

State of Hawaii  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Division of Boating and Ocean Recreation  
Honolulu, Hawaii 96813

April 11, 2014

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

REQUEST TO (A) AMEND PRIOR BOARD ACTION ON ITEM J-1 OF THE OCTOBER 12, 2012 LAND BOARD MEETING REGARDING A REQUEST TO (1) REALIGN THE PERPETUAL PUBLIC ACCESS EASEMENT CREATED BY A 1963 AGREEMENT, RECORDED IN LAND COURT AS DOCUMENT NO. 324984 AND AFFECTING TAX MAP KEY NO. (1) 2-3-37:12, OVER THE MODERN HONOLULU (HOTEL) PROPERTY OWNED BY M WAIKIKI, LLC; (2) ACCEPT A PERPETUAL NON-EXCLUSIVE EASEMENT FROM M WAIKIKI LLC OVER PEDESTRIAN OVERPASS ABOVE HOBRON LANE AS A PORTION OF THE REALIGNED EASEMENT; AND (3) GRANT A 55-YEAR NON-EXCLUSIVE EASEMENT TO M WAKIKI LLC FOR POOL DECK AND OUTSIDE DINING PURPOSES ON ELEVATED DECK ADJACENT TO SECOND FLOOR OF THE MODERN HONOLULU; AND (B) AMEND THE 1963 AGREEMENT TO ALLOCATE MAINTENANCE AND OTHER OBLIGATIONS AMONGST THE PROPERTY OWNERS WHILE REMAINING JOINTLY AND SEVERALLY RESPONSIBLE AND LIABLE TO THE STATE UNDER THE 1963 AGREEMENT.

APPLICANT:

The applicants are M Waikiki LLC, owner of The Modern Honolulu (formerly the Waikiki Edition), Association of Apartment Owners of the Ilikai Apartment Building (Ilikai), and Association of Apartment Owners of the Ilikai Marina Condominium (Ilikai Marina). During the last five years, the applicants have not had a sale, lease, license, permit, or an easement covering public lands canceled for failure to satisfy the terms and conditions thereof.

STATUTORY AUTHORITY:

Hawaii Revised Statutes §§ 171-6, 171-13, and 171-30.

CEDED LAND STATUS:

Section 5(a) lands of the Hawaii Admission Act.  
DHHL 30% entitlement lands pursuant to the Hawaii State  
Constitution: YES \_ NO X

REQUEST AND DISCUSSION:

M Waikiki, joined by the Ilikai and the Ilikai Marina, respectfully request that the Board of Land and Natural Resources (Board) amend the approval granted for M Waikiki to purchase a 55-

year, non-exclusive easement over a portion of the elevated pedestrian walkway ("elevated deck") constructed on the makai side of the Ilikai and M Waikiki properties, at the Board's public meeting on October 12, 2012. **Their letter to the Board dated March 18, 2014, requesting an amendment to the Board's approval of October 12, 2012 ("Owners' letter"), is attached to this submittal as Exhibit 1. Attached to the letter are their Exhibits A through D.**

This matter involves public access to the beach from the second floor of the Ilikai Marina, M Waikiki, and Ilikai. On October 12, 2012, the Board addressed an elevated deck owned by the State and the public access easement over the elevated deck. The elevated deck adjoins the Ilikai and M Waikiki properties. **The October 12, 2012 submittal for agenda item J-1 is attached to this submittal as Exhibit 2, and the minutes for agenda item J-1 are attached to this submittal as Exhibit 3.** The Board approved realigning the public access easement existing on the elevated deck so that the public easement would be relocated from the portion of the elevated deck adjoining the M Waikiki property to over the pool deck of the M Waikiki property and over the Hobron Overpass, with the use of the hotel elevators for the disabled. The Board also approved the sale of a 55-year, non-exclusive easement to M Waikiki for pool deck and outdoor dining purposes over the portion of the elevated deck adjoining the M Waikiki property subject to two conditions. First, in the event the remainder of the elevated deck (the deck was not completed) is ever constructed over Hobron Lane and to the end of the Ilikai Marina property, the 55-year easement to M Waikiki would have a clause to address this. Second, a portion of the existing public access easement over the elevated deck adjoining the M Waikiki property would be retained along the makai edge of the elevated deck. A map depicting the Board's approval is Exhibit B of the Owners' letter.

Based on public testimony, the Board retained the five-foot strip of the public access easement along the makai side of the elevated deck adjoining the M Waikiki Property for public viewing purposes. At the time of the Board's approval on October 12, 2012, M Waikiki, Ilikai, and Ilikai Marina were in litigation. Apparently, persons who testified that they needed the five-foot strip along the elevated deck were associated with the Ilikai or Ilikai Marina. But since then, M Waikiki, Ilikai, and Ilikai Marina have resolved their differences. The Ilikai and Ilikai Marina no longer see a need to maintain a public access five-foot strip along the makai side of the elevated deck adjoining the M Waikiki property. Ilikai and Ilikai Marina have withdrawn their objection to M Waikiki's use of the elevated deck for pool deck and outdoor dining purposes.

Based on agreement by the Ilikai, Ilikai Marina, and M Waikiki, they respectfully request that the Board amend its approval of item J-1 on October 12, 2012, to delete the requirement that the five-foot strip along the makai side of the elevated deck adjoining the M Waikiki property be retained as a part of the public access easement. According to M Waikiki, the requirement to keep open an area five feet back from the railing would require M Waikiki to remove several trees and planters (as shown on Exhibit B to the Owners' letter), and would result in the loss of many tables within the Morimoto Waikiki restaurant. Realigning the path will permit the retention of the trees, which provide shade and serve to beautify the pool deck. M Waikiki, Ilikai, and Ilikai Marina believe that this realigned path is appropriate and serves the public interest. Ilikai and Ilikai Marina will also join in the grant of easement over the Hobron Overpass for public access.

**A map depicting what would result if the Board's October 12, 2012 approval were to be amended as requested by M Waikiki, Ilikai, and Ilikai Marina, is attached as Exhibit C to the Owners' letter.**

Furthermore, M Waikiki, Ilikai, and Ilikai Marina also wish to amend the 1963 Agreement to allocate amongst themselves responsibility for maintenance and repair of the beach ramp,

elevated deck, and Hobron Overpass, such that each property owner is responsible for the area under its own control, while all three property owners remain jointly and severally bound to the State of Hawaii regarding the terms, conditions, and covenants provided in the 1963 Agreement. **A copy of the proposed Amendment to 1963 Agreement is attached as Exhibit D to the Owners' letter.**

The Amendment to 1963 Agreement provides as follows:

- a. All three property owners shall be jointly responsible for the maintenance and repair of the ramp from the elevated deck to the beach (note that per the 1963 Agreement, they are also responsible for carrying insurance for the beach ramp and indemnifying the State);
- b. Ilikai will be responsible for the maintenance and repair of that portion of the elevated deck from the beach ramp to the Ilikai/M Waikiki property line, will indemnify and defend M Waikiki, Ilikai Marina, and the State from third party claims arising out of the use this area, and will carry insurance naming the other property owners and the State as additional insureds;
- c. M Waikiki will be responsible for the maintenance and repair of that portion of the elevated deck from the Ilikai/M Waikiki property line to the end of the elevated deck, will indemnify and defend Ilikai, Ilikai Marina, and the State from third-party claims arising out of the use of this area, and will carry insurance naming the other property owners and the State as additional insureds;
- d. Ilikai, Ilikai Marina, and M Waikiki will share responsibility for maintenance and repair of the Hobron Overpass.
- e. M Waikiki, Ilikai, and Ilikai Marina will remain jointly and severally liable for their obligations to the State under the 1963 Agreement, including but not limited to indemnification of the State of Hawaii.

