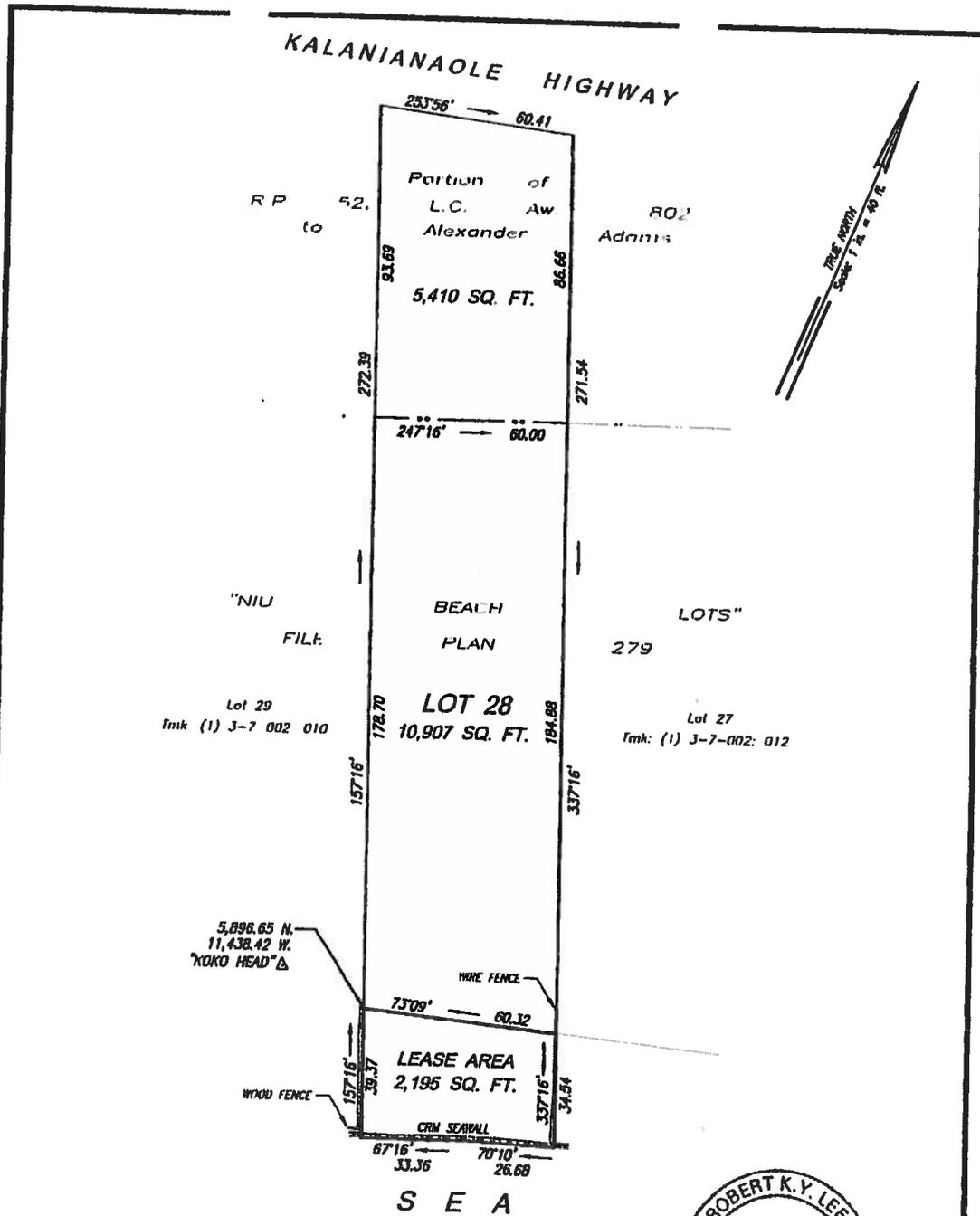
  
\_\_\_\_\_  
Laura H. Thielen, Chairperson



FILE NO. DIV. 1-2  
 DIST. SEC. 1-2-4  
 CONTAINING PARCELS  
 37102  
 SEC. 2 T. 2 S. 15 W.

**EXHIBIT "A"**

J:\C:\SURVEY CAD FILES\2008\4611\DWG\4611\_LOT28\_EASE.DWG



**PLAN SHOWING LEASE AREA  
 FRONTING LOT 28 OF "NIU BEACH LOTS"  
 AS SHOWN ON FILE PLAN 279  
 AT NIU, HONOLULU, OAHU, HAWAII  
 TAX MAP KEY: (1) 3-7-002: 009**



*This work was prepared by me  
 or under my direct supervision.*

*Robert K.Y. Lee*  
 Robert K.Y. Lee  
 Licensed Professional Land Surveyor  
 Certificate Number 5075

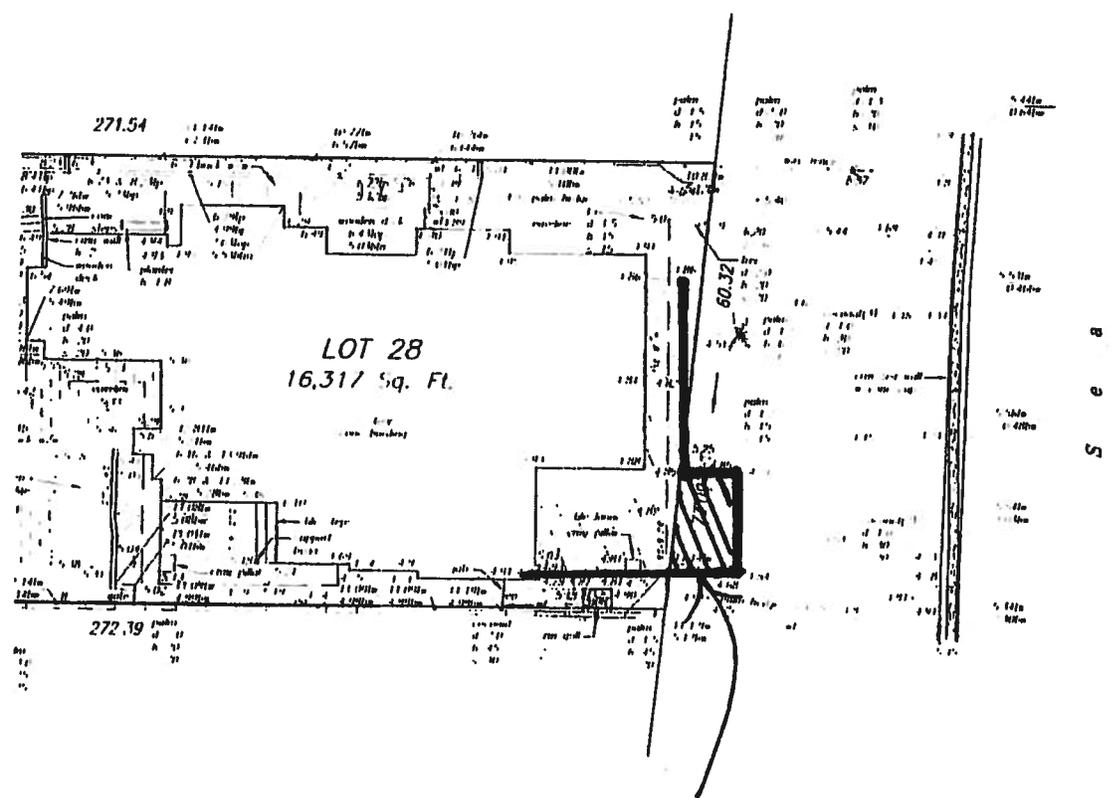
OWNER: TLM PARTNERS LTD.  
 ADDRESS: 5677 KALANIANA'OLE HIGHWAY  
 Hanalei, Hawaii 96821

APRIL 30, 2008  
 2153 N. KING STREET  
 SUITE 308  
 HONOLULU, HAWAII 96819

JOB NO.: 4611  
 FB. NO.: 1789  
 8.5" X 14" = 0.8 Sq. Ft.

**TOWILL SHIGEOKA & ASSOCIATES, INC.**  
 LAND SURVEYORS

**EXHIBIT "B" - 1**



LOT 28  
16,317 Sq. Ft.

Encroaching  
lanai



TOMI L. SHIGOKA & ASSOCIATES, INC.

*Robert K. Lee*  
Licensed Professional Land Surveyor  
Certificate Number 5075

NOVEMBER 20, 2007

EXHIBIT "B" - 2

LINDA LINGLER  
COMPTROLLER OF HAWAII



STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Office of Conservation and Coastal Lands  
POST OFFICE BOX 621  
HONOLULU, HAWAII 96809

Laura H. Hildebrand  
Chairperson  
Board of Land and Natural Resources  
Commission on Water Resource Management  
Russell V. Tsuji  
President  
Ken C. Kawahara  
Deputy Director - Water  
Agricultural Resources  
Hawaii and Ocean Resources  
Bureau of Ocean Affairs  
Commission on Water Resource Management  
Conservation and Coastal Lands  
Conservation and Resources Enforcement  
Bureau  
Fishery and Wildlife  
Historic Preservation  
Kaula Iwa Island Reserve Commission  
Land  
State Parks

REF:CC

File Number Encroachment: DA-08-018

08ad-068

MEMORANDUM:

TO: Al Jodar, Land Agent, Oahu  
Land Division

FROM: Samuel J. Lemmo, Administrator  
Office of Conservation and Coastal Lands

SUBJECT: Shoreline Encroachments at 5677 Kalaniana'ole Hwy, Waiupe, Oahu  
Tax Map Key: (1) 3-7-002:009

AUG 12 2008  
RECEIVED  
LAND DIVISION  
DEPT OF LAND & NATURAL RESOURCES  
STATE OF HAWAII  
2008 AUG 12 AID: 326

The Office of Conservation and Coastal Lands (OCCL) has reviewed the June 06, 2008 memo from Land Division, including the Shoreline Encroachment Information Sheet provided by the applicant, Mr. Donald Clegg.

According to information, photographs, and maps, it appears as though the encroachments are nonconforming. The encroachments include 2195 square feet of state land with a tile lanai on the mauka side and a seawall on the makai side.

The Board of Land and Natural Resource (BLNR) established a policy to allow the disposition of shoreline encroachments by either removal or issuance of an easement. In carrying-out this policy, the Department established criteria to guide decision-making over specific cases. The criteria are as follows:

1. Protect/preserve/enhance public shoreline access;
2. Protect/preserve/enhance public beach areas;
3. Protect adjacent properties;
4. Protect property and important facilities/structures from erosion damages; and
5. Apply "no tolerance" policy for recent or new unauthorized shoreline structures

In addition, the Department developed a "Shoreline Encroachment Information Sheet" that is intended to provide the State with additional information to guide the Department's decisions on the disposition of shoreline encroachments.

Surrounding Land Uses:

The surrounding uses are residential in nature.

Beach Resources:

EXHIBIT "C"

There is no existing beach resource makai of the shoreline structure. Though the 1954 aerial photograph shows a small beach fronting the shoreline structure, it had disappeared by the 1961 aerial photograph.

Public Access:

This section of coastline has limited public access. There are no local shoreline accesses and no local public parking.

