

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

August 10, 2012

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

PSF No: 11KD-005  
KAUAI

Amend Prior Board Action of October 28, 2011, Item D-8, Grant of Term, Non-Exclusive Easement to Harlan Cabot Amstutz and Patricia Price Amstutz, Co-Trustees of the Amstutz Family Trust Seawall and Stairway Purposes, Koloa, Kauai, Tax Map Key (4) 2-6-003:018 & 060, to Request a Deferral Regarding Tender of Consideration for the Easement.

BACKGROUND:

At its meeting on October 28, 2011, under agenda item D-8 as amended, the Board approved a grant of a fifty-five year term, non-exclusive easement to the Applicant (Attached as Exhibit A). The total easement area consisted of eight separate easement areas, identified as Easements A through H, totaling 1632 square feet. The vast majority of the easement area contained improvements that were built on fast lands within the record boundary of the property, but due to the movement of the shoreline inland, are now located in the shoreline area. Under the terms of the prior Board approval, the Applicant was required to pay the fair market value of the easement as determined by independent appraiser. Subsequently, Appraisal Hawaii Inc. was contracted to prepare a summary appraisal report to establish the fair market value of the easement, which was completed on April 4, 2012. As a result, the fair market value as of March 20, 2012 was determined to be a one-time payment of \$78,900.00.

REMARKS:

When informed of the results of the appraisal, the Applicant expressed concern regarding the amount of the cost of the easement, stating that it would create a significant financial burden. Considering that the primary purpose of seeking the easement is to resolve indemnity and insurance issues regarding the encroachments, the Department will attempt to remedy the situation by introducing proposed legislation for the 2013 Legislative Session. See draft legislation as Exhibit B. The proposed legislation will seek to grant the Board the authority to approve at a nominal rate, the issuance of easements for encroaching structures now located seaward of the shoreline but were authorized and built within the record boundary of the property and landward of the shoreline at the time of construction. The Department believes that passage of this proposed legislation would encourage compliance from other landowners in

similar situations in obtaining easements.

The Applicant was informed of the Department's proposed legislation, and now requests that the Board amend its approval of the easement to hold enforcement by allowing a temporary deferral of payment until the close of the 2013 Legislative Session, which would allow the proposed legislation to be enacted. A copy of the Applicant's testimony on this Item is attached as Exhibit C. The Board is respectfully requested to approve of the execution of the easement to the Applicant for the entire easement area, and the Applicant will compensate the Department only for the encroachments that are located outside the record boundary of the property. The amount of the compensation will be calculated using the "per square foot" cost of the entire easement, approximately \$48.35, and applying it to the area outside the record boundary. The easement area for the encroachments located outside the record boundary of the property total approximately 100 square feet, more or less, resulting in a cost of about \$4835.00. Staff asks and recommends the Board set the value at \$4835.00 for the encroachments situated outside the record boundary.

Applicant understands that payment for the remaining balance is only temporarily deferred, not waived. If the proposed legislation passes, then the Applicant would be excused from any further payment obligation. However, if the proposed legislation is not enacted, then Applicant shall be responsible for paying the remaining balance of the easement amount. In such an event, failure of the Applicant to pay may result in the termination of the easement and subsequent enforcement action.

RECOMMENDATION: That the Board:

1. Amend its prior Board action of October 28, 2011, under agenda item D-8 by approving the execution of the easement with a temporary deferral of the payment of the entire easement cost under the terms and conditions as described above; and
2. All terms and conditions listed in its October 28, 2011 approval to remain the same.

Respectfully Submitted,



Ian Hirokawa  
Project Development Specialist

APPROVED FOR SUBMITTAL:

  
William J. Aila, Jr., Chairperson

**AMENDED**

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

October 28, 2011

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

PSF No.: 11KD-005

Kauai

Grant of Term, Non-Exclusive Easement to Harlan Cabot Amstutz and Patricia Price Amstutz, Co-Trustees of the Amstutz Family Trust for Seawall and Stairway Purposes, Koloa, Kauai, Tax Map Key: (4) 2-6-003:018 & 060.

APPLICANT:

Harlan Cabot Amstutz and Patricia Price Amstutz, Co-Trustees of the Amstutz Family Trust, hereafter referred to as "Landowner".

LEGAL REFERENCE:

Section 171-13, 53(b), 53(c), Hawaii Revised Statutes, as amended.

LOCATION:

Portion of Government land located seaward of Parcels 18 and 60, Tax Map Key: (4) 2-6-003, situate at Koloa, Kauai as shown on the attached map labeled Exhibit A.

AREA:

1530 square feet, more or less, as shown on the attached map labeled as Exhibit B.

ZONING:

State Land Use District: Urban  
County of Kauai CZO: Open-Special Treatment District

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act

DHHL 30% entitlement lands pursuant to the Hawaii State Constitution: NO

*As Amended*  
APPROVED BY THE BOARD OF  
LAND AND NATURAL RESOURCES *DA*  
AT ITS MEETING HELD ON  
October 28, 2011

**EXHIBIT "A"**

CURRENT USE STATUS:

Unencumbered with encroachments.

CHARACTER OF USE:

Right, privilege and authority to use, maintain, repair, replace and remove existing seawall and stairs over, 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:

In accordance with Hawaii Administrative Rule Sections 11-200-8(a)(1) & (4) and the Exemption List for the Department of Land and Natural Resources approved by the Environmental Council and dated December 4, 1991, the subject request is exempt from the preparation of an environmental assessment pursuant to Exemption Class No. 1, that states "Operations, repairs or maintenance of existing structures, facilities, equipment, or topographical features, involving negligible or no expansion or change of use beyond that previously existing" and Class No. 4, that states "Minor alteration in the conditions of land, water, or vegetation." Exemption Notice is attached as Exhibit C.