## CONCLUSION

If the request of M Waikiki, Ilikai and Ilikai Marina is approved, the result will provide for a complete above-ground public access route between the Ilikai Marina parking structure and the sidewalk near the Hilton Lagoon, including the use of elevators at the M Waikiki property for the disabled. The State will obtain two grants of perpetual easements over private property, including accommodations for the disabled. M Waikiki will pay for a 55-year, non-exclusive easement from the State for use of the portion of the elevated deck adjoining its property. And maintenance and repair for the relocated public access easement, the elevated deck, and the beach ramp will be divided up among the property owners.

## RECOMMENDATION

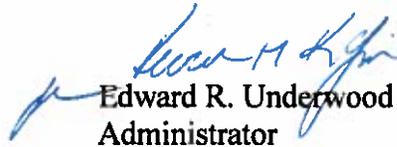
Subject to the discussion above:

1. That the Board approve the request of M Waikiki with the concurrence of the

Ilikai and Ilikai Marina to amend the approval of the Board at its October 12, 2012 meeting in item J-1 to delete the requirement that a five-foot pathway along the makai side of the portion of the elevated deck adjoining the M Waikiki property be retained and to allow this area to be included in the 55-year, non-exclusive easement to M Waikiki for pool deck and outdoor dining purposes.

2. That the Board approve the Amendment to 1963 Agreement, shown as Exhibit "D" to the Owners' letter, subject to review and negotiation of language by the Department of the Attorney General, and authorize the Chairperson to execute the amendment.
3. That the Board declare that granting the request of M Waikiki, Ilikai, and Ilikai Marina would probably have negligible or no expansion or change of use beyond that previously existing and would therefore be exempt from the preparation of an environmental assessment under HAR § 11-200-8 A.1.
4. That other terms and conditions as prescribed by the Chairperson to serve the best interests of the State shall be applicable.
5. That all recommendations above be subject to review and approval by the Department of the Attorney General.

Respectfully submitted,

  
Edward R. Underwood  
Administrator

APPROVED FOR SUBMITTAL

  
William J. Aila, Jr.  
Chairperson

**EXHIBIT "1"**  
*(4/11/14 mtg. submittal)*

**CASE LOMBARDI & PETTIT**  
A LAW CORPORATION

Lissa H. Andrews  
James M. Cnbley  
Adelbert Green  
Stacey W E. Foy  
Michael L. Lam  
Dennis M. Lombardi  
Michael R. Marsh  
Jon M.H. Pang  
Ted N. Pettit, Ph.D.  
Esther H. Roberts  
Lauran R. Sharkey  
Mark G. Valencia  
Nancy J. Youngren  
John D. Zalewski

PACIFIC GUARDIAN CENTER, MAUKA TOWER  
737 BISHOP STREET, SUITE 2600  
HONOLULU, HAWAII 96813-3283

David G. Britin  
Ryan M. Hamaguchi  
Lisa K. Johnson  
Michael G. Kozak  
Angela S. Kuo  
Dana R. Lyons  
Jana M. Naruse  
Jason Z. Say  
Na'unanikina'u A. Kamali'i

† A Law Corporation  
Daniel H. Case (Retired 2012)

TELEPHONE: (808) 547-5400  
FACSIMILE: (808) 523-1888  
E-mail: [info@caselombardi.com](mailto:info@caselombardi.com)  
<http://www.caselombardi.com>

Of Counsel  
John R. Dwyer, Jr.  
Gregory M. Hansen  
Frederick W. Rohlfing III

March 18, 2014

Board of Land and Natural Resources  
Kalanimoku Building  
1151 Punchbowl Street  
Honolulu, HI 96813  
Attn: **Mr. William J. Aila, Jr.**

RE: Request for Amendment of Easement Approval - TMK (1) 2-3-37:12

Chairman Aila and Members of the Board:

M Waikiki, LLC ("M Waikiki"), joined by the Association of Apartment Owners of the Ilikai Apartment Building ("Ilikai") and the Association of Apartment Owners of Ilikai Marina Condominium ("Ilikai Marina"), hereby respectfully requests that the Board of Land and Natural Resources ("BLNR") revise the approval granted for M Waikiki to purchase an easement over a portion of the elevated pedestrian walkway constructed on the makai side of the Ilikai and M Waikiki properties. M Waikiki, Ilikai and Ilikai Marina have resolved their differences, and jointly wish to amend the 1963 Agreement (defined below) to create the pedestrian walkway from the Ilikai Marina building, over the Hobron overpass, across the M Waikiki pool deck, then across the remainder of the elevated walkway down to the Hilton lagoon, as originally intended by the 1963 Agreement. The parties further wish to allocate amongst themselves responsibility for maintenance of the various portions of the reconfigured pedestrian path such that each party is responsible for the area under its own control, while all three parties remain bound to indemnify the State of Hawaii as provided for in the 1963 Agreement.

**I. Background**

On December 23 1963, developer Chinn Ho entered into an agreement with the State of Hawaii, recorded in the Land Court as Document No. 324984 ( the "1963 Agreement"), with regard to three parcels of land in Waikiki that were owned by his development entities Ilikai, Inc. and Makaha Valley Farms, Ltd., being Lot 1-A, as shown on Map 2 of Land Court Consolidation 64 (the "Ilikai Parcel"), Lot 1-B, as shown on Map 2 of Land Court Consolidation 64 (the "M Waikiki Parcel"), and Lot 6, as shown on Map 6 of Land Court Consolidation 64 (the "Marina Parcel"). Attached hereto is a map showing the configuration of the properties labeled Exhibit "A". Makaha Valley Farms, Ltd. and Ilikai Inc. are referred to as the "Owners" in the 1963 Agreement.

The 1963 Agreement permitted the Owners the right to construct an elevated pedestrian walkway (the "Elevated Deck") over the State of Hawaii owned Lot 25, as shown on Map 4 of Land Court Consolidation 32, as well as the right to construct an elevated pedestrian overpass

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over what is now Hobron Lane ("Hobron Overpass"). Pursuant to the terms of the 1963 Agreement, the intent was to provide pedestrian access to Duke Kahanamoku Beach. While the original plan contemplated by the 1963 Agreement was for the Elevated Deck to extend all the way to the edge of the Marina Parcel, the Elevated Deck as constructed terminates at the edge of the M Waikiki Parcel.

## **II. M Waikiki's Application**

The hotel component of the Ilikai and the hotel building located on M Waikiki Parcel were jointly operated by a variety of hotel operators from 1967 until 2006, at which time M Waikiki acquired the M Waikiki Parcel, which was then renovated into a separate hotel property. A dispute arose between M Waikiki and the Ilikai and Ilikai Marina as to the permissible uses within the Elevated Deck, as well as the access rights over the M Waikiki Parcel to the Hobron Overpass.

M Waikiki's predecessor in interest had obtained a Revocable Permit for pool deck and outdoor dining purposes in the portion of the Elevated Deck abutting the M Waikiki Parcel. M Waikiki sought to renew this revocable permit, but after objection from the Ilikai and Ilikai Marina, M Waikiki filed an Application with BLNR on January 21, 2011 to acquire easement rights for pool deck and outdoor dining purposes within the portion of the Elevated Deck abutting the M Waikiki Parcel.

M Waikiki worked with Department of Land and Natural Resources staff, and the Attorney General's office, to develop a plan to realign the easement path such that M Waikiki would, in exchange for the 55-year easement within the Elevated Deck, grant a perpetual easement for public access across its pool deck to the Hobron Overpass, and grant to the State of Hawaii M Waikiki's rights across the Hobron Overpass.