Effect of Removing the Encroachment on:

*Beach Resources: It is unknown if removal of the seawall would positively impact the beach resource, as the substrate mauka of the seawall is unknown. Though seawalls on either side will limit the potential formation of beach, a small pocket beach has the potential to form with input from the eroded coastal plain and the adjacent stream mouth clearing activities.*

*Public Access: OCCL staff has determined that public access will not be enhanced by removal of the seawall and tile lanai.*

*Affect on Adjacent Properties: Removal of the seawall may have a negative effect on neighboring shoreline armoring structures and might lead to their consequent destabilization. Consideration should be given to these potential impacts if the seawall is removed.*

*Affect on Upland Development: Removal of the seawall will cause erosion of the coastal plain. As the residence is more than 30 feet mauka of the seawall, it is uncertain whether removal of the seawall will create an emergency situation from the erosion.*

It has been a general policy and practice of the OCCL to support easement requests that have no discernable effect on beach and recreational resources, and do not act as a detriment to public access. In cases where the encroachment serves as primary erosion control for potentially threatened structures, impacts to the adjacent and upland developments must also be considered.

Upon review and careful consideration of the information gathered on this case, staff has determined that the requirements stated in HRS § 205A, HRS § 183C, and in the OCCL's evaluation criteria would support a disposition request being processed for both of the encroachments and the 2195 square feet of State land. The OCCL suggests that proper signage be placed identifying that the seawall, State land, and portion of the tile lanai on State land are open to the public.

Please feel free to contact Chris Conger, Sea Grant Extension Agent at the Office of Conservation and Coastal Lands at 587-0049.

CC: Office of Hawaiian Affairs, Grant Arnold

PHONE (808) 594-1888



**STATE OF HAWAII**  
**OFFICE OF HAWAIIAN AFFAIRS**  
711 KAPI'OLANI BOULEVARD, SUITE 500  
HONOLULU, HAWAII 96813

RECEIVED  
LAND  
FAX (808) 594-1865

2008 SEP - 3 A 10: 51

RECEIVED  
NATURAL RESOURCES  
STATE

HRD08/3791

August 29, 2008

Al Jodar  
Department of Land and Natural Resources  
Post Office Box 621  
Honolulu, Hawai'i 96809

**Re: Request for comments on the proposed 55-year term easement for seawall and landscaping on state lands, Niu, O'ahu, TMK: 3-7-02:09 seaward.**

Aloha e Al Jodar,

The Office of Hawaiian Affairs (OHA) is in receipt of the above-mentioned letter dated August 14, 2008. OHA has reviewed the project and offers the following comments.

OHA understands that a shoreline certification process revealed an encroachment on the subject property due to a seawall, landscaping area and a portion of the dwelling itself. OHA sees that staff recommendation to the board is to authorize the issuance of a term non-exclusive easement for the encroachment in addition to imposing a \$500 fine.

OHA notes that page two of the August 12, 2008 memorandum from Samuel Lemmo to Al Jodar states that a 1954 aerial photograph shows a small beach fronting the property, which is no longer there. OHA asks if the 1954 or 1961 photographs show the seawall or encroaching structures. We understand that not only did a beach used to be exist, but from the Office of Conservation and Coastal Lands memorandum we see that "a small pocket beach has the potential to form" if the seawall were removed.

While OHA is not suggesting that the seawall be removed in this case, we are inquiring if the loss of this beach can be attributed to what the Board of Land and Natural Resources may authorize in this action. If such a link can be made, perhaps a \$500 fine is too lenient.

**EMMIT "D"**

We also suggest that the 55-year lease now proposed may be too long. OHA notes that federal and state agencies are preparing for the advent of sea level rise. For example, the Coastal Zone Management Act at 16 USC §1451 (l) states, "Because global warming may result in a substantial sea level rise with serious adverse effects in the coastal zone, coastal states must anticipate and plan for such an occurrence." Therefore, a shorter lease term may allow future boards and decision-makers more flexibility in dealing with the unfortunates that this issue will present for us in the near future.

Further, OHA notes that the subject land is designated as Section 5(b) Ceded Lands, which hold a considerable amount of sentimental, historical and legal significance for Native Hawaiians and OHA. These lands were illegally taken from the Hawaiian Kingdom after the 1893 overthrow and later transferred ("ceded") by the United States government to the State of Hawai'i upon statehood. Today, the state holds the Ceded Lands corpus in trust for Native Hawaiians and the general public. OHA is supposed to receive a portion of all revenues generated on these lands.

Thank you for the opportunity to comment. If you have further questions, please contact Grant Arnold at (808) 594-0263 or e-mail him at [granta@oha.org](mailto:granta@oha.org).

'O wau iho nō me ka 'oia'i'o,



Clyde W. Nāmu'o  
Administrator

# **EXHIBIT**

**4**

September 8, 2009

Mr. Timothy Chee  
Land Agent, Land Division  
Dept. of Land and Natural Resources  
P.O. Box 621  
Honolulu, HI 96809  
Via: Express Mail

Re: Ref. No.: 08OD-068

Subject: Non-Exclusive Easement to TLM Partners Ltd. for Seawall, Lanai, and  
Landscaping Purposes Niu, Honolulu, Oahu, Tax Map Key: (1)-3-7-002:009 seaward.

Dear Mr. Chee:

Please find enclosed TLM Partners Ltd.'s check #2476 in the amount of \$135,135.00 that you requested in your letter of January 29, 2009 in anticipation of the granting for the easement described above plus document fee and maps and description fee. I am also enclosing the State and City/County Tax Clearances requested.

I will look forward to receiving the legal document from the Department of the Attorney General that you mention for my approval and signature so that the easement will be final and be able to be recorded.

Please contact me at the below address or by telephone if you have any questions.

Sincerely,



Thomas E. McConnell  
General Partner  
TLM Partners Ltd.  
1568 Calzada Avenue  
Santa Ynez, CA 93460  
Tel: (805) 264-5510 cell; (805) 686-1489

TEM/ck  
Encl.

RECEIVED  
LAND DIVISION  
2009 SEP 10 A 10:21  
MAIL ROOM  
ST.

EXHIBIT "4"

# **EXHIBIT**

**5a**

RECEIVED

10 MAY -5 110 21

# DAMON KEY LEONG KUPCHAK HASTER

A LAW CORPORATION  
DEPT. OF LAND & NATURAL RESOURCES  
STATE OF HAWAII

May 3, 2010

Attorneys at Law

1001 Bishop Street, Suite 1600  
Honolulu, Hawaii 96813-6152

Telephone: (808) 511-0011  
Facsimile: (808) 511-2212  
E-Mail: info@hawaiilawyer.com  
Website: www.hawaiilawyer.com

- Charles K. Doyle
- Elizabeth E. Dunnington
- Heidi B. Carlson
- Matthew T. Evans
- Paul R. Lynch
- Dean D. Hester
- Joseph W. Thelen
- Carmel E. Hoek
- Courtney S. Kajiawa
- Christine A. Eubank
- Christi Anne E. Leitch
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- Kenneth P. Fogel
- Dennis C. Young
- David P. McCauley
- James C. Akaiwa
- Mark M. Mural
- Anna H. Oshiro
- Michelle M. Shiu
- Douglas C. Smith
- Robert H. Bennett
- Michael A. Yoshida

Of Counsel  
R. Charles Bucken  
C. J. Damon, II  
Gerhard F. Hillech  
Harry A. Juman

Charles W. Foy  
(1999-2008)

Admitted in Hawaii and California  
Admitted in New York and District of Columbia



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Chairperson Laura H. Thielen  
State of Hawaii, Department of Land and Natural Resources  
1151 Punchbowl Street, Room 130  
Honolulu, Hawaii 96813

**Re: TAX MAP KEY (1) 3-7-002: SEAWARD OF 009**

Dear Chair Thielen:

We represent TLM Partners Ltd. ("TLM"), which is the owner of 5677 Kalaniana'ole Hwy, Honolulu, HI 96821, Tax Map Key: (1) 3-7-002:009 ("Property"). We and our client have been in contact with Messrs. Barry Cheung and Timothy Chee of your Department ("DLNR"), who asked that we write to you to request the return of the ONE HUNDRED THIRTY-FIVE THOUSAND ONE HUNDRED THIRTY-FIVE DOLLARS (\$135,135.00) submitted in connection with a proposed easement that does not appear to be necessary.

When it was suggested that TLM may need an easement, DLNR was contacted to discuss that possibility. The Board of Land and Natural Resources ("BLNR") voted to approve the grant of an easement to TLM in or around September 2008. After a year of discussions, however, the parties were not able to agree upon the need for, or the possible terms of, an easement. Because it is unclear that an easement is necessary, or even that the State has the right to grant an easement, we request that DLNR refund the \$135,135.00.

Further, Mr. Cheung asked that we provide you with any other questions or concerns. One concern we have relates to recent correspondence from DLNR to Mr. Thomas McConnell, the general partner of TLM, dated February 10, 2010, suggesting the existing seawall, lanai and landscaping constitute encroachments.

**EXHIBIT "5a"**

DAMON KEY LEONG KUPCHAK HASTERT

Chairperson Laura H. Thielen

May 3, 2010

Page 2

Previously, the DLNR suggested there was a single encroachment – the lanai of the house, despite the fact that the house and lanai were built by prior owners in or around 1934. We respectfully disagree that any encroachments exist, and seek further information concerning this.

It is unclear on what basis the State can claim either the right to grant an easement or to declare anything an encroachment under the circumstances. We have been unable to locate any evidence that this was not accreted land, and we have found nothing in DLNR's files to the contrary. It is well settled in Hawaii that accreted land belongs to the littoral owner, *see Maunalua Bay Beach Ohana 28 v. State*, 122 Haw. 34, 52, 222 P.3d 441, 459 (Ct. App. 2009), which in this case is TLM. We are interested in understanding from you what evidence, if any, exists to the contrary.

With respect to the suggestion that existing vegetation is an encroachment, we disagree. Not only does the photographic evidence suggest that palm trees have been in existence on the land for over fifty years, vegetation cannot constitute an encroachment since it is a naturally occurring phenomenon. *See, generally, Griefield v. Gibraltar Fire & Marine Ins. Co.*, 24 So.2d 356, 357-58 (Miss. 1946) (no landowner liability for natural growing vegetation).

As for the seawall, it is a lawful, non-conforming structure that continues along the makai boundary of several parcels. *See generally* Revised Ordinances of Honolulu, ch. 23 (providing for the continued use of nonconforming structures in the shoreline setback area); Haw. Admin. R. § 13-5-37 (stating similarly in the conservation district). *See also Waikiki Marketplace Inv. Co. v. Chair of Zoning Bd. of Appeals*, 86 Haw. 343, 356, 949 P.2d 183, 196 (Ct. App. 1997) (construing non-conforming structures and uses as lawful). The seawall has been in existence since 1961, or possibly earlier. *See* August 12, 2008, DLNR Letter from Mr. A. Jodar to Mr. S. Lemmo (File No. 0A-08-018). Further, DLNR already determined that "removal of the seawall will cause erosion of the coastal plain," and that, because "the residence is more than 30 feet mauka of the seawall, it is uncertain whether removal of the seawall will create an emergency situation from the erosion." More specifically, DLNR found that "impacts to the adjacent and upland developments must be considered" and that removal of the seawall fronting TLM's Property "may have a negative effect on neighboring shoreline armoring structures and might lead to their consequent destabilization." Furthermore, even assuming the seawall is located on State land, it was not constructed by TLM. Accordingly, we are unclear what right or duty exists to allow or require TLM to remove it.

DAMON KEY LEONG KUPCHAK HASTERT

Chairperson Laura H. Thielen

May 3, 2010

Page 3

We appreciate your anticipated cooperation with this matter. Please do not hesitate to contact the undersigned if you have any questions.