DCCA VERIFICATION:

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 initial one-time payment; and
- 2) Provide survey maps and descriptions according to State DAGS standards and at

Applicant's own cost.

REMARKS:

BACKGROUND:

On May 12, 2010, DLNR staff conducted a site visit of the Subject Property for the purposes of determining the location of the shoreline for a certified shoreline application. Also present at the site visit was the landowner's surveyor, Esaki Surveying and Mapping, Inc., ("Esaki") who also served as the Applicant for the certified shoreline application. During the site visit, DLNR staff identified numerous structures within the shoreline area. Esaki was informed that prior to any shoreline being certified, pursuant to the requirements of Hawaii Administrative Rules Section 13-222-19, the legal status of the shoreline structures must be resolved. Esaki was instructed that they would be required to provide documentation from an appropriate agency that the structures were permitted, or alternatively, establish that the structures were of a non-conforming status, and thus exempt from authorization. In addition, Esaki was also instructed to identify the seaward record boundary of the property and determine if any of the structures were an encroachment onto State land.

On June 3, 2010, the Department received a certified shoreline application for the subject property. The application was accepted for processing and the notice of acceptance was published on July 8, 2010 in the Office of Environmental Quality Control Environmental Notice. Upon review of shoreline map submitted with the application, it was discovered that the applicant had not identified the seaward record boundary on the map, nor any encroachments. Furthermore, at this point in time, neither Esaki nor the landowner took action to resolve the legal status of the structures located in the shoreline area. By letter to Esaki dated July 15, 2010, the State Land Surveyor restated the requirement to identify the seaward boundary on the shoreline map and to provide documentation supporting that the structures in the shoreline were approved by the appropriate government agencies or were exempt from such approval.

Over the course of the next several months, the landowner worked with Office of Conservation and Coastal Lands ("OCCL") staff regarding the legal status of the structures. During this time, the initial ninety-day processing period for the certified shoreline application was extended for the maximum allowable period for an additional 180 days, until April 3, 2011. Ultimately, OCCL determined that, based upon evidence submitted by the landowner, although there were no government documents that confirm the structure was authorized, it was very likely in place prior to October 1, 1964 implementation of the Conservation District rules and could therefore be considered non conforming. It was emphasized to the landowner that this determination applied only to the structures within the shoreline area, it was still necessary to identify the seaward property boundary and resolve any potential encroachments onto State land, by either obtaining an easement or removal.

In December 2010, the landowner began pursuing approval for easements for several areas deemed to be encroachments. The initial map produced by Esaki delineated two proposed easement areas for portions of the seawall, stairs and landscaped areas, comprising approximately 1450 square feet. The easement map did not identify the seaward record boundary, but instead calculated the easement areas using the shoreline location identified during the May 2010 site visit as the seaward boundary. Furthermore, easements were calculated for Parcel 18 only, excluding Parcel 60. On February 22, 2011, OCCL issued a letter in support of the requested disposition but noted that based on the submitted map, the full extent of the encroachments was unclear. OCCL noted that no government documents were provided which confirm the structures were authorized, nor was it clear based upon evidence submitted by the landowner that the structures were in place prior to the inception of the Conservation District Rules on October 1, 1964. However, since the majority of the structures were landward of the shoreline, OCCL opted not to pursue a conservation district violation, nor require an after the fact permit for the structures. OCCL did reserve the right to reconsider its finding if it is discovered that the improvements were constructed within the conservation district without a permit after 1964. OCCL ultimately supported the disposition on the basis that it would have no discernable impact on beach and recreational resources, and do not act as a detriment to public access. See letter attached as Exhibit D. As no revised maps were received, the potential encroachment was deemed to be unresolved, and the shoreline application was rejected. Public notice of the rejection was published in the Environmental Notice on March 8, 2011. No appeal of the decision was filed.

In light of this development, Esaki proceeded to revise the proposed easement map by identifying the record seaward boundary and delineating easement areas for all structures seaward of both the proposed shoreline location and the record seaward boundary for parcels 18 and 60. The updated map, dated September 13, 2011, shows eight easement areas labeled A through H, totaling approximately 1632 square feet.

#### ANALYSIS:

Upon review of the revised map, Land Division and OCCL are supportive of a disposition for all of the proposed easements except for the easement identified as C. Easement C pertains to a rock wall along the west boundary of parcel 60. The wall extends seaward perpendicular to the shoreline. After deliberation, staff has determined that the wall does not protect the subject property, and also obstructs lateral access along the shoreline. Hawaii Revised Statutes Chapter 115 guarantees the right of lateral access along the shoreline. Specifically, HRS Section 115-5 states "a right of transit shall exist seaward of the shoreline and this area shall be defined as a beach transit corridor." Additionally, Section 115-9 states "[a] person commits the offense of obstructing access to public property if the person, by action or by having installed a physical impediment, intentionally prevents a member of the public from traversing...a beach transit corridor; and thereby obstructs access to and along the sea, the shoreline, or any inland recreation area."