BLNR held a public hearing on October 12, 2012 regarding M Waikiki's application. At the October 12, 2012 hearing, members of the Ilikai and Ilikai Marina testified in opposition, and stated that the public should have the right to access the entire Elevated Deck area to, among other things, watch the Hilton fireworks show.

BLNR granted its approval of the sale of a 55-year easement to M Waikiki for pool deck and outdoor dining purposes, with a portion of the easement area reserved to the State for pedestrian passage, subject to two conditions. First, in the event the remainder of the Elevated Deck is ever constructed, the 55-year easement will terminate. Second, the path of travel reserved to the public would extend five (5) feet back from the edge of the Elevated Deck all the way to the end of the Elevated Deck. A map showing the path of travel as approved by BLNR is attached as Exhibit "B".

## **III. Joint Request to Amend Approval and Amend 1963 Agreement**

M Waikiki, Ilikai and Ilikai Marina have now resolved their differences with regard to the 1963 Agreement. Ilikai and Ilikai Marina hereby withdraw their objection to M Waikiki's use of

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the Elevated Deck for pool deck and outdoor dining purposes. Based on the agreement of the parties, Ilikai, Ilikai Marina and M Waikiki hereby respectfully request that BLNR amend its approval such that the path of travel in the reserved portion of the Elevated Deck be realigned in the manner shown on Exhibit "C" attached hereto. The existing BLNR approval requirement to keep open an area 5 feet back from the railing would require M Waikiki to remove several trees and planters (as shown on Exhibit "B"), and would result in the loss of many tables within the Morimoto Waikiki restaurant. M Waikiki has already created an ADA accessible path through the Elevated Deck, and has provided attractive landscaping. Realigning the path to the existing improvements will permit the retention of the trees, which provide shade and serve to beautify the pool deck. The public will still have the ability to watch fireworks.<sup>1</sup> M Waikiki, Ilikai and Ilikai Marina believe that this realigned path is appropriate and serves the public interest. Ilikai and Ilikai Marina hereby join in the grant of easement over the Hobron Overpass.

We understand that simply viewing the proposals on maps may not adequately convey the request being made. The parties invite BLNR to make a formal site visit to inspect the proposed realigned path as part of evaluating this request.

In addition, Ilikai, Ilikai Marina and M Waikiki wish to amend the 1963 Agreement to allocate amongst themselves maintenance responsibility for various portions of the realigned public pathway. M Waikiki, Ilikai and Ilikai are the successors in interest to the Owners under the 1963 Agreement, and may, with BLNR's approval, act to amend the terms of such agreement. A copy of the proposed Amendment to 1963 Agreement is attached as Exhibit "D". To summarize:

- a. all three parties shall jointly be responsible for the maintenance of the beach ramp;
- b. Ilikai will be responsible for the maintenance and repair of that portion of the Elevated Deck from the beach ramp to the Ilikai/M Waikiki property line, and will indemnify M Waikiki and Ilikai Marina from third party claims arising out of the use this area;
- c. M Waikiki will be responsible for the maintenance and repair of that portion of the Elevated Deck from the Ilikai/M Waikiki property line to the end of the Elevated Deck, and will indemnify Ilikai and Ilikai Marina from third-party claims arising out of the use of the Elevated Deck in this area. M Waikiki will be responsible for the maintenance and repair of the pool deck pursuant to the grant of easement to the State of Hawaii.
- d. Ilikai Marina will be responsible for the daily cleaning of the Hobron Overpass, but all three parties shall remain responsible for maintenance and repairs of the Hobron Overpass. Ilikai Marina will indemnify Ilikai and M Waikiki with regard to third-party claims arising out of the use of the Hobron Overpass.

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<sup>1</sup> We note that the people who do watch the fireworks show tend to be hotel guests of the Ilikai and M Waikiki.

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e. All three parties shall remain jointly and severally liable to indemnify the State of Hawaii pursuant to the 1963 Agreement.

M Waikiki, Ilikai and Ilikai believe that with these amendments, the public will be afforded the best approximation of the path of travel contemplated by the 1963 Agreement. The State will obtain two grants of easements to ensure that access rights are available to the public in perpetuity, and the parties will be in a position to effectively maintain the portion of the path of travel under their respective control, which will help to ensure that the pedestrian path of travel remains in good condition.

Yours very truly,



David G. Brittin, Esq.  
on behalf of M Waikiki, LLC



Christian P. Porter, Esq.  
on behalf of Association of  
Apartment Owners of Ilikai  
Apartment Building & Association Of  
Apartment Owners of Ilikai Marina  
Condominium

DGB.14-66  
Enclosures

# Original Elevated Walkway Plan

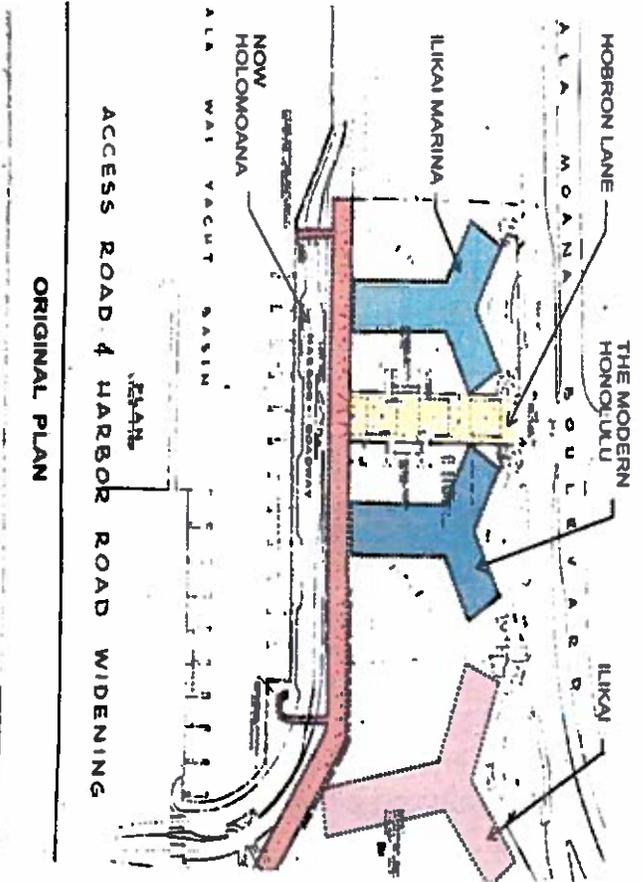


EXHIBIT "A"