Very truly yours,

DAMON KEY LEONG KUPCHAK HASTERT



Gregory W. Kugle

Christi-Anne H. Kudo Chock

GWK/CHKC:ecc  
1180-17P

# **EXHIBIT**

**5b**

67796

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LAND DIVISION

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DEPT. OF LAND &  
NATURAL RESOURCES  
STATE OF HAWAII

DEPT. OF LAND  
& NATURAL RESOURCES  
STATE OF HAWAII

Attorneys at Law

July 30, 2010

1001 Bishop Street, Suite 1600  
Honolulu, Hawaii 96813-1600

Telephone (808) 531-1001  
Facsimile (808) 531-1111  
E-Mail: info@hawaii.lawyer.com  
Website: www.hawaiilawyer.com

Chairperson Laura H. Thielen  
Department of Land and Natural Resources  
State of Hawaii  
1151 Punchbowl Street, Room 130  
Honolulu, Hawaii 96813

Hiroshi E. Hironaka  
Dorothy B. Catalan  
Patricia A. Capeland  
Matthew L. Evans  
Fred P. Fuchs  
Diane D. Hagan  
Carol M. Hsieh  
Courtney S. Hylawa  
Christine A. Johnson  
Teresa Anne H. Kipchak  
Cecily W. Kugel  
Kenneth P. Kuppel  
David C. Leong  
David P. MacLure  
James C. McWhorter  
Karl M. Donaldson  
Anna H. Oshiro  
Christopher P. P  
Michelle M. P  
Douglas J. Smith  
Robert H. Thomas  
Michael A. Yoshida

Re: Tax Map Key (1) 3-7-002; seaward of 009

Dear Chair Thielen:

Thank you for your correspondence dated May 24, 2010, concerning the issues of easements and encroachments related to 5677 Kulanianaole Highway, TMK No. (1) 3-7-002:seaward of 009, which is owned by our client, TLM Partners Ltd. ("TLM"). This correspondence concerns settlement and is therefore inadmissible for any purpose pursuant to Haw. R. Evid. 408.

While we do not agree with all of the positions taken by the Department, we do believe, as discussed below, there is enough uncertainty concerning some of the issues, and the impact of potentially adverse decisions on other land around the State, such that both the Department and our client have an interest in amicably resolving the situation. Therefore, we request a meeting with you to discuss a resolution that we hope would: (1) result in the entry of an easement at fair market value; (2) establish the line of the existing seawall as the certified shoreline; (3) regulate the uses, and the parties' respective rights and obligations within the easement area, and; (4) clarify the maintenance and repair obligations of the parties with respect to the seawall and other improvements within the easement area.

While there are some factual questions, such as (1) whether the land mauka of the seawall is the product of accretion or fill, or (2) whether the State's interest in such land is fee simple absolute until title is quieted or whether it is held in trust for the beneficial abutting owner, or (3) whether the State or Territory or some other entity constructed the seawall that protects a number of homes along this stretch of Niu constline, there are other important facts that are not in dispute and worth noting.

of Counsel  
R. Charles DeFon  
C. J. Damon, Jr.  
Gary A. Homan  
Frank W. Key  
(1999, 2000)  
Admitted to Hawaii, and Oklahoma  
Admitted to California  
Admitted to New York, and  
District of Columbia



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**EXHIBIT "5b"**

DAMON KEY LEONG KUPCHAK HASTORI

Chairperson Laura H. Thielen

July 30, 2010

Page 2

TLM did not build the subject seawall. Not only was it present when TLM purchased the property, but it has been present since at least 1961. Additionally, the seawall is a continuous wall fronting multiple Niu lots, not just TLM's property, which is further proof that it was not installed by TLM. Lastly, despite this wall having been in existence for fifty (50) years, allegedly on State land, the State has never, until recently, taken the position that the wall fronting TLM's property is an encroachment onto State land for which TLM is responsible. Thus, if the land on which the seawall sits is, in fact, State land, then the seawall appears to belong to the State, not TLM. Under the State's theory, TLM should not be responsible for its installation, repair or removal. Similarly, the State would face potential liability to TLM, as well as the adjoining owners, if the wall is not maintained, or is removed, thereby causing damage to adjacent properties and TLM's property.

With respect to vegetation and also assuming that it is located on State land, rather than TLM's property, the parties appear to disagree as to who has the right or obligation to maintain the vegetation, or whether maintenance constitutes a trespass, or violation, or a reasonable exercise of an adjacent owner's rights to protect his own property from damage or vermin emanating from another's property. The State has not, to TLM's knowledge, ever maintained the vegetation present on its alleged property.

For the foregoing reasons, it is in both the State's interest, and TLM's interest, to seek an amicable resolution. TLM would be amenable to a resolution that would: (1) result in the entry of an easement at fair market value; (2) establish the face of the existing seawall as the certified shoreline; (3) regulate the uses, and the parties' respective rights and obligations within the easement area, and; (4) clarify the maintenance and repair obligations of the parties with respect to the seawall and other improvements within the easement area. The negotiations prior to this time have not resulted in an easement based on the fair market value, or that clearly sets forth TLM's rights with respect to maintenance and repair. Assuming the terms of the easement, and related shoreline certification, can be reached, then the fair market value can be determined. If the parties are unable to agree on the value, then TLM would seek the appraisal procedures as set forth in Haw. Rev. Stat. § 171-17(b). Or, in the event an amicable resolution cannot be reached in a timely manner, TLM will have no choice but to consider legal action to recover sums paid, plus interest and attorneys' fees, as well as a declaration of the parties' rights with respect to maintenance of the seawall, ownership of the property, and any such other relief that TLM may be entitled to.

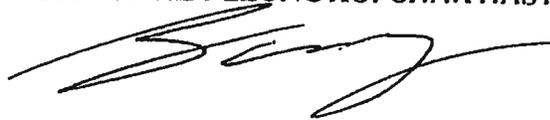
**DAMON KEY LEONG KUPCHAK HASTERT**

Chairperson Laura H. Thielen  
July 30, 2010  
Page 3

We look forward to meeting with you, schedule permitting, during the week of August 2<sup>nd</sup> or the week beginning August 9<sup>th</sup>, to discuss the foregoing. Thank you in advance for your continued cooperation in this matter.

Very truly yours,

**DAMON KEY LEONG KUPCHAK HASTERT**



Gregory W. Kugle  
Christi-Anne H. Kudo Chock

GWK/CIHKC:ds  
cc: TLM Limited Partnership  
Mr. Barry Cheung  
121452P

# **EXHIBIT**

**5c**

6837c

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**DAMON KEY LEE ONG KUPCHAK HASTERT**  
A LAW CORPORATION

2010 NOV - 8 P 3: 13

DEPARTMENT OF LAND & NATURAL RESOURCES  
STATE OF HAWAII  
November 2, 2010

Attorneys at Law

1001 Bishop Street, Suite 1600  
Honolulu, Hawaii 96813-2652

Telephone (808) 531-8811

Fax (808) 531-2242

E-Mail: [info@hawaiilawyer.com](mailto:info@hawaiilawyer.com)

Website: [www.hawaiilawyer.com](http://www.hawaiilawyer.com)

Hazelise E. Burroughs

Iselle H. Calakan

Matthew L. Evans

Scott R. Fyfe

Thomas D. Hansen

Carrie N. Heisk

Courtney S. Kalfawa

Christine A. Kishino

Christine Anne H. Lingo

Gregory W. Fugle

Frederick R. Fugle

David J. Grogan

David H. McCauley

James C. McWhorter

Mark M. Moulton

Anna H. Oshio

Michelle M. Stein

Douglas C. Smith

Robert H. Thomas

Michael A. Yoshida

OT Counsel

R. Charles Hooten

C. J. Hooten, Jr.

Kathy A. Inman

Charles W. Foy

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Chairperson Laura H. Thielen  
State of Hawaii, Department of Land and Natural Resources  
1151 Punchbowl Street, Room 130  
Honolulu, Hawaii 96813

Re: TAX MAP KEY (1) 3-7-002: SEAWARD OF 009

Dear Chair Thielen:

We represent TLM Partners Ltd. ("TLM"), which is the owner of 5677 Kalaniana'ole Hwy, Honolulu, HI 96821, Tax Map Key: (1) 3-7-002:009 ("Property"). This correspondence responds to yours dated October 18, 2010.

TLM hereby demands return of the \$135,135.00, which the Department of Land and Natural Resources ("DLNR" or "Department") has been holding for the past year. TLM's money must be returned forthwith because: (1) TLM was wrongly informed that an easement was required; (2) to date, no easement has been granted, and; (3) the Department's legal authority to demand or grant the subject easement is questionable at best. Please immediately return TLM's funds to it. The check can be mailed directly to:

TLM Partners Ltd.  
1568 Calzada Avenue  
Santa Ynez, CA 93460

Please confirm that the funds will be transmitted by November 12, 2010, or otherwise respond to this request by that date. If this demand for the return of the funds must be addressed to the Board, then please have this matter put on the agenda at the earliest possible time.

EXHIBIT "5c"

**DAMON KEY LEONG KUPCHAK HASTERT**

Chairperson Laura H. Thielen

November 2, 2010

Page 2

The October 18 correspondence mischaracterizes Analytical Planning ("AP")'s June 6, 2008 correspondence. AP used the term "fill" in quotes, indicating that the term was not AP's term, but a term used by others. Furthermore, AP is not a soils engineer, coastal engineer or other expert for purposes of determining the nature of the land in question. Finally, and perhaps most importantly, DLNR could not have relied on this "admission" because DLNR's own files are replete with references to the land located behind this common seawall along Niu beach as being "accreted land":

Staff review of the available evidence suggests that the encroachment area in question may have been **an accretion area in existence before October 1, 1964**, which is the year that the Conservation District law came into effect. This possible **accretion area** was artificially stabilized without authorization from any agency.... Thus staff cannot substantially prove that any portion of the encroachment area was ever located within the Conservation District.

*See* Correspondence from Dierdre Mamiya, Administrator, Department of Land and Natural Resources, to Warren Bucher, Ph.D., dated July 31, 2002 (enclosed, emphasis added).

Ms. Mamiya's letter is significant for several reasons. First, it is describing a parcel just 3 lots away from TLM's parcel. Second, it is also describing the same common seawall that was built prior to 1961 and which protects all of the lots along this section of Niu. Third, it characterizes the land mauka of the seawall as "accretion". Fourth, it concedes that DLNR could not prove that this accretion area was ever located within the Conservation District, which means that DLNR could not prove that this accretion area was located makai of the shoreline. In sum, while AP made no admissions on TLM's behalf, DLNR files are replete with admissions of its own.

Furthermore, historically, TLM's makai property line was located at the high water mark, not further inland. In the original Land Commission Award of Niu Valley to Alexander Adams (enclosed), the makai boundary was "along Sea." In the 1927 file plan, the makai description of Lot 28 also states "high water mark at sea shore to a t on coral." Thus, historically, the makai boundary of TLM's lot, and

DAMON KEY LEONG KUPCHAK HASTERT

Chairperson Laura H. Thielen  
November 2, 2010  
Page 3

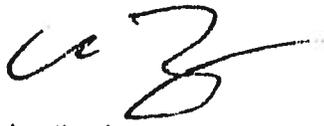
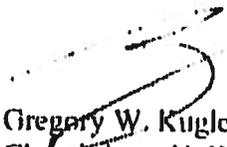
the privately owned lots along Niu beach, was the high water mark. It was not further inland.

Moreover, our prior correspondence simply pointed out that assuming arguendo the State holds legal and beneficial title to the land in question, then the seawall located on that land would also belong to the State and it would be unfair and improper to force TLM to remove it. The fact that the seawall is a common, integrated seawall fronting a number of properties along Niu is evidence that it was not built by any one owner to protect any one individual parcel, but was instead a regional project. Certainly TLM, which acquired this parcel several decades after the seawall was built, should not remove it. Moreover, whoever removes the seawall, or requires its removal, will undoubtedly face liability from nearby property owners. DLNR has determined that removal of the seawall would result in erosion and damage to properties on either side of TLM's property, to a loss of the "State" land, and would also endanger TLM's property and house. Should DLNR remove the seawall, or order a third party to remove it, DLNR will create a dangerous condition.