Furthermore, the wall may be considered a public safety hazard. This particular area is a rocky coastline, and there are two holes in the ground on the west side of the wall, which open to the ocean below. Because of the proximity of the holes to the wall, the holes would be obscured from the view of anyone traversing the shoreline from the east. This area is subject to powerful wave inundation. During a site visit, waves were seen crashing over the seaward end of the wall as well as the holes on the side of the wall. In addition, the wall extends seaward to the end of the rocky shoreline at the water's edge. The top of the wall is wide enough to give the impression that it can serve as an accessible path, essentially creating an attractive nuisance. If an individual who is unfamiliar with the area walks out the end of the wall, they could be in danger of being swept into the ocean by a strong wave. Given the factors noted above, staff recommends that the Board deny the request to grant Easement C and require that the landowner remove the rock wall up to the proposed shoreline location as a condition on which other easements are granted.

Another issue for the Board to consider in this case is that, in this instance, the encroachments are identified as structures seaward of the record seaward boundary and the proposed shoreline location. In past practice, when dealing with shoreline encroachments, the Department has utilized solely the boundary of record to determine the presence of any encroachments. However, the Department has been advised by the Attorney General that, according to the Hawaii Supreme Court in County of Hawaii v. Sotomura, "land below the high water mark, like flowing water, is a natural resource owned by the state subject to, but in some sense in trust for, the enjoyment of certain public rights." In addition, the Attorney General opined that although the State may own land within the shoreline area that does not mean the State owns or is responsible for any structures placed it by others or the abutting landowner. Therefore, any structures located seaward of the proposed shoreline location as determined by staff would be considered encroachments upon State land. Furthermore, shoreline easements should include any structures in the shoreline area, even if the structures are located within the record boundary of the property. In accordance with this rationale, the proposed easement map prepared by Esaki notes easements for structures both seaward of the shoreline (Easements A, B and C) and the record seaward boundary (Easements D through H).

AGENCY COMMENTS:

State and County of Kauai agencies were solicited for comments. The following agencies did not respond:

State of Hawaii: Department of Hawaiian Homes, and DLNR-Aquatic Division.

County of Kauai: Planning Department.

DLNR-Historical Preservation Division: Our records indicate that the area there has been no known historic site of the aforementioned subject parcels. However a review of the parcels in the vicinity of the proposed easement area indicates the presence of a historic

coastal trail complex (State inventory of Historic Places Site 50-30-11-0990).

An archaeological inventory survey should be conducted to determine the presence and/or disposition of the coastal trail complex (SIHP Site 50-30-11-0990) and any other historic or cultural properties potentially impacted by this easement.

If trail remnants remain in tact within this project area they should be maintained to allow for the continued use of this resource for shoreline public access and traditional cultural practices. (See Exhibit E)

Office of Hawaiian Affairs: OHA seeks clarification whether the Request for State Lands Application Form included with your letter has been accepted by DLNR as complete. If this action will be subject to Board of Land and Natural Resources (BLNR) approval, we would appreciate receiving the draft BLNR Submittal for review and comments. (See Exhibit F).

Further, staff is recommending that the Board authorize the acceptance of a deposit from the Applicant. This will allow the Applicant to process the shoreline certification, which is needed for the Applicant's to pursue a building permit. As standard practice, staff does not allow a shoreline certification to be processed until all encroachments have been resolved through the full execution of legal documents or removal of the encroachments. In the past, shoreline certifications or other approvals were released prior to full document execution and staff found it difficult to compel the Applicant to execute the documents and make payment. Therefore, staff offers this alternative method of collecting a deposit to enable the Applicant to pursue permits and approvals with less risk that the Applicant will not execute the documents. While such a deposit does not completely ensure that the documents will be executed, it does show a strong commitment by the Applicant to enter into an agreement with the State.

Upon execution of the legal documents, this deposit will be applied towards the consideration amount and other applicable charges. If the deposit amount is more than the total, then the Applicant shall be reimbursed any difference (and vice versa). If the Applicant does not execute the document, the Applicant shall be required to remove the encroachments to the satisfaction of the Department or to forfeit the deposit in full, which shall be used to remove the encroachment.

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.

**RECOMMENDATION:** That the Board:

- 1) Subject to the Applicant fulfilling all of the requirements listed above, including removal of the rock wall identified on the proposed easement map as Easement C,

authorize the issuance of a term, non-exclusive easement to Harlan Cabot Amstutz and Patricia Price Amstutz, CO-Trustees of the Amstutz Family Trust covering the subject area for seawall 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. The easement shall run with the land and shall inure to the benefit of the real property described as Tax Map Key: (4) 2-6-03: 018 and 060, provided however: (1) it is specifically understood and agreed that the easement shall immediately cease to run with the land upon the expiration or other termination or abandonment of the easement; and (2) if and 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;
  - C. Review and approval by the Department of the Attorney General; and
  - D. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.
  - E. Any shoreline hardening policy that may be adopted by the Board prior to execution of the grant of easement
- 2). Declare that, after considering the potential effects of the proposed disposition as provided by Chapter 343, HRS, and Chapter 11-200, HAR, this project will probably have minimal or no significant effect on the environment and is therefore exempt from the preparation of an environmental assessment.
  - 3) 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: (4) 2-6-03: 018 and 060, 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.
  - 4) Authorize the Department to accept a deposit from the Applicant as an estimated easement consideration pursuant to the conditions set forth in the Remarks section above.