Retained by State



State to M Waikiki



M Waikiki to State



M Waikiki to State

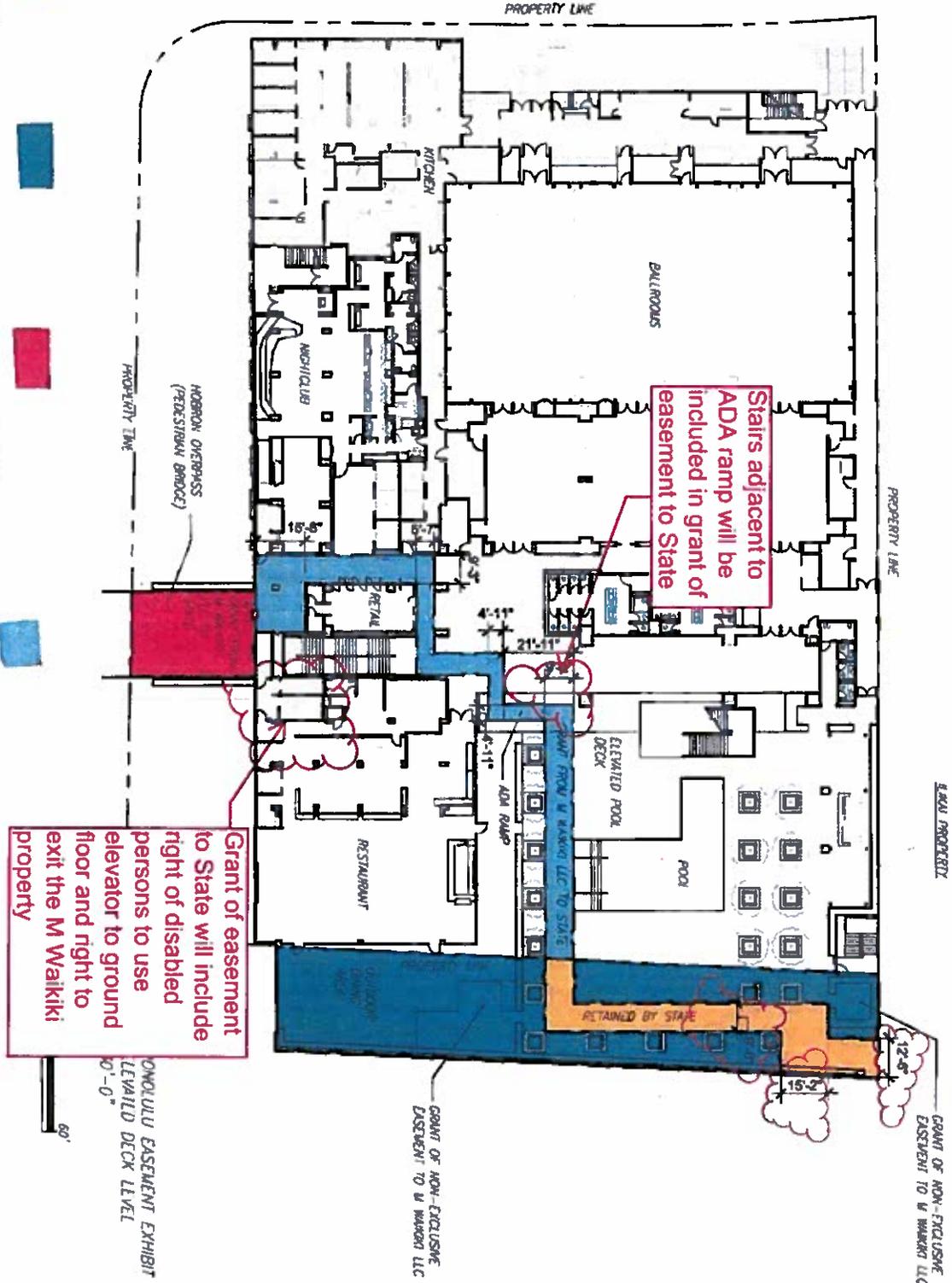


EXHIBIT "C"

## **AMENDMENT TO 1963 AGREEMENT**

The AMENDMENT TO 1963 AGREEMENT ("Amendment") is made this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_, by and between M WAIKIKI, LLC, a Delaware limited liability company ("M Waikiki"), ASSOCIATION OF APARTMENT OWNERS OF ILIKAI APARTMENT BUILDING ("Ilikai"), a Hawaii corporation, the ASSOCIATION OF APARTMENT OWNERS OF ILIKAI MARINA CONDOMINIUM ("Ilikai Marina"), a Hawaii nonprofit corporation, and the STATE OF HAWAII, by its Board of Land and Natural Resources.

A. M Waikiki is the owner of that certain property identified as Lot 1-B, as shown on Map 2, filed in the Office of the Assistant Registrar of the Land Court of the State of Hawaii ("Land Court") with Land Court Consolidation No. 64 of Ala Moana Properties, Limited (the "M Waikiki Parcel"), as noted on Certificate of Title 813,270.

B. Ilikai is the homeowners association for the condominium community located on Lot A-1 as shown on Map 2 of Land Court Consolidation No. 64 (the "Ilikai Parcel"), and is authorized to enter into this agreement pursuant to that certain First Restatement of the Declaration of Condominium Property Regime of the Ilikai Apartment Building, filed in the Land Court as Document No. 2158834 and noted on those Certificates of Title shown on Schedule 1.

C. Ilikai Marina is the homeowners association for the condominium community located on Lot 6 as shown on Map 6 of Land Court Consolidation No. 64 (the "Marina Parcel"), and is authorized to enter into this agreement pursuant to that certain Restated Declaration of Condominium Property Regime of the Ilikai Marina Apartment Building filed in the Land Court as Document No. 1994289 and noted on those Certificates of Title shown on Schedule 2.

D. The State of Hawaii is the owner of Lot 25, as shown on Map 4 of Land Court Consolidation 32, and noted on certificate of tile 66,816, as more particularly described on Schedule 3. The elevated walkway on Lot 25 constructed pursuant to the 1963 Agreement is owned by the State of Hawaii.

E. The State of Hawaii, Makaha Valley Farms, Ltd. and Ilikai, Inc. entered in to that certain Agreement, dated December 23, 1963 recorded in the Land Court as Document No. 324984 (the "1963 Agreement") with regard to development of the Ilikai Parcel, the M Waikiki Parcel and the Marina Parcel, which 1963 Agreement is noted on Certificate of Title 813,270 and those Certificates of Title shown on Schedules 1, 2 and 3.

F. Pursuant to the terms of the 1963 Agreement, an elevated walkway was constructed upon Lot 25 abutting the makai edge of the M Waikiki Parcel and the Ilikai Parcel, along with a ramp down to the beach level (the "Beach Ramp") from the Ilikai Parcel. The portion of the elevated walkway that was supposed to be constructed as well from the M Waikiki Parcel and running to the end of the Marina Parcel (as provided in the 1963 Agreement) was never constructed.

G. Also pursuant to the terms of the 1963 Agreement, an elevated pedestrian overpass was constructed over Hobron Lane connecting the Marina Parcel and the M Waikiki Parcel (the "Hobron Overpass").

H. Prior to M Waikiki's purchase of the M Waikiki Parcel, the Ilikai Parcel and the M Waikiki Parcel were operated as a single resort facility which included sharing certain features.

Subsequently, the M Waikiki Parcel and the Ilikai Parcel have been operated as separate, standalone properties.

I. M Waikiki submitted an Application to Amend Grant of Easement ("Easement Application") with the Board of Land and Natural Resources ("BLNR") seeking to amend the 1963 Agreement to permit outdoor dining and pool uses within the Elevated Deck abutting the M Waikiki Parcel.

J. M Waikiki and the Division of Boating and Ocean Recreation of the Department of Land and Natural Resources responded to M Waikiki's request described in paragraph I above by working on a recommendation to the BLNR proposing to realign the perpetual public access easement established by the 1963 Agreement on the elevated walkway to a location on the M Waikiki Parcel and asking the BLNR to issue a non-exclusive 55-year easement to M Waikiki for pool deck and outdoor dining purposes over the portion of the elevated walkway adjoining the M Waikiki Parcel. At its public meeting on October 12, 2012, the BLNR approved this recommendation with conditions, two of which were to preserve the public access along the makai edge of the elevated walkway, as appropriate, and should the unconstructed portion of the elevated walkway be constructed in the future, any easement over the elevated walkway granted to M Waikiki would have a clause to address the effect of this newly constructed portion of the walkway on the easement to M Waikiki. On \_\_\_\_\_, the BLNR took action on a request by M Waikiki, Ilikai, and Ilikai Marina to amend the BLNR's prior approval by deleting the retained portion of the public access easement on the makai edge of the elevated walkway abutting the M Waikiki. The BLNR decided that \_\_\_\_\_.