We appreciate your anticipated cooperation with this matter. Please do not hesitate to contact the undersigned if you have any questions.

Very truly yours,

DAMON KEY LEONG KUPCHAK HASTERT



Gregory W. Kugle  
Christl-Anne H. Kudo Chock

GWK/CHKC:ccc/ds  
Enclosures

cc: TLM Partners Ltd. (w/enclosures)  
128827P

REF:PB:MA



STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
LAND DIVISION  
P.O. BOX 021  
HONOLULU, HAWAII 96809

AQUATIC RESOURCES  
BOATING AND OCEAN RECREATION  
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RESOURCES ENFORCEMENT  
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FORESTRY AND WILDLIFE  
HISTORIC PRESERVATION  
LAND DIVISION  
STATE PARKS  
WATER RESOURCE MANAGEMENT

File Number Encroachment: OA-02-27

Warren Bucher, Ph. D.  
Oceanit  
1001 Bishop Street  
Pacific Tower, Suite 2970  
Honolulu, HI 96813

JUL 31 2002

Dear Mr. Bucher:

**Subject:** Shoreline Encroachment (Sea Wall and Fill) at 5691 Kalaniana'ole Highway  
[TMK: (1) 3-7-02:008]

Coastal Lands Program (CLP) staff has reviewed this case, which involves your client's seawall and encroachment area at Nui, Oahu. Based upon information you have submitted on behalf of your clients, Ada Murakami and Michael Gallagher, the seawall and encroachment area in question consists of approximately 2000 square feet. According to previous information that the applicant's attorney has submitted to the Department, the Cassidy family had constructed the seawall fronting the encroachment area at some date between 1954 and 1960.

According to submitted evidence it appears that seawall defining the encroachment area in question was built at some date between 1954 and 1961. Two R.M. Towill aerial photos have been submitted, one from 11/17/1954 that shows no seawall structure Makai of parcel [TMK (1) 3-7-02:008] and one from 01/20/1961 which appears to show a seawall structure located Makai of the parcel in question as well as a seawall fronting the neighboring parcel.

The Board of Land and Natural Resource (BLNR) recently established a policy to allow the disposition of shoreline encroachments by either removal or issuance of an easement. In carrying-out this policy, the Department established criteria to guide decision-making over specific cases. The criteria are as follows:

1. Protect/preserve/enhance public shoreline access;
2. Protect/preserve/enhance public beach areas;
3. Protect adjacent properties;
4. Protect property and important facilities/structures from erosion damages; and
5. Apply "no tolerance" policy for recent or new unauthorized shoreline structures

In addition, the Department developed a "Shoreline Encroachment Information Sheet" that is intended to provide the State with additional information to guide the Department's decisions on the disposition of shoreline encroachments. This form has been completed and submitted. On July 3, 2002 staff visited the site to investigate the encroachment and to gather

reconnaissance information to support a recommendation for either removal of the encroachment or issuance of an easement. Of primary importance are the Department's objectives to protect and preserve shoreline resources and shoreline access.

Surrounding Land Uses:

It was observed during the site visit that surrounding uses are residential. It appears that the abutting neighbor's seawall to the east is contiguous with the seawall in question. The land area behind the neighboring parcel [TMK (1) 3-7-02:007] seawall is not an encroachment area. The land area behind the seawall of parcel :007 lies within the recorded boundaries of that parcel. The area behind the neighboring parcel [TMK (1) 3-7-02:020] to the west appears to be an encroachment area. The owner of parcel :20 was informed in 1990 to either remove the encroaching seawall or apply for an easement for the area from the State.

Beach Resources:

CLP staff inspected the area. The beach area mostly consists of mudflats. In some areas there is a thin layer of sand.

Public Access:

There is no nearby easy public access to the shoreline in this area. The closest ocean access is at Niu Stream approximately four or five parcels to the west side of the property.

Effect of Removing the Encroachment on:

*Beach Resources:* Removal of the seawall would be inconsequential as there is no beach in the vicinity. Public recreation such as fishing, boating and surfing takes place offshore of the parcel.

*Public Access:* CLP staff has determined that public access would not be enhanced by removal of the encroachment.

*Affect on Adjacent Properties:* Removal of the seawall in question could cause damage to the seawall fronting parcel TMK (1) 3-7-02:007, which appears to be contiguous with the seawall in question.

Staff observed during the site visit that the subject seawall appears long established. The encroaching wall is contiguous with the seawall fronting the neighboring parcel to the east. The submitted evidence (aerial photos) suggests the seawall was in existence prior to 1961. The encroachment area in question is quite substantial in size (approximately 2000 square feet) but based on inspection of the submitted aerial photo it appears that this area was in existence prior to the construction of the seawall in question. The neighboring parcel to the east [TMK (1) 3-7-02:007] currently has property boundaries that extend much further Makai than the seaward boundary of the parcel in question. The property to the east has had its present Makai boundary included in its parcel description since at least 1949. This is evidence that the land Makai of parcel :008 seaward boundary has been in existence for a substantial length of time.

Further evidence to the long term existence to the area fronting subject parcel :008 is documentation at State Survey regarding the neighboring parcel to the west [TMK (1) 3-7-

02:020]. A certified shoreline for parcel :020 was rejected in 1990 because of the low concrete wall fronting that parcel. The low concrete wall adjoins the seawall fronting the parcel :008. In 1990 the owner of parcel :020 was given two options by the Department to rectify the situation and receive a certified shoreline; either remove the structure or apply for an easement from the State for the encroachment area.

Staff review of the available evidence suggests that the encroachment area in question may have been an accretion area in existence before October 1, 1964, which is the year that Conservation District law came into effect. This possible accretion area was artificially stabilized without the authorization from any agency. As the shoreline was artificially stabilized the landowner is no longer able to make an accretion claim for the encroachment area in question. The seawall that stabilized the accretion area was constructed prior to October 1, 1964 when Conservation District law came into effect. Thus staff cannot substantially prove that any portion of the encroachment area was ever located within the Conservation District.

Upon review and consideration of the information gathered on this case, staff has determined that the issuance of an easement for the encroachment area would have no adverse impacts on natural resources, including beach resources. Therefore, the Coastal Lands Program has no objections to an easement request being processed. The Oahu District Land Office calculates the monetary amount required to dispose this use of State land through an easement. The landowner should note that they may be subject to the administrative penalty system for unauthorized use of State land pursuant to section 171-6, Hawaii Revised Statutes.

We hope this letter helps resolve some of the outstanding issues regarding your property. Please feel free to contact Masa Alkire of the Coastal Lands Program at 587-0382. Please contact the Oahu District Land Office at 587-0433 regarding the processing of an easement.

Aloha,



Dierdre S. Mamiya  
Administrator

Cc: Oahu Board Member  
Oahu District Land Office  
City and County of Honolulu DPP  
Chairperson's Office

This is a Claim for a tract of Land called "Nix", in the district of Waikiki Oahu; consisting of 26.2 acres and a tract of land belonging to "Nix", called "Kawaiakala", consisting of 2.700 acres.

From the testimony of Geo. K. Kamae, and Mr. J., it appears, that the claimant was created Lord or Koniokiti of this land in the time of Kamehameha; and that he has exercised the Koniokitihip of the same, without dispute ever since the year of our Lord 1822. It further appears, that the claimant obtained his Rights in this land in the same way that he obtained his Rights in the land comprised in the Claim No. 801: namely, in remuneration for services rendered the King as Sea Captain or Sailing Master.

The Board are of the opinion, that the claimant's Rights in these lands are as large as those possessed by any Chief or other high Koniokiti in lands possessed by them; namely a Feehold title less than allodial, subject to the Rights of Tenants.

We do therefore award to Alexander Adams, the Claimant, a Feehold title less than allodial, in the land of "Nix", and in the tract of land of "Kawaiakala" according to the notes and bounds of the annexed Survey, made by J. M. Keane, Esq. on 14<sup>th</sup> day of February A.D. 1818. The Claimant is to respect the Rights of all Tenants of these lands; and may commute this title for a Fee simple, as prescribed by law.

Notes of Survey of "Nix", in Waikiki.

Commencing at Point marked + at Mahealani Point corner of this land by spring of water joining Waikiki at Low-water running N. 29° 30' W. 52 1/2 ft. up Sali and along middle of Ridge separating Nix from Mualupe Valley to large Point at angle. Thence N. 72° W. 112 1/2 ft. 46 ft. along Waikiki on top of Ridge to a tree on last bare peak at foot of ledge. Thence N. 15° W. 76 ft.

along Waitape to Mauka N. W. peak of this land  
 on top of Mountain next to Koolau. Then following  
 along on top of Mountain Ridge, the Mauka side of  
 this land and Koolau to Mountain peak at Mauka  
 E. peak of this, to land called "Kulionou" in Koolau.  
 Then following along down Ridge separating this  
 from Koolau to Rocks on top of Sea Pali little  
 above Sea - thence S.  $33^{\circ} 30'$  E. 6 Ch.  $39 \frac{1}{2}$  ft. down Pali  
 along Kulionou to Rock near corner of Kalo patch  
 little above Sea; at the N. E. corner of this  
 land, then along Sea to place of Commencement  
 This land has a Sea to it as marked on Map.  
 and contains an area of

Feb. 11. 1848

Acres 24.2

See Page 190 for diagram

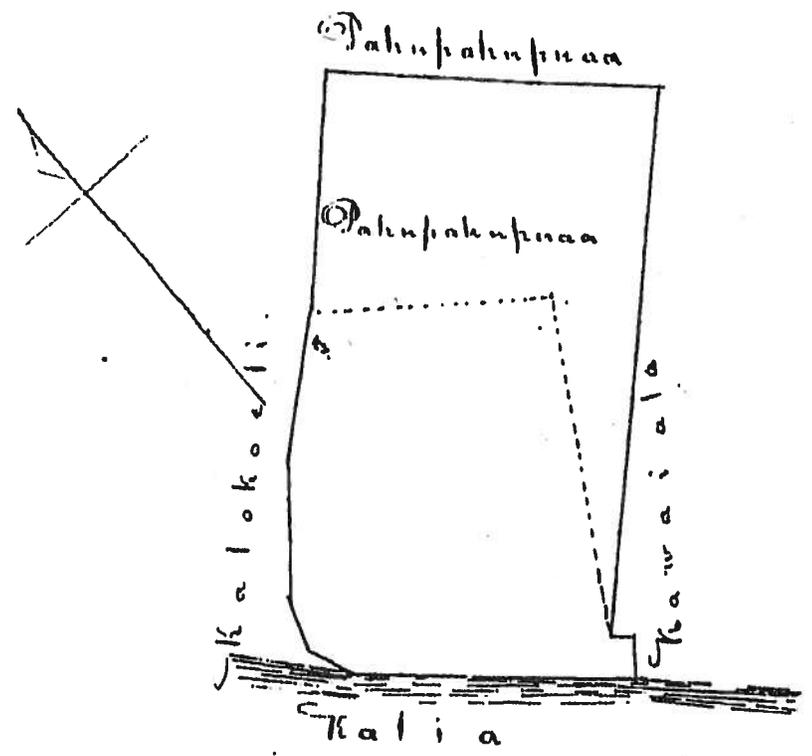
"Notes of Survey of Kalo Lands in Waikiki called  
 Kawaiata alua in Niu"

"Commencing at Mauka S. Corner of this land on  
 Mauka side of stream called Kalia, and running  
 N.  $44^{\circ} 15'$  W. 3 Ch.  $63 \frac{1}{2}$  ft. along Kalia stream to  
 slight angle - thence N.  $19^{\circ} 45'$  W. 53 ft. to Mauka W.  
 Corner of this land - thence N.  $24^{\circ} 30'$  E.  $16 \frac{1}{2}$  ft. along  
 Kalo Kalo to slight angle - thence N.  $43^{\circ} 45'$  E. 2 Ch.  
 to slight angle - thence N.  $55^{\circ} 0'$  E. 2 Ch.  $11 \frac{1}{2}$  ft. along  
 Kalo Kalo to slight angle - thence N.  $48^{\circ} 30'$  E. 3 Ch.  
 $33 \frac{1}{2}$  ft. to Mauka N. Corner of this land - thence S.  
 $62^{\circ} 0'$  E. 1 Ch.  $62 \frac{1}{2}$  ft. along Kahupahupuaa to  
 Mauka E. Corner of this land - thence S.  $59^{\circ} 45'$  W. 8 Ch.  
 along Tiawaiata 182 to corner - then offset  $31 \frac{1}{2}$  ft.  
 to left to corner - thence S.  $43^{\circ} 30'$  W.  $38 \frac{1}{2}$  ft. to place  
 of Commencement including an area of

Feb. 11. 1848

Acres 1.700

T. M. Keane



Costs. Adjudication of C. N. 802. Mon. Adams & Co.