Respectfully Submitted,



Ian Hirokawa  
Project Development Specialist

APPROVED FOR SUBMITTAL:

  
William J. Aifa, Jr., Chairperson

W

Land Board Meeting: October 28, 2011: D-8: Approved as Amended:

See next page:

**Land Board Meeting: October 28, 2011: D-8: Approved as amended.**

The assigned Deputy Attorney General raised an issue of the applicability of 171-53, HRS applying in another shoreline encroachment/easement matter, item D-25. HRS 171-53 applies to leasing (and to some extent easements) of submerged or reclaimed lands. Though staff did not believe either D-25 or D-8 involved an easement within submerged lands or reclaimed lands<sup>1</sup>, in an abundance of caution and to move this matter forward and to avoid having to return to the Land Board later with an amended submittal, staff recommended the following amendment.

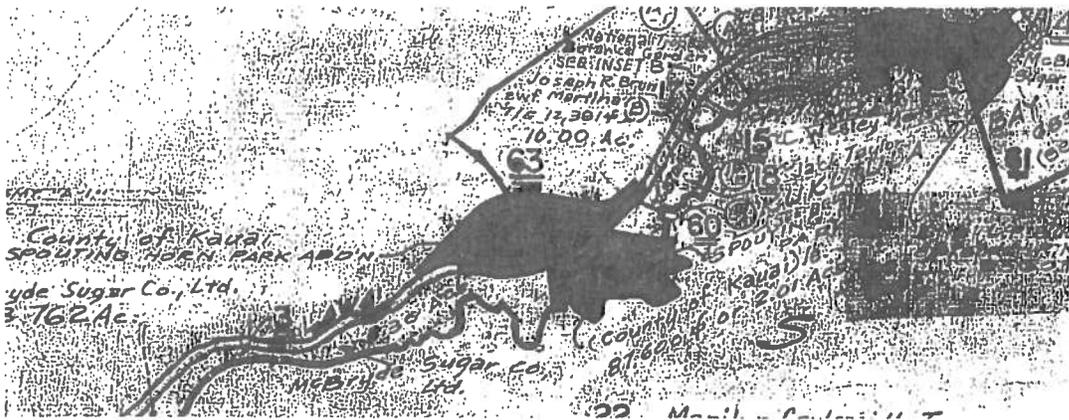
**Legal Reference within the text of the submittal is amended to reflect the reference to, in addition to cited statutory sections, 171-53 to the extent it is determined that section is applicable.**

**Recommendation No. 1 is amended to reflect that the Board is not requiring the removal of the rock wall identified in the proposed easement map as Easement C, and instead, the Board, in addition to the easements recommended by staff, approves the granting of an easement for the rock wall indentified in the proposed easement map as Easement C (for a combined Easements A through G, for a total area of 1632 square feet, more or less).**

**Add recommendation no. 5 as follows: To the extent 171-53, HRS is determined to be applicable to this particular disposition, the Board finds that the disposition approved herein is not prejudicial to the best interest of the State, and staff shall comply with the publication and other requirements of 171-53, if any before execution of the easement document.**

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<sup>1</sup> Staff advised the Land Board that it believed there is, or ought to be a distinction between “within the shoreline” versus submerged lands or reclaimed lands as referred to in 171-53. In this case, based an earlier shoreline certification, the encroaching structures are inland of the shoreline, and not seaward. Furthermore, the ocean is beyond the rocky shoreline and proposed easement area.



TMK: (4) 2-6-03

**EXHIBIT "A"**





STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
LAND DIVISION

POST OFFICE BOX 621  
HONOLULU, HAWAII 96809

October 13, 2011

## EXEMPTION NOTIFICATION

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

**Project Title:** Grant of Term, Non-Exclusive Easement to Harlan Cabot Amstutz and Patricia Price Amstutz, Co-Trustees of the Amstutz Family Trust for Seawall and Stairway Purposes, Koloa, Kauai, Tax Map Key: (4) 2-6-003:018 & 060.

**Project / Reference No.:** PSF 11KD-005

**Project Location:** Koloa, Kauai, seaward of Tax Map Key Nos.: (4) 2-6-003:018 & 060

**Project Description:** Issuance of Term, Non-Exclusive Easement for Seawall and Stairway Purposes

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

**Exemption Class No.:** In accordance with Hawaii Administrative Rule Sections 11-200-8(a)(1) & (4) and the Exemption List for the Department of Land and Natural Resources approved by the Environmental Council and dated December 4, 1991, the subject request is exempt from the preparation of an environmental assessment pursuant to Exemption Class No. 1, that states "Operations, repairs or maintenance of existing structures, facilities, equipment, or topographical features, involving negligible or no expansion or change of use beyond that previously existing" and Class No. 4, that states "Minor alteration in the conditions of land, water, or vegetation."

According to the information provided to the Office of Conservation and Coastal Lands, the subject improvements have been in place and unaltered since at least 1981. The subject request is the continuous operation, repair and maintenance of the existing structures and topography. Staff believes the request involves minor alteration in the condition of land, water, and

EXHIBIT "C"

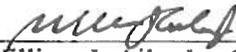
vegetation. As the structures have been in place for a significant period of time, granting an easement for them to remain in place should have no significant effect on the surrounding environment. Therefore it is recommended that the subject request be exempted from an environment assessment.