K. M Waikiki, Ilikai and Ilikai Marina wish to allocate certain of their joint responsibilities under the 1963 Agreement amongst themselves to facilitate the ongoing maintenance obligations. The State of Hawaii has agreed to this amendment of the 1963 Agreement to permit such allocation on the condition that, as to the State of Hawaii, all parties remain bound to the terms of the 1963 Agreement. This Amendment to 1963 Agreement is intended to run with the land.

NOW, THEREFORE, the parties hereby agree as follows:

1. The 1963 Agreement is incorporated herein by this reference, and all parties hereto acknowledge and agree to be bound by its terms and conditions. The parties hereto also acknowledge and agree that M Waikiki, Ilikai and Ilikai Marina are the successors in interest to the "Owners" as defined in the 1963 Agreement.

2. Ilikai will be responsible for the daily cleaning of the Beach Ramp. Ilikai, Ilikai Marina and M Waikiki shall be jointly responsible for the repair and maintenance of the Beach Ramp.

3. Ilikai will be responsible for the repair and maintenance of the portion of the Elevated Deck from the top of the Beach Ramp to the Ilikai/M Waikiki property line, and will indemnify, defend and hold harmless M Waikiki, the State of Hawaii and the Ilikai Marina from any third-party claims arising out of the use of this portion of the Elevated Deck, including without limitation, any cost or utility easements required by the State of Hawaii, and will obtain insurance and name the other parties as additional insureds in connection therewith.

4. M Waikiki will be responsible for the repair and maintenance of the portion of the Elevated Deck from the Ilikai/M Waikiki property line to the termination of the Elevated Deck,

and will defend and hold harmless the Ilikai, the State of Hawaii and the Ilikai Marina from any third-party claims arising out of the use of this portion of the Elevated Deck, including without limitation, any cost or utility easements required by the State of Hawaii, and M Waikiki will carry insurance and name all parties as additional insureds in connection therewith.

5. Ilikai Marina will be responsible for the daily cleaning of the Hobron Overpass, but the Ilikai, Ilikai Marina and M Waikiki will be jointly responsible for the repair and maintenance of the Hobron Overpass. Ilikai Marina will indemnify, defend and hold harmless the Ilikai, the State of Hawaii and M Waikiki from any third-party claims arising out of the use of the Hobron Overpass, and will carry insurance that also names the other parties as additional insureds in connection with that portion of the Hobron Overpass that the Ilikai Marina is responsible for as agreed to with M Waikiki. M Waikiki will carry insurance that also names the other parties as additional insureds in connection with that portion of the Hobron Overpass that M Waikiki is responsible for as agreed to with the Ilikai Marina. In connection therewith, the Ilikai Marina and the M Waikiki will mutually agree upon a defined point on the Hobron Overpass where the Ilikai Marina's area of responsibility ends and M Waikiki's area of responsibility begins and each shall insure their area of responsibility accordingly.

6. Ilikai, Ilikai Marina and M Waikiki shall each designate a representative who shall have the authority to meet with the other party representatives with regard to any proposed maintenance or repairs to the Beach Ramp or the Hobron Overpass. All repairs and maintenance to the Beach Ramp or Hobron Overpass must be mutually agreed to in writing prior to commencement of any repair or maintenance work.

7. Each party shall ensure that the portion of the Elevated Deck or Hobron Overpass for which it is responsible shall be maintained to the same level, and upon the same schedule as the improvements on their respective properties.

8. In the event that a dispute arises regarding compliance with the terms and conditions of this Amendment (each a "Dispute"), the party that believes that a violation has occurred shall inform the other party in writing of the alleged violation. The parties shall then meet and confer regarding the Dispute in an attempt to resolve the matter through good-faith negotiations. If such negotiations are not successful, either party may request mediation, which shall be held on the Island of Oahu by and pursuant to the rules of Dispute Prevention and Resolution, Inc. ("DPR"). The parties shall share equally in the expense of the mediator. In the event that the Dispute is not fully resolved through negotiation and mediation, if one of the parties wishes to pursue the Dispute further, the unresolved aspects of the Dispute shall be submitted to binding arbitration by and pursuant to the rules of DPR. To the extent permitted by the Federal Arbitration Act, no punitive damages shall be awarded to either party, and no award of attorneys' fees or damages attributable to emotional distress, or a multiple of actual damages based upon any theory, may be made or awarded in any Dispute. Nothing in this Paragraph 8 shall be deemed to require the State of Hawaii to participate in the mediation or arbitration of any Dispute, it being the intent of the parties that the State of Hawaii shall have all rights of enforcement under the 1963 Agreement.

9. Ilikai, Ilikai Marina and M Waikiki acknowledge and agree that nothing in this Amendment to 1963 Agreement shall in any way limit, modify, reduce, eliminate, or alter the rights of the State of Hawaii as set forth in the 1963 Agreement, including, without limitation, the obligation that Ilikai, Ilikai Marina and M Waikiki (as successors to the "Owners" in the 1963 Agreement) shall indemnify the State of Hawaii as agreed to in the 1963 Agreement. This Amendment to 1963 Agreement only allocates repair and maintenance responsibilities and

liability amongst the owners of the Ilikai Parcel, M Waikiki Parcel, and Marina Parcel, and does not relieve them of their individual and collective responsibilities, liability, and covenants as to the State of Hawaii as provided in the 1963 Agreement. The State of Hawaii agrees, however, that compliance with any of the terms, conditions, or covenants of the 1963 Agreement by one parcel owner in accordance with this Amendment to 1963 Agreement, if such compliance is satisfactory to the State of Hawaii, shall be considered to be compliance with said term, condition, or covenant by all of the parcel owners.

10. All parties herein agree that the perpetual public access easement on the portion of the elevated walkway adjoining the M Waikiki Parcel may be relocated so as to run over the M Waikiki Parcel and over the Hobron Overpass, as may be approved by the BLNR, and that the BLNR may grant non-exclusive term easements over any part of the elevated walkway as determined appropriate by the BLNR.

11. This Amendment (together with the 1963 Agreement) contains the entire agreement between the parties and supersedes all prior or contemporaneous oral and written agreements, representations, negotiations, correspondence or communications related thereto. There are no terms of this Amendment that are not expressly in writing in this Amendment and its terms may not be amended orally.

12. This Amendment may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

13. This Amendment shall be governed by and construed in accordance with the law of the State of Hawaii. If any part, term, or provision of this Amendment is held by the courts to be illegal or in conflict with any law of the State, the validity of the remaining portions or provisions shall not be affected, and the rights and obligations of the parties shall be construed and enforced as if the Amendment did not contain the particular part, term, or provision held to be invalid.

**[REMAINDER OF THIS PAGE IS INTENTIONALLY LEFT BLANK]**

IN WITNESS WHEREOF, the parties have executed this Amendment as of the date first above written.