To Accidental Expenses &  
 action of Commission in this Ct. 19 January 1858  
 draft deposition of Ct. reduced  
 Citation  
 draft testimony Reduced & Eng. and 9 Jan. 58  
 Survey of N. Adams for two lands  
 Engrossed Copy of do  
 Report this day rendered by Commissioners  
 on the above claim

50
75
200
80
5
3525

State Records  
 29 January 1859

W. L. Lee  
 J. B. Smith  
 L. H. ...  
 By ...  
 ...

This is a claim for a tract of land called "Niu", in the district of "Waiheke" Oahu, consisting of 300 acres and a Kalo land belonging to "Niu", called "Kawaiata", consisting of 1,700 acres.

From the testimony of "Poo" Kihunaoa, and Mr. Si, it appears, that the claimant was created Lord of "Kauohiki" of this land in the time of "Kamehameha", and that he has exercised the "Kauohiki" of the same, without dispute ever since the year of our Lord 1822. It further appears, that the claimant obtained his rights in this land in the same way that he obtained his rights in the land comprised in the claim No. 501: namely, in remuneration for services rendered the King as Sea Captain or Sailing Master.

The Board are of the opinion, that the claimant's rights in these lands are as large as those possessed by any Chief or other high "Kauohiki" in lands possessed by them; namely a "Feehold" title less than allodial, subject to the rights of Tenants.

We do therefore award to Alexander Adams, the Claimant, a "Feehold" title less than allodial, in the land of "Niu", and in the Kalo land of "Kawaiata", according to the limits and bounds of the annexed Survey, made by J. M. Cook, Esq. on 11<sup>th</sup> day of February A.D. 1848. The Claimant is to respect the rights of all Tenants of these lands, and may commute this title for a "Fee" simple, as prescribed by law.

"Notes of Survey of 'Niu', in 'Waiheke'."

Commencing at Point marked + at Mahealani, S. W. corner of this land, by spring of water joining "Waiheke" at Sea, and running N. 29° 20' W. 52 Ch 39 7/8 ft. up "Pali" and along middle of Ridge separating "Niu" from "Waiheke" Valley to large Point at angle. Thence N. 71° 15' W. 114 1/2 ft. along "Waiheke" on top of Ridge to a tree on last bare peak at foot of woods. Thence N. 15° E. 76 ft.

along Waialeale to Mountain N. W. peak of this land on top of Mountain near to Koolau. Then following along on top of Mountain Ridge, the Maunaloa side of this land and Koolau to Mountain peak at Maunaloa E. peak of this, to land called "Kuliouou" in Koolau, then following along down Ridge separating this from Koolau to Peak on top of Sea Pali little above Sea - thence S.  $33^{\circ} 30'$  E. 6 Ch.  $39 \frac{1}{2}$  ft. down Pali along Kuliouou to Rock near Corner of Kalo patch little above Sea; at the slight S. E. Corner of this land; then along Sea to place of Commencement  
This land has a Sea to it as marked on Map.  
and contains an area of

Feb. 11. 1848

Acres 24.12

See Page 190 for diagram

"Notes of Survey of Kalo Land in Waikiki called  
Kawaiwala also in Niu"

"Commencing at Maunaloa S. Corner of this land on Maunaloa side of stream called Kalia, and running N.  $44^{\circ}$  W. 3 Ch.  $63 \frac{1}{2}$  ft. along Kalia stream to slight angle - thence N.  $19^{\circ}$  W. 53 ft. to Maunaloa W. Corner of this land - thence N.  $21^{\circ}$  E.  $46 \frac{1}{2}$  ft. along Kalo patch to slight angle - thence N.  $43^{\circ} 45'$  E. 2 Ch. to slight angle - thence N.  $55^{\circ}$  E. 2 Ch.  $11 \frac{1}{2}$  ft. along Kalo patch to slight angle - thence N.  $48^{\circ} 30'$  E. 3 Ch.  $33 \frac{1}{2}$  ft. to Maunaloa N. Corner of this land - thence S.  $42^{\circ}$  E. 1 Ch.  $62 \frac{1}{2}$  ft. along Pahi-pahi-pahi to Maunaloa E. Corner of this land - thence S.  $51^{\circ}$  W. 8 Ch. along Kawaiwala 182 to corner - then offset 21  $\frac{1}{2}$  ft. to left to corner - thence S.  $42^{\circ} 30'$  W.  $38 \frac{1}{2}$  ft. to place of commencement including an area of

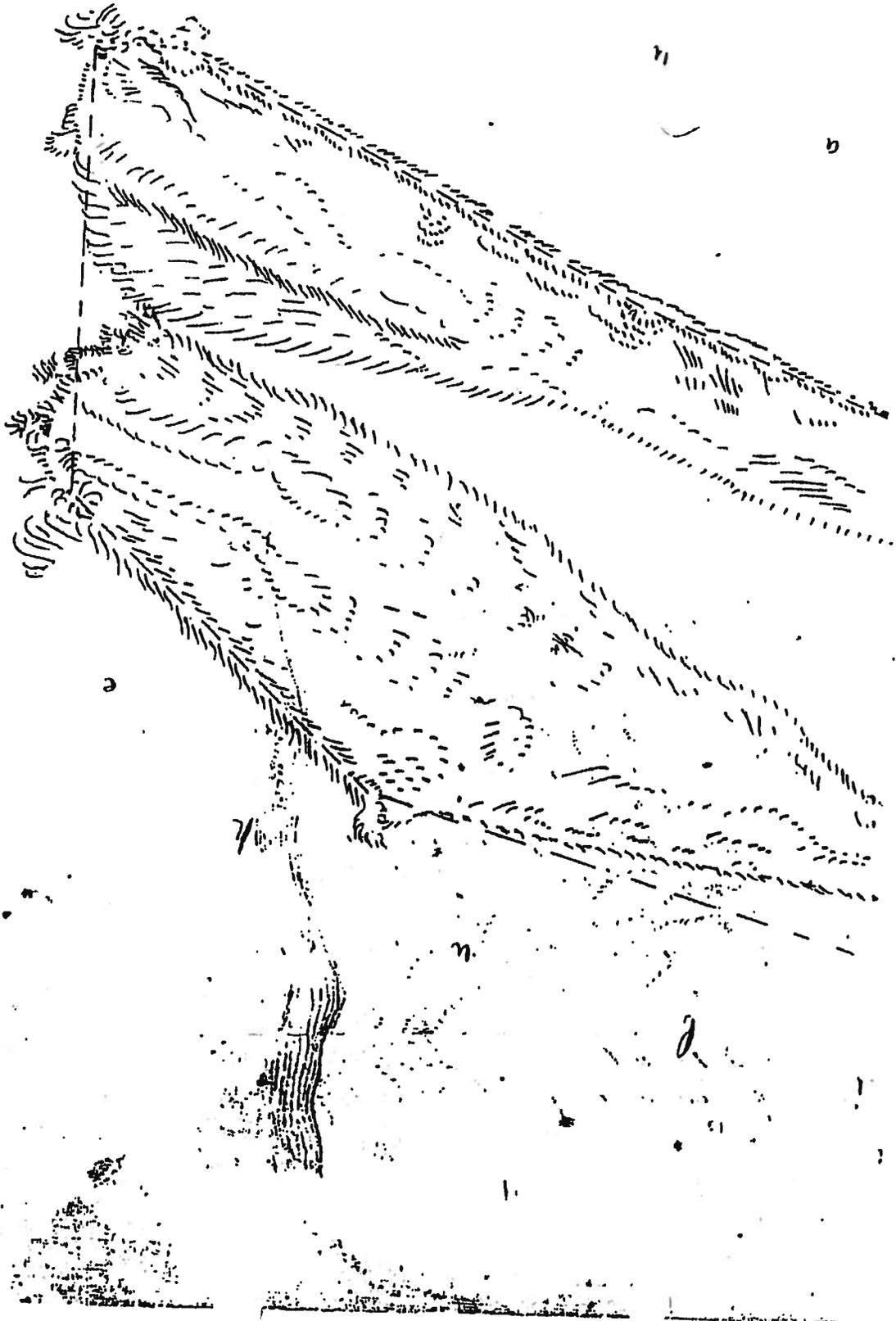
Feb. 11. 1848

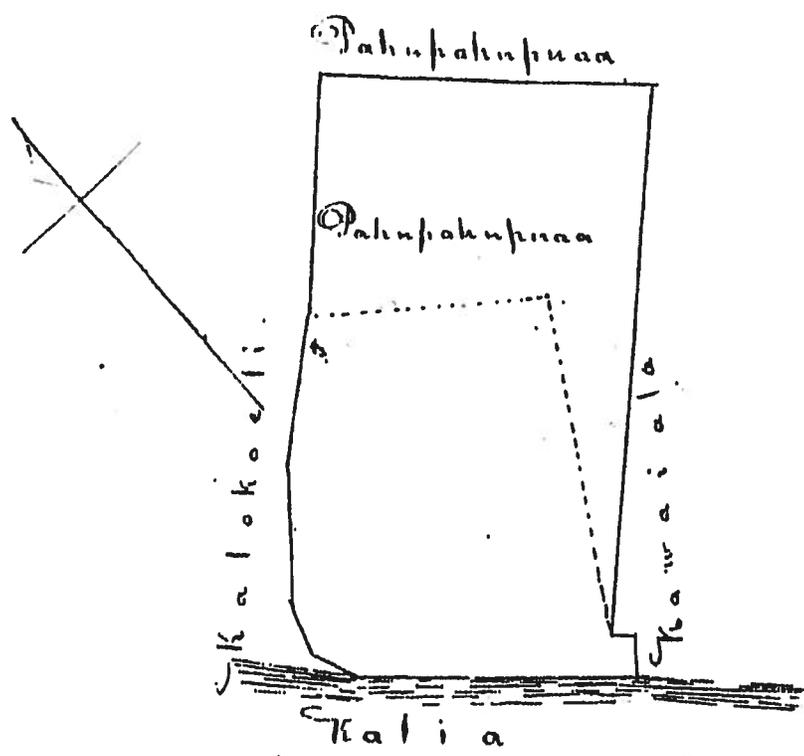
Acres 1.400

T. M. Keane, Sur.

190

Page 107. CI. 802.





Cook's Adjudication of C. N. 802. Mer. Adams St.