Consulted Parties

Office of Conservation and Coastal Lands

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

NEIL ABERCROMBIE  
GOVERNOR OF HAWAII



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

WILLIAM J. AILA, JR.  
INTERIM CHAIRPERSON  
BOARD OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE MANAGEMENT

GUY H. KAULUKUKUI  
FIRST DEPUTY

WILLIAM M. TAM  
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES  
BOATING AND OCEAN RECREATION  
BUREAU OF CONVEYANCES  
COMMISSION ON WATER RESOURCE MANAGEMENT  
CONSERVATION AND COASTAL LANDS  
CONSERVATION AND RESOURCES ENFORCEMENT  
ENGINEERING

FORESTRY AND WILDLIFE  
HISTORIC PRESERVATION  
KAHOOLAWE ISLAND RESERVE COMMISSION  
LAND  
STATE PARKS

REF:CC

File Number Encroachment: KA-11-04

**MEMORANDUM:**

FEB 22 2011

TO: Larry Pacheco, Land Agent  
Kauai Land Division

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

CC: Kauai Board Member

SUBJECT: RE: Request for 55 year, Term, Non-Exclusive Easement for Shoreline Encroachment Purposes, which Include Portions of Seawall and Stairway

The Office of Conservation and Coastal Lands (OCCL) has received your request for comments concerning an easement request for shoreline encroachments seaward of TMK (4) 2-6-003:018 and 060. The OCCL has also received a Shoreline Encroachment Information Sheet for the same land uses. The information submitted to the OCCL is attached to letter.

The OCCL has reviewed the information submitted concerning the encroachments makai of TMK (4) 2-6-003:018, Koloa, Kauai, Hawaii. From the maps submitted, it is unclear the full extent of the encroachments, though it appears as though they are comprised of approximately 1450 square feet of private land uses on State land, including seawalls, stairs, and landscaped area.

OCCL staff was unable to locate any documents relating the legal status of the land uses or the disposition of State lands beneath them in the State records. OCCL staff has also reviewed the documents submitted by the applicant, Dr. Harlan Amstutz, pertaining to the origins of the land uses and their current status. A notarized affidavit from the applicant's architect, Paul Wuesthoff, states that the walls were in place, and have remained unaltered since he started working on the property in 1981. A letter from the licensed surveyor working on the project, Dennis Esaki, states, "To the best of my knowledge, the wall permit record for the above parcel no longer exists at the Planning Department, County of Kauai." Additionally, aerial photographs of the area, from before October 1, 1964, are of insufficient resolution to identify coastal structures on a rocky, vegetated coastline.

**EXHIBIT "D"**

The land uses appear to be intact and unaltered since the 1981 photographs. It is unclear if the structures were in place prior to the inception of the Conservation District rules in October 1, 1964. As of present it appears that most of the encroachments lie mauka of the current recommended certified shoreline location, with the exception of the stairs on the eastern encroachment.

Based upon this information the OCCL will not be pursuing a violation of Conservation District rules and regulations nor asking for an after-the-fact Conservation District Use Application to cure this matter. Should the OCCL find that any portion of these improvements was built within the Conservation District without a permit, after 1964, the OCCL may reconsider this finding.

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 the shoreline encroachments.

Surrounding Land Uses:

*The surrounding coastal uses in the area are residential, to the east, and open coastal lands and park to the west, as this parcel is the eastern, abutting property to Spouting Horn. The upland residential area currently has a moderate density development pattern.*

Beach Resources:

*There are two small pocket beaches fronting the property. The western pocket beach, comprised of cobble and sand, does not appear to be impacted by the encroachments. The eastern pocket beach is along the eastern section of wall and around the potentially encroaching stairs. It is unclear from the maps if any other land uses near the pocket beaches are encroaching. Most of the coast in this area is basalt headland.*

Public Access:

*There is ample public access from Spouting Horn on the western side, and along the small pocket beach on the eastern side. There is excellent lateral access in the area, along the rocky coast fronting the Spouting Horn State Park and the parcel.*

Effect of Removing the Encroachment on:

*Beach Resources: Removal of the land uses will not appreciably improve the existing pocket beaches.*

*Public Access: OCCL staff has determined that no improvement would be gained by removing the encroachments.*

**EXHIBIT "D"**

*Affect on Adjacent Properties: Removal of the encroaching stairs will impact the utility of the stairs for accessing the beach from the private parcel, but will not impact public access or the structure. Removal of the larger western encroachment will not significantly impact the seawall, but will cause the failure of the landscaped area due to erosion. There would be no impact to adjacent dwellings from the removal of either encroachment.*

It has been the general policy and practice of the OCCL to support easement requests that have no discernible effect on beach and recreational resources, and do not act as a detriment to public access. In cases where the encroachment serves as a 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 the encroaching land uses. The OCCL suggest that proper signage be placed identifying that the State land is open to the public. The OCCL suggest that any disposition require the land uses remain unimproved. However, if improvements are allowed the OCCL also suggests a requirement for an integrated public access component to address the mandated lateral shoreline access parameters stated in HRS § 115.

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

**EXHIBIT "D"**

NEIL ABERCROMBIE  
GOVERNOR OF HAWAII



STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
STATE HISTORIC PRESERVATION DIVISION  
601 KAMOKILA BOULEVARD, ROOM 555  
KAPOLEI, HAWAII 96707

WILLIAM J. AILA, JR.  
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BOARD OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE MANAGEMENT

GUY KAULUKUKUI  
INTERIM FIRST DEPUTY

WILLIAM M. TAM  
INTERIM DEPUTY DIRECTOR - WATER

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

February 28, 2011

Log No. 2011.0363

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MEMORANDUM

TO: Larry Pacheco, Land Agent  
Department of Land and Natural Resources  
Land Division  
3060 Eiwa Street, Room 208  
Lihue, HI 96766