M WAIKIKI, LLC,  
a Delaware limited liability company

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_

ASSOCIATION OF APARTMENT OWNERS  
OF  
THE ILIKAI

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_

ASSOCIATION OF APARTMENT OWNERS  
OF  
THE ILIKAI MARINA CONDOMINIUM

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_

Approved by the Board of Land and  
Natural Resources at its meeting held on

\_\_\_\_\_

APPROVED AS TO FORM:

\_\_\_\_\_  
Pamela K. Matsukawa  
Deputy Attorney General

Dated: \_\_\_\_\_

STATE OF HAWAII

By: \_\_\_\_\_  
William J. Aila, Jr.  
Chairperson, Board of Land and  
Natural Resources

EXHIBIT "2"  
12/11/14 mtg.  
submission)

State of Hawaii  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Division of Boating and Ocean Recreation  
Honolulu, Hawaii 96813

October 12, 2012

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

REQUEST TO (1) REALIGN THE PERPETUAL PUBLIC ACCESS EASEMENT CREATED BY A 1963 AGREEMENT, RECORDED IN LAND COURT AS DOCUMENT NO. 324984 AND AFFECTING TAX MAP KEY NO. (1) 2-3-37:12, OVER THE MODERN HONOLULU (HOTEL) PROPERTY OWNED BY M WAIKIKI LLC; (2) ACCEPT A PERPETUAL NON-EXCLUSIVE EASEMENT FROM M WAIKIKI LLC OVER PEDESTRIAN OVERPASS ABOVE HOBRON LANE AS A PORTION OF THE REALIGNED EASEMENT; AND (3) GRANT A 55-YEAR NON-EXCLUSIVE EASEMENT TO M WAIKIKI LLC FOR POOL DECK AND OUTSIDE DINING PURPOSES ON ELEVATED DECK ADJACENT TO SECOND FLOOR OF THE MODERN HONOLULU; AND POSSIBLE EXECUTIVE SESSION

APPLICANT:

The applicant is M Waikiki LLC, owner of The Modern Honolulu (formerly the Waikiki Edition). During the last five years, the applicant has not had a sale, lease, license, permit, or an easement covering public lands canceled for failure to satisfy the terms and conditions thereof.

STATUTORY AUTHORITY:

Hawaii Revised Statutes §§ 171-6, 171-13, and 171-30.

CEDED LAND STATUS:

Section 5(a) lands of the Hawaii Admission Act.  
DHHL 30% entitlement lands pursuant to the Hawaii State  
Constitution: YES \_ NO X

BACKGROUND and DISCUSSION:

In 1963, an agreement was entered by the State of Hawaii, by its Director of Transportation, Ilikai Incorporated, and Makaha Valley Farms, Limited, which will be referred to as the "1963 Agreement," for development in the Ilikai area adjacent to the Ala Wai Small Boat Harbor ("Ala Wai SBH"). The 1963 Agreement included (i) construction of and acceptance by the State of an elevated pedestrian walkway ("elevated deck") above the parking area along the

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

sidewalk near the Hilton Lagoon; (ii) creation of a perpetual pedestrian easement ("public access easement") over the elevated deck; and (iii) construction of two elevated public pedestrian overpasses descending to the ground from the elevated deck. The elevated deck was supposed to have been built on the makai side of what is now the Ilikai Marina Apartment Building ("Ilikai Marina Apartments"), The Modern Honolulu and the Ilikai, in Waikiki, Oahu. Pursuant to the 1963 Agreement, the elevated deck is owned by the State.

Section 6 of the 1963 Agreement authorized the construction of the elevated deck over Lots 25 and 26, as shown in Exhibit A. Exhibit A shows that the original intent was to have the elevated deck continue from the beach access way near the Hilton Lagoon to along the second floor makai side of what is now the Ilikai, The Modern Honolulu, and Ilikai Marina Apartments (spanning Hobron Lane between The Modern Honolulu and Ilikai Marina Apartments). Exhibit A also shows a dashed line drawing labeled as "Future Overpass W/15 Min Clearance Location Subject to Architects Studies" adjacent to the Ilikai Marina Apartments, and a separate dashed line drawing labeled "Pedestrian Ramp to Beach 16' Min Clearance over Roads" across from the Ilikai.

The second page of Exhibit A is a Google Map depiction of the area.

The original plan set forth in the 1963 Agreement was not fully realized. The 1963 Agreement is attached to this submittal as Exhibit B. The original plan would have provided public pedestrian access from ground level to and along an elevated walkway spanning the length of the three lots at issue (including across Hobron Lane) and in reverse direction. In actuality, only a truncated portion of the original plan was developed and the elevated deck is essentially a walkway to nowhere and has never provided the type of access intended. The elevated deck ends at the Ewa end of The Modern Honolulu (the middle of three lots).

Currently, The Modern Honolulu has constructed large planter boxes and a part of Morimoto's restaurant on the elevated deck. According to M Waikiki LLC's application, the elevated deck "has been used for outdoor dining, pool deck space, and other recreational purposes continuously since construction of the property in 1967. Furthermore, it is also undisputed that historically the Elevated State Deck appurtenant to the Ilikai was used for a wide variety of purposes, including a putting green and planters." See page 2 of M Waikiki LLC's application to the Land Board for use of the elevated deck, dated May 13, 2011, attached to this submittal as Exhibit C. In the past, revocable permits have been issued by the Board. Here are the revocable permits that are in DOBOR's files:

| <u>Date</u> | <u>Permittee</u>          | <u>Purpose</u>  | <u>Rent per Month</u> |
|-------------|---------------------------|---|-----------------------|
| 1992        | Jowa Hawaii Company, Ltd. | Outdoor dining area for restaurant and deck area for swimming pool  | \$1,500               |
| 1994        | Jowa Hawaii Company, Ltd. | Outdoor landscaped area for wedding ceremonies by adjoining wedding chapel operations and pool deck expansion | \$1,500               |
| 2000        | Forward One               | Outdoor dining area for restaurant operations and deck area for swimming pool.                                | \$1,800               |

The effect of using the elevated deck for hotel purposes is the displacement of the public from the elevated deck and the public access easement.

**PROPOSED RESOLUTION:**

Upon the department's receipt of M Waikiki LLC's application for use of the elevated deck and in order to resolve the issues regarding the uncompleted elevated deck, displacement of the public from the elevated deck, and use of the elevated deck by the hotel for hotel purposes, the Division of Boating and Ocean Recreation ("DOBOR") met with representatives of the M Waikiki, LLC. Shortly after beginning discussions, M Waikiki LLC filed for bankruptcy and all communications stopped. However, M Waikiki LLC recently contacted DOBOR through the Attorney General's Office and informed DOBOR that the bankruptcy proceedings have concluded.

M Waikiki LLC is now ready to proceed with resolving the issues. A proposal to the Board was mutually agreed upon by DOBOR and M Waikiki LLC to realign the public access easement through the M Waikiki LLC property in order to create a continuous public pedestrian right-of-way between the parking structure adjacent to the Ilikai Marina Apartments and the ground level beach access way near the Hilton Lagoon. At this time, the portion of the elevated deck from the ground level beach access way to and along the makai side of the Ilikai is open and clear and not in dispute with the State. (We note that there is ongoing litigation between the Ilikai and The Modern Honolulu, but the State is not involved in that litigation.) The proposed realignment of the public access easement would run from the point that the elevated deck adjoins The Modern Honolulu on its second floor pool deck, through the pool deck and lobby area, then over the overpass that spans Hobron Lane. The overpass is already used by the public to walk between M Waikiki LLC and the parking structure contained within the Ilikai Marina Apartments. For disabled persons, the elevators in the second floor lobby area of The Modern Honolulu would be made available to travel to the ground level of The Modern Honolulu, and disabled persons may cross Hobron Lane on the street level to get to the parking structure because the overpass was constructed prior to the adoption of the Americans with Disabilities Act and does not provide an accessible path of travel for disabled persons. (M Waikiki will provide drawings of the proposed realignment at the Board's meeting.)