To "Incidental Expenses & action of Commission" in this Ct. 19 January 1853  
 draft deposition of Ct. reduced  
 Citation  
 draft testimony Reduced & Eng. on 19 Jan. 53  
 Survey of J. M. Cook for two lands  
 Engrossed Copy of do.  
 Report this day rendered by Commissioners on the above claim

1
1
1
50
75
205
8
5
3525

State Records  
 29 January 1854

W. L. Lee  
 J. G. Smith  
 L. M. Cook  
 J. K. ...  
 ...



# **EXHIBIT**

**5d**

DAMON KEY LEONG KUPCHAK HASTERI  
A LAW CORPORATION

December 9, 2010

RECEIVED  
LAND DIVISION  
2010 DEC 13 A 9 56  
STATE OF HAWAII  
LAND & NATURAL RESOURCES

Honolulu, Hawaii  
1001 Bishop Street, Suite 1600  
Honolulu, Hawaii 96813-2013  
Telephone: (808) 531-1000  
Facsimile: (808) 531-1111  
E-Mail: info@hawaii-lawyer.com  
Website: www.hawaii-lawyer.com

Mr. Barry Cheung  
Oahu District Land Office  
State of Hawaii Department of Land and Natural Resources  
Post Office Box 621  
Honolulu, Hawaii 96809

Re: Tax Map Key No. (1) 3-7-002:009

Dear Mr. Cheung,

In response to your letter of November 29, 2010, we respectfully disagree with the Department of Land and Natural Resources' characterization of our position and the events that have transpired in regards to Tax Map Key No. (1) 3-7-002:009 seaward.

Therefore, we request that the issue of reimbursement be added to the agenda of the Board of Land and Natural Resources' January, or next available, meeting.

If you have any questions, please feel free to contact the undersigned.

Very truly yours,

DAMON KEY LEONG KUPCHAK HASTERI

Gregory W. Kugle  
Christi-Anne H. Kudo Chock

GWK/CHK:ds  
cc: Mr. Thomas McConnell  
1007310



Whip law firm is a client  
of the State of Hawaii  
and is not a law firm  
under the rules of the  
State Bar of Hawaii.

EXHIBIT "5d"

# **EXHIBIT**

**6a**

7/29/11

LINDA LINGLE  
GOVERNOR OF HAWAII



LATUA H. JOHNSON  
GOVERNOR  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
1555 KALANIANA'OLE HWY, SUITE 1000, HONOLULU, HI 96813



**STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
LAND DIVISION**

POST OFFICE BOX 621  
HONOLULU, HAWAII 96809

May 24, 2010

Mr. Gregory W. Kugle  
Ms. Christi-Anne H. Kubo Chock  
Damon Key Leong Kupchak Hastert  
1003 Bishop Street, Suite 1600  
Honolulu, Hawaii 96813-6452

Dear Mr. Kugle & Ms. Chock

In response to your letter dated May 3, 2010 regarding questioning the need, as well as, the Board of Land and Natural Resource's (Board) authority to issue the proposed easement at TMK: (1) 3-7-002: Seaward of 009, it is our position that any improvement outside the recorded boundary of the private property that falls on State land is an encroachment. An easement will legitimize the situation in which people are causing encroachment on State lands.

By the topographical survey map conducted by Towill, Shigeoka & Associates dated, November 20, 2007, a portion of lanai, landscaping area, and seawall are located seaward of the recorded boundary of your client's property. Therefore, these improvements are encroaching on State lands.

In your letter, you mentioned that there was no evidence indicating the subject area was not accreted land. However, you fail to point out that there is a lack of any evidence establishing that the subject area was in fact accreted lands. Furthermore, even if there was some evidence establishing that the subject area was in fact accreted lands, there is no record of the subject area being adjudicated by the court as accreted lands and belong to the abutting landowner. Therefore, we believe the subject area is currently owned by the State of Hawaii.

From the photos submitted by your client's consultant, we cannot agree that the current state of the vegetation at 5677 Kalaniana'ole Highway is naturally occurring phenomenon. The area is well-maintained with grass nicely mowed. A manicured lawn on State land is, at minimum, an unauthorized use, if not outright encroachment.

The Board, pursuant to §171(6)(12), HRS, has the power to remove, or remedy any encroachment on State land. And, under §171(6)(15), HRS, the Board has the authority to address the unauthorized, or prohibited use of State lands. The non-conforming nature of the encroachments relates to its "zoning" status. Your allegations of the "lawful" nature of the

**EXHIBIT "6a**

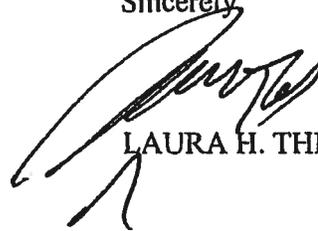
Kugle, G./Kubo-Chock, C.  
May 24, 2010  
Page 2.

structures may be relevant to its status under building permit laws; however, it does not address the trespass issues on State land. Zoning, and land ownership rights are two separate matters.

Therefore, we determined that an easement is needed to legitimize the encroachment at the subject location. Should you choose to remove the encroachment, please inform us in advance of this action so we can ensure that no one's land is damaged, including State land.

Please feel free to contact Mr. Barry Cheung of Oahu District Land Office at #587-0430 should you have any questions.

Sincerely,



LAURA H. THIELEN

cc: Sam Lemmo, OCCL

# **EXHIBIT**

**6b**



STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
LAND DIVISION

POST OFFICE BOX 621  
HONOLULU, HAWAII 96809

October 18, 2010

Ref: 08od-068

Mr. Gregory W. Kugle  
Ms. Christi-Anne H. Kudo Chuck  
Damon Key Leong Kupchak Hastert  
1003 Bishop Street, Suite 1600  
Honolulu, Hawaii 96813-6452

Dear Mr. Kugle & Ms. Chock

Subject: TLM Partners Ltd. Niu, Honolulu, Oahu, TMK (1) 3-7-002:seaward of 009

Thank you for your letter dated July 30, 2010 wherein you queried the State's ownership of the subject area, and reiterated your client did not build the seawall. Your client is also asking for the refund of \$135,135.00 paid to resolve the encroachment.

We respectfully point out to you that your client's agent, Analytical Planning Consultants, Inc., stated in its letter dated June 6, 2008 that enclosed was a "[p]hoto taken from the house showing much of the "fill" (emphasis added) area". Accordingly, the Department took this as an admission that the subject land is in fact "fill" or reclaimed lands. Therefore, the statement in your letter dated May 3, 2010 that "[i]t was settled in Hawaii that accreted land belongs to the littoral owner" does not appear applicable in this case, and we believe the issuance of a non-exclusive easement in this case is proper.

Further, we do not agree with your statement that "the seawall appears to belong to the State, not TLM..." In the aforementioned letter from your client's agent, the subject location of the State owned strip of land was described as the "sea wall encroachment in front of the existing house". The proposed easement seeks to resolve all such encroachments.

If you wish to discuss this matter further, you may contact Russell Tsuji, Land Administrator at 587-0414 or Barry Cheung of Oahu District Land Office at 587-0430.

Sincerely,

A handwritten signature in black ink, appearing to be "LH Thielen".

Laura H. Thielen  
Chairperson

EXHIBIT "6b"

# **EXHIBIT**

**6c**

LANDS DIVISION  
HONOLULU, HAWAII



PAUL J. COMY  
LAND ADMINISTRATOR  
1001 KALANOAUENANUI DRIVE  
HONOLULU, HAWAII 96813-6452  
TELEPHONE: 587-0414  
FAX: 587-0430  
WWW.DLN.HAWAII.GOV



STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES

POST OFFICE BOX 621  
HONOLULU, HAWAII 96809

November 29, 2010

Mr. Gregory W. Kugle  
Ms. Christi-Anne H. Kudo Chock  
Damon Key Leong Kupchuk Hastert  
1003 Bishop Street, Suite 1600  
Honolulu, Hawaii 96813-6452

Dear Mr. Kugle & Ms. Chock:

In response to your letter dated November 2, 2010, the Board of Land and Natural Resources authorized the issuance of a non-exclusive easement to remedy an encroachment on State land. The easement has not been consummated only because your client refused to sign the easement document. We enclose another copy of the easement document for execution should you wish to reconsider your position.

Alternatively, the proper forum to present your arguments is at a future meeting of the Board. Please let us know if you would like this matter presented to the Board.

If you have any further questions, you may contact Russell Tsuji, Land Administrator at 587-0414, or Barry Cheung of our Oahu District Land Office at 587-0430.

Sincerely,

*Paul J. Comy*  
for LAURA H. THIELEN

Enclosure

RECEIVED  
NOV 30 2010  
11:29 AM  
DLN

EXHIBIT "6c"

# **EXHIBIT**

**7**



# **EXHIBIT**

**8**



**EXHIBIT "8"**

10/27

# **EXHIBIT**

**9**

# Subject Photo Page

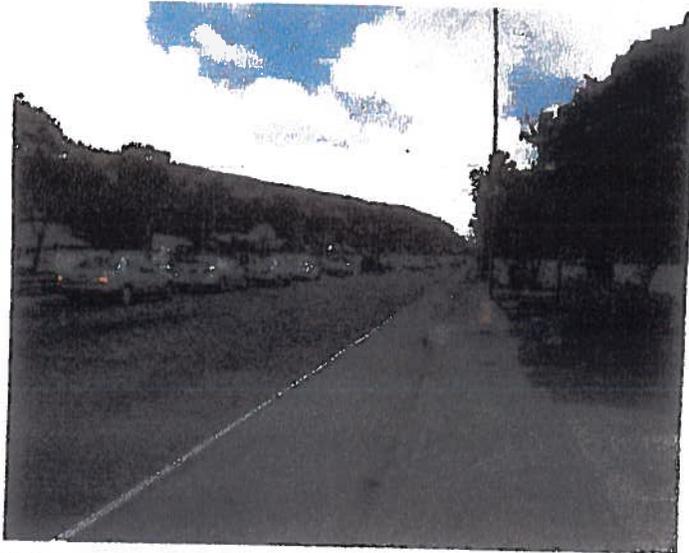
Borrower/Client: H M Partners, Ltd  
Property Address: 5677 Kalaanani Hwy  
City: Honolulu County: Honolulu State: Hawaii Zip Code: 96821 2903  
Lender: Dept of Land & Natural Resources

## Subject Front

5677 Kalaanani Hwy  
Sales Price: N/A  
Gross Living Area:  
Total Rooms:  
Total Bedrooms:  
Total Bathrooms:  
Location: Mo'orea  
View: B, O, S, O, Ocean, E, I  
Site:  
Quality:  
Age:



## Street Scene



## Subject Aerial



# Subject Photo Page

Buyer/Client: H M Partners, Ltd  
Property Address: 5677 Kalanianaʻole Hwy  
City: Honolulu County: Honolulu State: Hawaii Zip Code: 96821-2303  
Listing: Dept of Land & Natural Resources



## Subject Rear Yard & Lanai

5677 Kalanianaʻole Hwy  
Sales Price: N/A  
Gross Living Area:  
Total Rooms:  
Total Bedrooms:  
Total Bathrooms:  
Location: Nui Beach  
View: 16,317,300 sq ft  
Site:  
Dusky:  
Age:



## Subject Rear Yard & Lanai

# Subject Photo Page

Broker/Client: T.M. Partners, Ltd  
Property Address: 5677 Kalamannole Hwy  
City: Honolulu County: Honolulu State: Hawaii Zip Code: 96821-2103  
Title: Dept of Land & Natural Resources



## Subject SE Rear Corner

5677 Kalamannole Hwy  
Sales Price: N/A  
Gross Living Area:  
Total Rooms:  
Total Bedrooms:  
Total Bathrooms:  
Location: Near Beach  
View: 16,317 sq Ocean Fr  
Site:  
Quality:  
Age:



## Rear Yard/Seawall

Looking East



## Seawall Looking East

Brown/Client H M Partners, Ltd  
Property Address: 5677 Kalamannole Hwy  
City Honolulu  
County Honolulu  
Land: Dept of Land & Natural Resources