FROM: Theresa Donham, Archaeology Branch Chief/Deputy SHPO 

SUBJECT: **Chapter 6E-42 Historic Preservation Review -  
Request for a 55-Year, Term, Non-Exclusive Easement for Shoreline Encroachment  
Purposes, which Includes Portions of a Seawall and Stairway. (Ref. No. 11KD-005)  
Koloa Ahupua'a, Koloa District, Island of Kaua'i  
TMK (4) 2-6-003:018 and :060 (Seaward)**

Thank you for the opportunity to review and comment on the aforementioned application that was received by our office on February 2, 2011. According to your letter Dr. Harlan and Mrs. Patricia Amstutz have applied for a 55 year non-exclusive easement for shoreline encroachments, which includes portions of a seawall and a stairway *makai* of their property. A review of our records indicates that there are no known historic sites on the aforementioned subject parcels. Our records also indicate that there has been no archeological inventory survey (AIS) of this property. Aerial photographs indicate that the area mauka from the (rRO) rock outcrop shoreline has been highly disturbed by grading associated with intensive sugarcane cultivation (Foote et. al. 1972).

However, a review of the parcels in the vicinity of this proposed easement area indicates the presence of a historic coastal trail complex (State Inventory of Historic Places Site 50-30-11-0990. Site -0990 was described in a 2002 AIS by Creed et. al. as a trail complex with a mix of modern and historic sections that runs along the shoreline (SHPD Rpt. K-764). This site represents both a historic site and an avenue for traditional cultural practices such as fishing and gathering marine resources. Because the Creed et. al. (2002) AIS focused exclusively on the nearby (4) 2-6-003:020 parcel, it is unknown whether this trail extends into the current proposed easement area. Our main concern is that the construction of this seawall and stairway may have impacted the coastal trail and hindered access along the shoreline. Therefore, we request that the following conditions are attached to the subject easement should it be approved.

- I. An archaeological inventory survey should be conducted to determine the presence and/or disposition of the coastal trail complex (SIHP Site 50-30-11-0990) and any other historic or cultural properties potentially impacted by this easement.
- II. If trail remnants remain intact within this project area, they should be maintained to allow for the continued use of this resource for shoreline public access and traditional cultural practices

Please contact Mike Vitousek at (808) 692-8029 or [Michael.Vitousek@hawaii.gov](mailto:Michael.Vitousek@hawaii.gov) if you have any questions or concerns regarding this memo.

EXHIBIT "E"



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

HRD11/5548

February 15, 2011

Larry Pacheco, Land Agent  
Department of Land and Natural Resources-Land Division  
3060 Eiwa Street, Room 208  
Lihu'e, Kaua'i

**Re: Request for 55-year term non-exclusive easement  
Koloa, Island of Kaua'i**

Aloha e Larry Pacheco,

The Office of Hawaiian Affairs (OHA) is in receipt of your January 31, 2011 letter requesting comments on the grant of a non-exclusive easement for a 55-year term (action) to allow portions of an existing shoreline encroachment (a seawall and stairway) to remain in place seaward of a property owned by the Amstutz Family Trust (applicants).

OHA seeks clarification whether the "Request for State Lands Application Form" (form) included with your letter has been accepted by the Department of Land and natural Resources as complete. We note that very little specific descriptive information is detailed in this form. Based on the limited information available to us at this time, it is our understanding that the seawall and stairway have been in place since the applicants purchased the property in 1980.

Section III of the form asks whether the action is intended "to resolve an encroachment or other violation". The applicants answered yes to this question, and explained that the violation is "low walls on ocean side". OHA requests clarification on this issue.

In Section V.C. of the form, the applicants state that "no new structure or use is being considered", yet in Section V.F., the applicant indicates that they "have requested a permit to add a room at the street level just inside of the property line". OHA also requests clarification on this apparent discrepancy.

If this action will be subject to Board of Land and Natural Resources (BLNR) approval, we would appreciate receiving the draft BLNR submittal for review and comment as opposed to the form which you provided. We have no additional comments on this action at this time. Should you have any questions or concerns, please contact Keola Lindsey at 594-0244 or keolal@oha.org.

'O wau iho nō me ka 'oia'i'o,

Clyde W. Nāmu'o  
Chief Executive Officer

C: OHA- Kaua'i Community Outreach Coordinator

**EXHIBIT "F"**

A BILL FOR AN ACT RELATING TO SHORELINE ENCROACHMENT EASEMENTS.

Section 1. The purpose of this Act is to provide the Board of Land and Natural Resources the discretion to grant easements for nominal consideration in regards to encroaching structures that were authorized by an appropriate regulatory agency and originally constructed landward of the shoreline and within the record boundary of an oceanfront property but are now located within the shoreline area, due to the dynamic nature of the location of the shoreline.

Section 2. The Department has been advised by the Attorney General that, according to the Hawaii Supreme Court in County of Hawaii v. Sotomura, "land below the high water mark, like flowing water, is a natural resource owned by the state subject to, but in some sense in trust for, the enjoyment of certain public rights." In addition, the Attorney General opined that although the State may own land within the shoreline area that does not mean the State owns or is responsible for any structures placed there. Any structures located seaward of the shoreline location as determined by the Department would be considered encroachments upon public land. When an encroachment is discovered, it may be resolved by either removal or obtaining an easement. Therefore, shoreline easements would include any structure now in the shoreline area, even if the structure is located within the record boundary of the landward property at the time of construction.

Section 3. The Department has been named as a party in claims regarding structures, improvements and debris in the shoreline area that was once private property.