This proposal, if approved by the Board, will require the execution of three easement documents. The first easement would be a perpetual easement granted to the State by M Waikiki LLC for the realignment of the public access easement across the second floor pool deck and lobby area of The Modern Honolulu (including use of the elevators for disabled persons). The second easement is a perpetual easement to the State coterminous with the first easement for the portion of the public access easement that will span Hobron Lane (the overpass) to get to the parking structure contained within the Hikai Marina Apartments. The third easement is a non-exclusive 55-year easement granted to M Waikiki LLC by the State for use of the elevated deck adjoining the second floor pool deck of The Modern Honolulu for pool deck and outdoor dining purposes to be paid for by M Waikiki LLC at appraised value.

The 1963 Agreement contains protections, including indemnification, and maintenance of the elevated deck, by the adjoining property owners for the State, which will not change. The proposal is to take the public access easement created by the 1963 Agreement and relocate the easement across the M Waikiki LLC's hotel property and extend that easement over the overpass to achieve an alignment of the easement that makes practical sense. In accordance with the 1963 Agreement, the relocated public access easement, including the overpass portion of the easement, will remain perpetual and M Waikiki LLC will continue to maintain and repair the easement area and indemnify the State as required by the 1963 Agreement.

The proposal also includes that a 55-year non-exclusive easement along the elevated deck abutting The Modern Honolulu be issued to M Waikiki LLC for pool deck and outdoor dining purposes. The public would not have to use the elevated deck for access because of the realignment of the public access easement. The cost of the easement would be determined by appraisal and the easement would be subject to the Board's standard terms and conditions subject to any language modifications approved by the Chairperson.

#### EXEMPTION FROM AN ENVIRONMENTAL ASSESSMENT:

Hawaii Administrative Rules ("HAR") § 11-200-8 A.1. provides for a particular class of action that is exempt from the preparation of an environmental assessment as follows:

#### §11-200-8 Exempt Classes of Action

- A. Chapter 343, HRS, states that a list of classes of actions shall be drawn up which, because they will probably have minimal or no significant effect on the environment, may be declared exempt by the proposing agency or approving agency from the preparation of an environmental assessment provided that agencies declaring an action exempt under this section shall obtain the advice of other outside agencies or individuals having jurisdiction or expertise as to the propriety of the exemption. Actions declared exempt from the preparation of an environmental assessment under this section are not exempt from complying with any other applicable statute or rule.
- B. In accordance with the "Comprehensive Exemption List for the Division of the Boating and Ocean Recreation, Department of Land and Natural Resources, State of Hawaii, as concurred by the Environmental Council, State of Hawaii", dated

March, 1998, the subject request is exempt from the preparation of an environmental assessment pursuant to Exemption Class No. 1 that states in pertinent part, "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."

\* \* \*

According to M Waikiki LLC's application, the elevated deck was constructed in 1967 and has continually been used for hotel purposes, such as pool deck and outdoor dining. Furthermore, revocable permits have been issued by the Board for the use of the elevated deck for hotel purposes. The public access easement over the elevated deck has encumbered the elevated deck since its construction.

The Hobron Lane overpass is used by the public to walk between M Waikiki LLC and the parking structure adjacent to the Ilikai Marina Apartments. The realignment of the public easement over the pool deck, lobby, and overpass and the granting of an easement over the elevated deck to the hotel owner for pool deck and outdoor dining purposes would probably have negligible or no expansion or change of use beyond that previously existing and would therefore be exempt from the preparation of an environmental assessment under HAR § 11-200-8 A.1.

#### **RECOMMENDATIONS:**

- I. That the Board approve the realignment of the public access easement through the acceptance of two perpetual easements to be granted by M Waikiki LLC as described above and incorporated herein, subject to the following terms:

All of the terms, provisions, conditions, covenants, and restrictions of the 1963 Agreement, except to the extent that such terms, provisions, conditions, covenants, or restrictions may directly conflict with the realignment of the public access easement, will apply to the two easements to be granted by M Waikiki LLC. This includes but is not limited to the following:

- (i) M Waikiki LLC shall keep any and all structures and improvements of the elevated deck abutting M Waikiki LLC's property and area of the realigned easement including the overpass, in good order and repair, and shall comply with all rules, regulations, ordinances, and laws of the City and County of Honolulu and State of Hawaii authorities, and shall indemnify and hold harmless the City and County of Honolulu and the State of Hawaii against all actions, suits, damages, and claims by whomsoever brought or made by reason of the nonobservance and nonperformance of this covenant or of the said rules, regulations, ordinances, and laws.

(ii) M Waikiki LLC shall allow the State at all times, with 24-hour notice to M Waikiki LLC, to enter upon and examine the condition of any and all structures and improvements relating to the elevated deck abutting M Waikiki LLC's property and realigned easement area including overpass, and M Waikiki LLC shall repair any defects within thirty (30) days after receipt of written notice thereof from the State.

(iii) M Waikiki LLC shall hold the State of Hawaii harmless from any claim or demand by third persons for loss or damage, including claims for property damage, personal injury or wrongful death, arising out of any accident within the elevated deck abutting M Waikiki LLC's property or the realigned easement area including overpass, or occasioned by any nuisance or damage or claims growing out of or caused by any failure on the part of the M Waikiki LLC to observe or perform the covenants on their part to be observed and performed, and shall reimburse the State of Hawaii for any reasonable attorney's fees and/or other costs incurred in connection therewith.

(iv) M Waikiki LLC shall not commit or suffer any act or neglect whereby the elevated deck abutting M Waikiki LLC's property shall become subject to any attachment, lien charge or encumbrance whatsoever, and shall indemnify and hold the State of Hawaii harmless from all such liens, charges and encumbrances and all expenses resulting therefrom, including reasonable attorney's fees.

(v) In the event the State of Hawaii shall, without any fault, be made a party to any litigation commenced by or against the M Waikiki LLC in connection with the elevated deck abutting M Waikiki LLC's property or the realigned easement including overpass, M Waikiki LLC shall pay all costs and reasonable attorney's fees incurred by or imposed on the State of Hawaii and shall also pay all costs and reasonable attorney's fees which may be incurred or paid by the State of Hawaii in enforcing the covenants.

(vi) M Waikiki LLC shall procure at its own cost and expense and keep in force a policy or policies of comprehensive general liability insurance in such form and with such insurance company or companies as shall satisfy the State that M Waikiki LLC will be able to fulfill M Waikiki LLC's covenants to the State in the easements for realignment of the public access easement, including the overpass, with minimum limits for personal injury and property damage that are usual in the Hawaii hotel industry, and shall provide DOBOR with a copy of said policies.

2. That the two easements addressed in recommendation no. 1 shall run with the land.
3. That the specific language of the two easements addressed in recommendation no. 1 be negotiated by the Department of the Attorney General and approved by the Chairperson.
4. That the Board grant to M Waikiki LLC a non-exclusive 55-year easement over and along the elevated deck abutting The Modern Honolulu for pool deck and outdoor dining purposes, for which M Waikiki LLC shall pay the State the value of the easement determined by appraisal and pay all costs of the appraisal; that the easement be subject to the Board's most current standard terms and conditions with any modifications of the

language to be negotiated by the Department of the Attorney General and approved by the Chairperson; that such easement shall benefit the property owned by M Waikiki LLC (The Modern Honolulu) and run with the land so long as each succeeding owner has not, during the five years before it acquired the property, had any sale, lease, license, permit, or easement covering public lands canceled for failure to satisfy the terms and conditions thereof.

5. That M Waikiki LLC shall prepare for all easements, all metes and bounds descriptions and maps for submission to and approval by the department and the Survey Division of the Department of Accounting and General Services.
6. That all easements be properly filed in the Land Court.
7. That the Board declare that the realignment of the public easement over the pool deck, lobby, and overpass and the granting of an easement over and along the elevated deck abutting The Modern Honolulu for pool deck and outdoor dining purposes would probably have negligible or no expansion or change of use beyond that previously existing and would therefore be exempt from the preparation of an environmental assessment under HAR § 11-200-8 A.1.
8. That other terms and conditions as prescribed by the Chairperson to serve the best interests of the State shall be applicable.
9. That all recommendations above be subject to review and approval by the Department of the Attorney General.