County Honolulu

State Hawaii

Zip Code 96814 25303

### SW Rear Corner

5677 Kalamannole Hwy  
Sales Price N/A  
Gross Living Area  
Total Rooms  
Total Bedrooms  
Total Bathrooms  
Location Niu Beach  
View 16,317sq/Ocean Fld  
Site  
Quality  
Age



### Rear Yard/Seawall

Looking West



### Seawall Looking West



# **EXHIBIT**

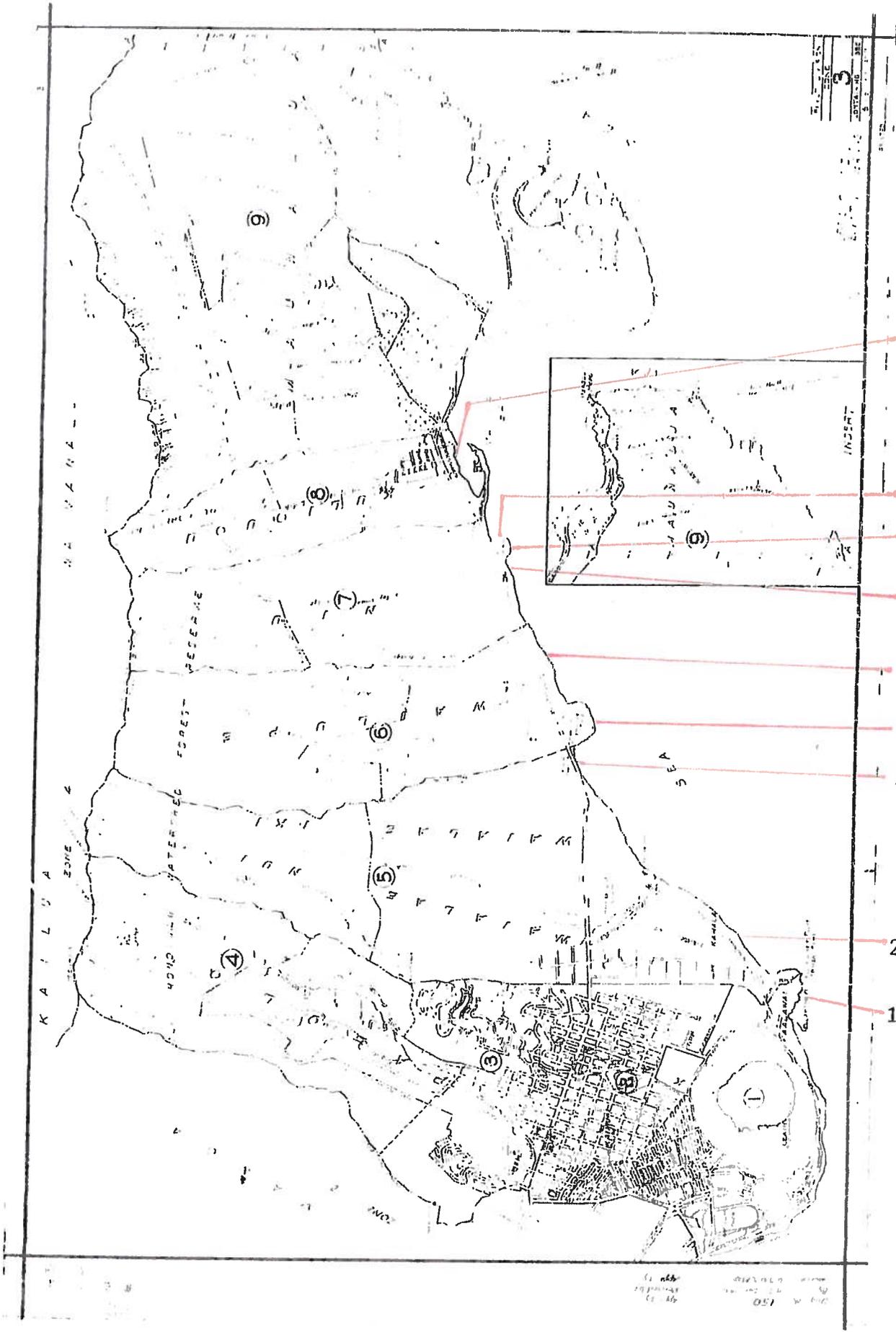
**10**

**TLM-Seawall Encroachment and Filled Lands Case**  
**Other Lot Owners in the Surrounding Area that have Sought or Obtained Easements**

TMK	Date of OCCL's letter	Owner	File #	GL#	Area (sf)	Consideration (\$)	Date of Commencement
1 (1) 3-5-001:004	6/8/2009	Fialko		GL5986	773	83,020	6/23/2010
2 (1) 3-5-003:010	9/23/2005	WF Coastal Proeprties, LLC		GL5932	2197	34,140	4/23/2008
3 (1) 3-5-022:001	9/21/2004	Nakama		GL5853	323	12,800	1/22/2007
4 (1) 3-5-022:002	10/12/1999	Chang		GL5601	111	2,100	5/1/2000
5 (1) 3-5-022:005	3/10/2006	Fox	06od-107				
6 (1) 3-5-058:010	6/8/2009	Beecom Hawaii LLP		GL5994	1460	233,770	9/1/2010
7 (1) 3-6-001:029	7/27/2000	Wo		GL5609	505	20,430	8/5/2005
8 (1) 3-6-002:002	12/8/2004	Henli Investment		GL5934	95	3,670	12/15/2010
9 (1) 3-6-002:005	6/20/2000	Felix		GL5610	843	50,700	7/15/2003
10 (1) 3-6-003:015	4/10/2002	Ueyama		GL5669	146	11,300	7/12/2002
11 (1) 3-7-002:008	7/31/2002	Gallagher	02od-242				
12 (1) 3-7-002:009	8/12/2008	TLM Partners Ltd (subject)	08od-068				
13 (1) 3-7-002:040	9/17/2003	D'Olier	03od-294				
14 (1) 3-7-002:043	3/21/2005	Cho		GL5874	199	11,530	2/7/2007
15 (1) 3-7-002:050	9/3/2003	Naniwa Shoji Co. Ltd		GL5906	777	49,700	3/1/2007
16 (1) 3-8-002:001	7/20/2004	Wu	04od-219				
17 (1) 3-8-002:004	6/9/2005	Ward	05od-158				

# **EXHIBIT**

**11**



16, 17

13, 14

15

11, 12

8 to 10

7

3 to 6

2

1

# **EXHIBIT**

**A-1-B-1**

Russell Y  
Tsuji/DLNR/StateHiUS  
03/08/2012 01:31 PM

To gwk@hawaiilawyer.com  
cc CHKC@hawaiilawyer.com, Barry.W.Cheung@hawaii.gov  
bcc  
Subject RE: TLM

Greg:

- We definitely need a deadline for payment with no subordination. A cap on any new 1st mortgage McConnell may obtain will just complicate matters. As far as what triggers payment, in addition to sale or a date certain, whichever occurs first, I propose to have a 3rd trigger. Payment will also be due upon TLM performing substantial improvements to the property that would otherwise require a county building permit--whichever to occur first.

As you're well aware, McConnell went before the Land Board and testified that he no longer wanted to do improvements to his home, so he no longer needs a shoreline cert. and therefore he wants his money back and to cancel the easement. The Land Board ordered his money to be returned, which we have complied with. We certainly don't want McConnell turning around later after legitimizing the encroachment via an easement document (but not actually paying for it at closing) and later apply for a shoreline cert that would allow him to be able to proceed with improvements to the home or property.

- On the term nonconforming, we'll probably need to keep that term in because the face of the wall currently sits on the conservation district line--shoreline. Absent the wall, the shoreline and conservation district would likely be further mauka. Thus, OCCL will need to be consulted before doing any improvements, or even maintenance on the wall. OCCL here has a regulatory function.

From a Land Mgt. standpoint and pursuant to the easement document, the LD generally doesn't need to review maintenance projects. However, improvements will require review and approval of the plans and specs. One way to evaluate improvements versus maintenance from a Land Div. review process (distinguished from OCCL's regulatory review). I think of it using the "put/keep" analysis. Put meaning constructing something new that wasn't there before (or replacement after total removal/destruction) and therefore its an improvement. Keep meaning to maintain--keep what you've got. However, because this is a shoreline property and borders the conservation district, your client should really be advised to consult with *both* OCCL and LD on both maintenance and improvement projects. From what I've seen before (to be sure you may want to check with Sam) OCCL may require something as simple as a work plan and drawings for a simple maintenance project, but improvements could trigger a CDUA process.

- As you well know the shoreline cert. is only good for 1 year under the rules; so what may be the shoreline today, may be different in the future.

As to the Easement document, see the draft below that I had emailed to you previously.

As to the "Agreement" and the "Mortgage" that you sent, those documents will need to be formally and thoroughly reviewed by the AGs. AGs will probably say we need a simple Note or promise to pay the debt owed. Though I did send your Mortgage and Agreement to them I have not heard back; I think they are waiting to see if the Easement document will ultimately be agreed upon, including those critical provisions related to when payment will be made, and the subordination issue. I don't think the AGs want to spend time reviewing your mortgage and agreement until they know for sure an agreement has been achieved.

I did a cursory review of the Agreement and Mortgage and merely noted on the document the provisions I thought were very problematic and needed to be deleted.

Another issue I kept seeing over and over in your documents was the State warranting title. The State will not warrant title; so all of that language needs to be deleted.

**EXHIBIT A-1-B-1**

Call me after you have had a chance to review this.

Thanks,

Russell

"Gregory Kugle" <gwk@hawaiilawyer.com>

03/07/2012 02:21 PM

To <Russell.Y.Tsuji@hawaii.gov>, "Christi-Anne H. Kudo Chock"  
<CHKC@hawaiilawyer.com>

cc <Barry.W.Cheung@hawaii.gov>

Subje RE: TLM  
ct

Thanks Russell. We will have a messenger come by this afternoon.

I wanted to summarize our discussions over the past week concerning the form of the easement/agreement/mortgage, to see where we have agreement/disagreement, and whether we can bring this matter to closure in a mutually acceptable fashion.

On the easement with your revisions, we have 3 concerns.

1. Paragraph 22: The reference to "nonconforming" might not be accurate and therefore we request replacing that language with a reference to the fact that the seawall was built before 1961.
2. Paragraph 27: The addition of language stating "Any improvements to the existing seawall shall be subject to prior written approval of the Grantor." You explained that this paragraph is intended to allow the grantee to undertake routine maintenance, repair and upkeep of the existing seawall, but that substantial improvements to the existing seawall would require some degree of review by the Department. The amount of review would depend on the nature of the improvements proposed. With this understanding, we will discuss with TLM whether the language will be acceptable.
3. Paragraph 28: You explained that this language is intended to provide that the existing seawall and the easement covering it would constitute resolution of any encroachment issue and that a shoreline certification could therefore be done. You stated that a shoreline certification, if done, would locate the shoreline at the face of the seawall, but that the Department could not actually agree to that location absent an actual shoreline survey. You also indicated that absent overtopping of the seawall by the ocean, the shoreline would be located at the face of the seawall if a shoreline survey were to be done. With this understanding, we will discuss with TLM whether the language will be acceptable.

With respect to the Agreement/Mortgage, you indicated three primary issues:

4. The obligation contained in the Agreement and secured by the Mortgage was non-recourse, and therefore the Department may not recover the full amount of the easement price if the property did not have an

unencumbered value in excess of the obligation amount. While we do not believe this to be likely, we will discuss with TLM the possibility of having this be recourse debt.