Section 4. Pursuant to Sections 171-13 and 171-17(b), Hawaii Revised Statutes, easements granted by the Board under the circumstances described in Section 2 requires compensation at fair market value. This measure seeks to grant the Board discretion to grant such easements as described above for nominal consideration.

Section 5. Chapter 171, Hawaii Revised Statutes is amended by adding a new section to read as follows:

"§171-13.5 Shoreline Encroachment Easements. (a) Structures from a property abutting the shoreline as defined in Chapter 205A, Hawaii Revised Statutes, authorized and constructed landward of the shoreline within its record boundary at the time

EXHIBIT "B"

of construction, and now located seaward of the shoreline, are encroachments trespassing on public land.

(b) The Board may grant easements for such encroachments defined in subsection (b) for nominal consideration.

(c) Easements granted in accordance with this section shall not require the approval of the governor and authorization of the legislature pursuant to section 171-53."

Section 6. Section 171-17, Hawaii Revised Statutes is amended to read as follows:

**"§171-17 Appraisals.** (a) The appraisal of public lands for sale or lease at public auction for the determination of the upset price may be performed by an employee of the board of land and natural resources qualified to appraise lands, or by one but not more than three disinterested appraisers whose services shall be contracted for by the board; provided that the upset price or upset rental shall be determined by disinterested appraisal whenever prudent management so dictates. No such lands shall be sold or leased for a sum less than the value fixed by appraisal; provided that for any sale or lease at public auction, the board may establish the upset sale or rental price at less than the appraisal value set by an employee of the board and the land may be sold or leased at that price. The board shall be reimbursed by the purchaser or lessee for the cost of any appraisal required to be made by a disinterested appraiser or appraisers contracted for by the board.

(b) The sale price or lease rental of lands to be disposed of by drawing or by negotiation shall be no less than the value determined by:

- (1) An employee of the board qualified to appraise lands; or
- (2) A disinterested appraiser or appraisers whose services shall be contracted for by the board, and such appraisal, and any further appraisal with the approval of the board, shall be at the cost of the purchaser;

provided that the sale price or lease rental shall be determined by disinterested appraisal whenever prudent management so dictates; provided further that should the purchaser fail to agree upon the sale price or lease rental, the purchaser may appoint an appraiser who together with the board's appraiser shall appoint a third appraiser, and the sale price or lease rental shall be determined by arbitration as provided for in chapter 658A which shall be final and binding. The purchaser shall pay for all appraisal costs, except that the cost of the third appraiser shall be borne equally by the purchaser and the board.

(c) For shoreline encroachment easements granted pursuant to Section 13.5 of this Chapter, the Board may grant such easements for nominal consideration.

(ed) In the repurchase of any land by the board, the board shall have the option to repurchase the land for the original sale price or the fair market value at the time of repurchase, whichever is the lower. Any improvements affixed to the realty shall be purchased at their fair market value. At the time of the repurchase, the fair market value of the land, and the improvements, if any, shall be determined by a qualified appraiser whose services shall be contracted for by the board; provided should the owner fail to agree upon the value, the owner may appoint the owner's own appraiser who together with the board's appraiser shall appoint a third appraiser, and the value shall be determined by arbitration as provided in chapter 658A. The owner shall pay for all appraisal costs, except that the cost of the third appraiser shall be borne equally by the purchaser and the board.

(de) In the event of reopening of the rental to be paid on a lease, the rental for any ensuing period shall be the fair market rental at the time of reopening. At least six months prior to the time of reopening, the fair market rental shall be determined by:

- (1) An employee of the department qualified to appraise lands;  
or
- (2) A disinterested appraiser whose services shall be contracted for by the board;

and the lessee shall be promptly notified of the determination; provided that should the lessee fail to agree upon the fair market rental, the lessee may appoint the lessee's own appraiser who together with the board's appraiser shall appoint a third appraiser and the fair market rental shall be determined by arbitration as provided in chapter 658A. The lessee shall pay for the lessee's own appraiser, the board shall pay for its appraiser, and the cost of the third appraiser shall be borne equally by the lessee and the board. Any language in present leases to the contrary notwithstanding, the provisions of this subsection, when possible and notwithstanding the six-month notice required, shall apply to leases with original lease rental reopening dates effective before and after July 1, 1996.

(ef) Whenever more than one appraiser is appointed each shall prepare and submit an independent appraisal. All appraisal reports shall be available for study by the public. [L 1962, c 32, pt of §2; am L 1963, c 135, §§1, 2, 3; am L 1965, c 239, §10; Supp, §103A-17; HRS §171-17; am L 1976, c 147, §1; am L 1985, c 116, §1; gen ch 1985; am L 1986, c 48, §1; am L 1993, c

132, §1; am L 1996, c 233, §1 and c 234, §1; am L 2001, c 265, §4, am L 2013, c XXX, §6]"

Section 7. Section 171-17, Hawaii Revised Statutes is amended to read as follows:

**"§171-53 Reclamation and disposition of submerged or reclaimed public land.** (a) Any submerged public land or land beneath tidal waters shall not hereafter be reclaimed by private abutting owners, except as hereinafter provided.

(b) As to presently reclaimed land, the board of land and natural resources, after finding that its disposition is not prejudicial to the best interest of the State, community or area in which such reclaimed land is located and after giving public notice in accordance with section 171-16(d) of its intention to dispose, may dispose of it, without recourse to public auction, to the abutting owner, by sale or lease; provided that if the reclaimed land has been filled in or made with the prior approval of government authorities, and not otherwise filled in or made contrary to the public interest, it may be disposed of at fair market value or fair market rental of the submerged public land, but if the reclaimed land has been filled or made otherwise, it shall be disposed of at the fair market value or fair market rental of the reclaimed land.