5. The obligation contained in the Agreement and secured by the Mortgage must be subordinated to a first mortgage. The Department's concern being that a first mortgage could be obtained, a shoreline certified, and building permits issued for reconstruction of the dwelling. We will discuss with TLM removing the subordination requirement, thereby making the State's mortgage first priority.

6. Related to number 2 above, the Department is concerned once the easement is granted, TLM could certify a shoreline, undertake renovations and retain the property, rather than sell it. We will discuss with TLM revising the "due date" of the obligation to be the earlier of the sale of the property or the issuance of a shoreline certification for renovation purposes.

Please advise us if our understandings are incorrect as to items 2 and 3. Please advise us if the revision as proposed in item 1 is acceptable. Finally, please indicate that if the changes outlined in items 4, 5 and 6 are implemented and the documents revised accordingly, then they will be acceptable.

We look forward to reaching consensus and bringing this matter to closure.

Aloha,

Greg

Gregory W. Kugle  
Damon Key Leong Kupchak Hastert  
1003 Bishop Street, Suite 1600  
Honolulu, Hawaii 96813  
Tel: (808) 531-8031 ext. 603  
Fax: (808) 533-2242  
[gwk@hawaiilawyer.com](mailto:gwk@hawaiilawyer.com)  
[www.hawaiilawyer.com](http://www.hawaiilawyer.com)

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**From:** Russell.Y.Tsuji@hawaii.gov [mailto:Russell.Y.Tsuji@hawaii.gov]  
**Sent:** Wednesday, March 07, 2012 1:02 PM  
**To:** Gregory Kugle; Christi-Anne H. Kudo Chock  
**Cc:** Barry.W.Cheung@hawaii.gov  
**Subject:** TLM

Greg/Christie: we have the check. Do you want to come and pick it up?

# **EXHIBIT**

**A-1-B-2**

----- Forwarded by Russell Y Tsuji/DLNR/StateHiUS on 04/09/2012 01:54 PM -----

Russell Y  
Tsuji/DLNR/StateHiUS  
04/09/2012 01:52 PM

To gwk@hawaiilawyer.com  
cc "Christi-Anne H. Kudo Chock" <CHKC@hawaiilawyer.com>,  
<Barry.W.Cheung@hawaii.gov>  
Subject Fw: TLM

Greg:

1. Deadline.

First, I appreciate your suggestion of adding a shoreline certification as a trigger for payment, but our comment is there may be situations where a building permit could be issued by the County without actually requiring a shoreline certification (for example, interior renovations that do not affect the existing structure or when a staffer just issues the permit).. If we're able to resolve the more important issue of a firm deadline noted below, then we would suggest adding as a trigger, the issuance of building permits exceeding \$10,000, in addition to the issuance of a shoreline certification.

More importantly though, is your client's refusal of a firm deadline for payment. We cannot and will not agree to this--we must continue to insist on a firm deadline. This is especially so since your client is insisting that No Interest accrue and in addition, the fee owner of the property to be secured is not an individual but a legal entity that theoretically could go on beyond the passing of your clients, and possibly for a very long time without an actual sale or transfer of the secured property. The State cannot and will not wait indefinitely for payment for an easement issued to legitimize a an encroachment--especially when you're proposing that No Interest accrue. This is unreasonable and simply unacceptable.

At most we would be willing to extend the deadline to 10 years, and if agreeable by your client, we would also be willing to recommend that No Interest accrue--but that would be contingent upon a firm deadline of 10 years or less. After that it makes no sense as inflation would substantially eat away at the principle debt owed.

If your client agrees to a deadline of 10 years or less, then our suggestion on wrapping up the payment paragraph would be to make the payment due upon the first of the following to occur: (1) March 1, 2022, (2) upon sale (3) issuance of a shoreline certification, (4) issuance of a building permit exceeding \$10,000

2. Interest. For your information our standard interest rate for installment agreements (Land Board approved payment of a debt over time instead of all cash immediately) is currently 7.0 percent annually. But as noted above, unless your client is willing to agree to a deadline of no later than 10 years, then this is really is a nonissue as we won't be able to come to terms for the granting of an encroachment easement with payment over time, and we'll proceed accordingly.

EXHIBIT "A-1-B-2"

3. Warranty. State does not and will not issue any warranties for an easement. All land disposition documents such as easements and leases are issued as is, where is. As to any reimbursement, there is really nothing to reimburse since the State has not even gotten paid for the easement. The most we may consider is a credit on the indebtedness.

4. Repair and Maintenance. All of our land disposition documents like easements and leases require, inter alia repair and maintenance of the demised premises, and also compliance with all laws, rules, etc. Federal, County and State; To the extent the conservation district line is actually mauka of the seaward face of the wall, then the owner should consult with the Office of Conservation and Coastal Lands (in its capacity, together with the Land Board as regulators of the conservation district) to determine whether the proposed repair needs to go through the CDUA process. Our land disposition documents such as easements and leases will not delve into rules or regulations of the conservation district, except to require compliance with them.

More importantly, my understanding is that the conservation district line could possibly move inland should shoreline move or the wall becomes submerged, in whole or in part in the future. As such, a land disposition document

At this juncture, we're trying to negotiate an easement document for an encroachment which is not an OCCL function, but solely involves the Land Division

5. Subordination. Thank you for agreeing to delete any reference to subordinating to a subsequent mortgage.

6. Recourse/Nonrecourse. Thank you for agreeing to make the note a recourse debt.

7. Note and Mortgage. Since you asked, Wynhoff took a shot at a simple draft Note and I added my comments, and we both commented or revised your draft Mortgage, all of which are attached below. But unless your clients agree on a firm deadline as noted above, I wouldn't even bother spending time updating the Note or Mortgage to the other deal points noted above.

Finally, as I advised you, since we have not yet come to terms on an agreement and though progress has been made, the deadline issue in paragraph 1 above is a deal breaker for us on this easement that would legitimize an encroachment on State lands. As such, I will be briefing the Land Board on the status of our easement negotiations on April 13, and will expeditiously proceed accordingly.

Very truly yours,

Russell Y. Tsuji  
Administrator



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TLM Easement-kugle-tsuji-wynhoff.04.05.12..pdf

# **EXHIBIT**

**A-1-C**

EXEMPTION NOTIFICATION

Regarding the preparation of an environmental assessment pursuant to Chapter 343, HRS and Chapter 11-200, HAR

Project Title: Removal of unauthorized CRM wall and wire fence

Project / Reference No.: PSF 08od-068

Project Location: Niu. Honolulu, Oahu, Tax Map Key: (1) 3-7-002:seaward of 009

Project Description: Removal of unauthorized encroachments on state lands

Chap. 343 Trigger(s): Use of State Land

Exemption Class No.: Sections 11-200-8(a)(8) HAR and the Exemption Class 8 in the Exemption List for the Department of Land and Natural Resources approved by the Environmental Council and dated December 4, 1991, that state "Demolition of structures, except those structures located on any historic site as designated in the National Register or Hawaii Register as provided for in the National Historic Preservation Act of 1966, Public Law 89-665 or Chapter 6E, Hawaii Revised Statutes"

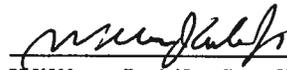
State Historic Preservation Division did not respond when the original request for easement was processed in 2008. Staff is not aware of the subject wall being placed on any historic register.

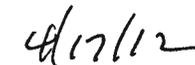
Staff recommends the Board declare they are exempt from preparation of an environmental assessment in accordance with Hawaii Administrative Rules.

Consulted Parties Not applicable

Exemption Item Description  
from Agency Exemption List: Not applicable

Recommendation: It is recommended that the Board declare that this project will probably have minimal or no significant effect on the environment and is presumed to be exempt from the preparation of an environmental assessment.

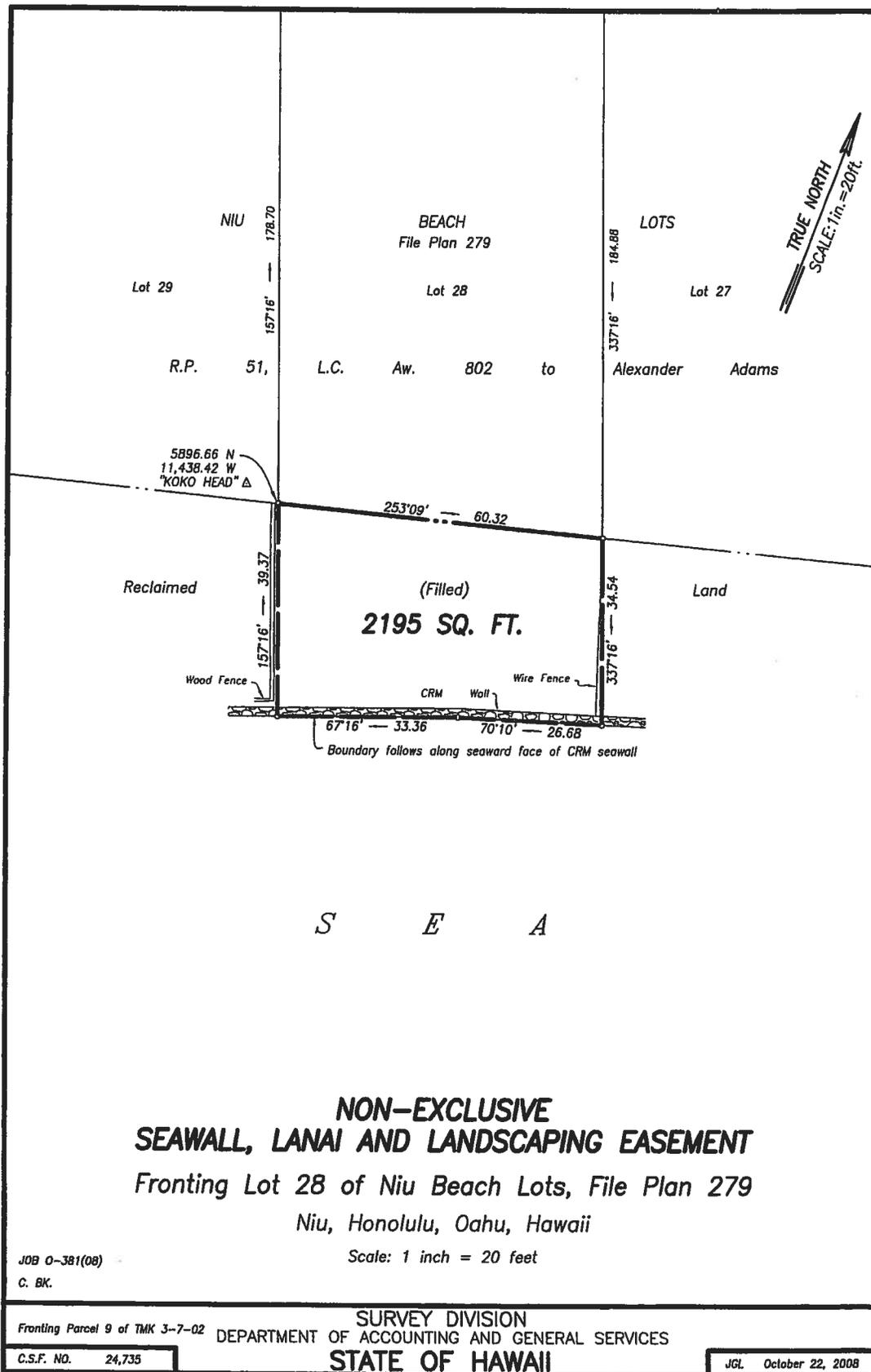
  
\_\_\_\_\_  
William J. Aila, Jr., Chairperson

  
\_\_\_\_\_  
Date

**EXHIBIT A-1-C**

# **EXHIBIT**

**A-1-D**



**EXHIBIT A-1-D**