(c) The board, with the prior approval of the governor and the prior authorization of the legislature by concurrent resolution, may lease state submerged lands and lands beneath tidal waters under the terms, conditions, and restrictions provided in this chapter; provided that the authorization of the legislature shall not be required for leases issued under chapter 190D; and provided further that the approval of the governor and authorization of the legislature shall not be required for any grant of easement or lease of state submerged lands or lands beneath tidal waters used for moorings, cables, ~~or~~ pipelines, or any shoreline encroachment as described in section 171-13.5; provided further that this exemption shall not apply to easements for cables used for interisland electrical transmission or slurry pipelines used for transportive materials, mined at sea, or waste products from the processing of the same.

The lease shall provide that the lands shall be reclaimed at the expense of the lessee. Title to the reclaimed lands shall remain in the State.

(d) Whenever in connection with reclaimed lands or the reclamation of submerged lands or lands beneath tidal waters by authority of law, the board deems it advantageous to the State in order to settle the rights (littoral or otherwise), if any,

of an abutting owner, to create public beaches, or to consolidate the holdings of public lands in the vicinity or provide public ways or access to the public lands, it may, with the prior approval of the governor, sell, lease, or transfer by way of an exchange, without recourse to public auction but subject to the limitations contained in section 171-50 and to the other provisions of this chapter, lands having the status of public lands. [L 1962, c 32, pt of §2; am L 1965, c 239, §28; Supp, §103A-50; am L 1967, c 234, §3; HRS §171-53; am L 1981, c 199, §2; am L 1987, c 367, §2; am L 1999, c 176, §1; am L 2000, c 261, §§3, 5; am L 2002, c 68, §2 and c 103, §1(2); am L 2005, c 129, §2, am L 2013, c XXX, §7]"

Section 8.           New statutory material is underscored.

Section 9.           This Act shall take effect upon its approval.

22 July 2012

**To: Russell Tsuji and Members of the Land Board**

**From: Harlan Amstutz, M.D.**

**Ref: Koloa, HI 96756**

**I would like to formally request a delay in the execution of presented options in regard to easement(s) identified in the process of obtaining shoreline recertification of the boundaries of my property. This request is due to DNLR's reclassification of my property boundaries based on 2007 changes in the law.**

**It is my understanding that the DLNR is considering asking the Hawaii legislature to amend the current statute as it may apply to some or all of the easements identified in the recent shoreline certification process. My hope is this would especially apply to the low-wall areas easements A & C. These walls were created by the original owner and were part of my property when purchased in 1980 as identified in the certified survey of May 24, 1978.**

**Additionally:**

- 1. The low walls now identified as easement A and C are 93 % of the easement areas.**
- 2. The low wall identified as easement A is an attractive feature placed there by the previous owner, presumably to protect a low land mass (1414 sq. ft.), in approximately 1964. The wall in no way inhibits use by the community, and because it is cosmetically appealing, I believe it enhances the areas use. After the destruction of trees which**

**EXHIBIT "C"**

were growing on the land in the two hurricanes Iwa and Iniki, the enclosed area now contains some napaka and ice plants and is constantly used by local fisherman, surfers, picnickers etc.

3. Photographs of the area over the years have shown no change in the adjacent beach area shape or size since the late 70's...in fact, the low wall may also be protective of the area as notable beach erosion of all other beach areas in Poipu has occurred as a result of the two hurricanes Iwa and Iniki.
4. In addition, removal of the wall may be detrimental with ensuing erosion of the land mass and beach when other tsunamis or hurricanes occur.
5. Removal of the wall may be my only financial alternative, as the assessment for this low wall area recently given to me is in my view excessive. .

Thus, I am hoping that the proposed legislative amendment which I discussed with Russell Tsuji would both permit the DLNR to substantially lower or eliminate the ~ \$ 79,000 lease assessment and save the walls. In my view and that of shoreline users surveyed during my recent two week visit, the walls are both attractive and a useful feature for the visitors to the area as well as my family.

For easement C, I would like to point out that this area has in fact been Hawaii state property since the shoreline survey of 1981 and was verified subsequently in shoreline surveys done in 1987 and 1996. In the ensuing 30 years years, an easement had not been previously proposed to me by the State. Although I am not a legal authority, it suggests to me that this area may no longer be my responsibility since although it existed when I purchased the property in 1980, it has belonged to the State since 1981 . Again if it remains my responsibility I may have to tear it down.

The encroachment areas identified as easements D, F, G, and H are slivers of area or what I would consider minor deviations (~147sq. ft. total) based on the

re-construction of the seawall much of which was washed away and re-built due to the hurricane of 1982. As you will note the reconstruction of the sea wall undulates with as much area under the survey of record as over it. This design feature is attractive and may also been protective of the land mass which was seriously eroded in Iwa since did not occur after the more powerful hurricane of Iniki. Please review these easement areas and hopefully the statue now or then will permit this forgiveness as there is certainly no liability issue here.

B & E easements represent steps (~94 sq feet) to the beach then permitted during the reconstruction by the County after Iwa. In my view they are safety features so that persons descending to beach and lagoon areas due not fall and risk injury and I and I believe the State or I would not want the liability of removing them and therefore if the assessment base still applies here I would pay.

I do hope that the decision will be deferred until after a hoped for legislative decision is made.

Mahalo for your consideration.