Respectfully submitted,



Edward R. Underwood  
Administrator

**Attachments**

**APPROVED FOR SUBMITTAL:**



William J. Aila, Jr.  
Chairperson and Member





Google earth

feet 600  
meters 100



EXHIBIT A

... NO. 1951

LAND COURT

CHIEF CLERK

ADMINISTRATIVE REGISTER

FEB 11 1964

RECORDED FOR REGISTRATION

... 20 ...

...

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...

...

AGREEMENT

THIS INDENTURE made this 23<sup>rd</sup> day of December, 1963, by and among the STATE OF HAWAII, by its Director of Transportation, hereinafter called the "STATE", and ILIKAI, INCORPORATED, and MAKAHA VALLEY FARMS, LIMITED, both Hawaii corporations, whose principal places of business are located in Honolulu, Hawaii, hereinafter called "OWNERS",

WITNESSETH THAT:

WHEREAS, on July 11, 1961, the STATE entered into an Agreement with Hawaiian Dredging & Construction Company, Limited, now known as Dillingham Corporation, a Hawaii corporation, and ILIKAI, INCORPORATED, with respect to Lot 1, as shown on Map 1 of Land Court Consolidation 64 and other parcels of land, which agreement has not been publicly recorded; and

WHEREAS, Lot 1 has since been subdivided into Lots 1-A, 1-B, 1-C and 1-D, as shown on Map 2 of Land Court Consolidation 64 and Lot 1-D has been further subdivided into Lots 1-D-1 and 1-D-2 as shown on Map 3 of Land Court Consolidation 64; and

WHEREAS, the owners of said lots and the corresponding Transfer Certificates of Title Numbers are as follows:

| <u>LOT</u>       | <u>OWNERS</u>             | <u>T.C.T.</u> | <u>MAP NO.</u> |
|------------------|---------------------------|---------------|----------------|
| 1-A              | Ilikai, Incorporated      | 85,450        | 2 LCC 64       |
| 1-B              | Ilikai, Incorporated      | 81,553        | 2 LCC 64       |
| 1-C              | Ilikai, Incorporated      | 85,451        | 2 LCC 64       |
| 1-D-1)<br>1-D-2) | Makaha Valley Farms, Ltd. | 84,862        | 3 LCC 64       |

and

WHEREAS, pursuant to paragraphs 1, 8 and 11 of the aforementioned unrecorded Agreement dated July 11, 1961, the access rights affecting Lots 1-D-1 and 1-D-2 have been conveyed to the STATE and Lot 1-C and the access rights affecting Lots 1-A and 1-B are to be conveyed to the STATE; and

WHEREAS, it is the intent and desire of the parties herein that the terms and conditions of the aforementioned unrecorded Agreement dated July 11, 1961 and certain additional agreements to effectuate said terms and conditions should be incorporated in this Agreement in a form acceptable for filing with the Assistant Registrar of the Land Court and that the said unrecorded Agreement shall be hereby cancelled.

NOW, THEREFORE, in consideration of the foregoing premises and of the agreements hereinafter contained, it is hereby mutually agreed by and among the parties as follows:

1. ILIKAI, INCORPORATED shall convey Lot 1-C, together with all appurtenances and encumbrances thereon to the STATE, in fee simple and without cost to the STATE, and the STATE shall improve and use said Lot 1-C for a vehicular and pedestrian right-of-way, subject, however, to this Agreement.

2. ILIKAI, INCORPORATED shall subdivide Lot 1-A into two (2) lots to be designated as Lot 1-A-1, containing 122,071 square feet, more or less, and Lot 1-A-2, containing 143 square feet, more or less, or such other designation as shall be used and shall grant and convey to the STATE a perpetual easement for a public right-of-way over, across, along and upon said Lot 1-A-2 as subdivided.

3. All of the access rights into and from Lot 25 of Land Court Consolidation 32, over and across the boundary common to said Lot 25 and

Lot 1-A-1 and Lot 1-B, as shown on Map \_\_\_\_\_ and Map 2 of Land Court Consolidation 64 and all of the access rights over and across the common boundary of Lot 1-A-1 and Lot 1-A-2, as shown on Map \_\_\_\_\_ of Land Court Consolidation 64 shall be conveyed by ILIKAI, INCORPORATED to the STATE, provided, however, that ILIKAI, INCORPORATED shall reserve the right to use Lot 1-A-2 for a right-of-way in common with the public.

4. A perpetual overhead easement over and across the aforementioned Lot 1-C as conveyed to the STATE shall be reserved unto the OWNERS, and said perpetual overhead easement shall be utilized by said OWNERS in a manner which will not interfere with the free flow of vehicular and pedestrian traffic on said land and the plans and specifications for construction of any structure reserved herein shall be subject to the prior approval of the STATE. The ramps over and across said land shall be constructed substantially in the manner shown on the plan, entitled "Ilikai Apartments" prepared by John Graham and Company and dated February 3, 1961, which plan is attached hereto as Exhibit A and made a part hereof.

5. A perpetual easement under, over and across said Lot 1-C shall be reserved unto the OWNERS, for utility, communications, sewer, and other like purposes in a manner which will not interfere with the free flow of vehicular and pedestrian traffic on said land.

6. The OWNERS shall have the right to construct, repair, replace, maintain, and improve for and on behalf of the STATE, and the STATE shall accept, substantially as shown and designated in Exhibit A, the following:

(a) An elevated pedestrian right-of-way over Lots 25 and 26 of Land Court Consolidation 32 (said Lot 26 now being designated as Lot 2, as shown on Map 1 of Land Court Consolidation 64) and

the public right-of-way adjoining Land Court Consolidation 1716.

(b) Two elevated public pedestrian overpasses extending from said elevated public pedestrian right-of-way in 6(a) hereinabove, provided, however, the said overpasses may be relocated with the approval of the STATE; and

(c) An elevated public pedestrian ramp to descend from the Waikiki (east) end of said elevated public pedestrian right-of-way of 6(a) hereinabove.

TOGETHER with the foundations and columns to support the structures in subparagraphs 6(a), 6(b) and 6(c) hereinabove, and, also, together with the installation, repair, replacement, and maintenance of utilities and other similar appurtenances in conjunction with the structures mentioned in subparagraphs 6(a), 6(b) and 6(c) hereinabove.

7. The OWNERS shall not construct any structure on or over their approximately ten (10) foot wide strip of land, which consists substantially of Lots 14, 15, and 19 of Land Court Consolidation 32 (presently identified respectively as Lots 3, 4 and 5 of Land Court Consolidation 64) and Lot 5-C-2 of Land Court Application 852 owned by the STATE, which are adjacent to the ten (10) foot wide public right-of-way bordering Land Court Applications 1716 and 1549, and shall forever keep the use of the above-mentioned land as public roadway.

8. Notwithstanding anything contained in Exhibit A to the contrary, the reservations contained in paragraphs 4 and 5 herein and the structures specified in subparagraphs 6(a), 6(b) and 6(c) herein shall be, wherever applicable, subject to the following:

a. The structures to be constructed pursuant to paragraphs 4 and 5, and subparagraphs 6(a), 6(b) and 6(c) herein shall be

constructed only in accordance with plans and specifications approved by the STATE; it being the intent of the STATE to provide easy, safe, and esthetically beautiful access to Duke Kahanamoku Beach and Ala Wai Boat Harbor for the public at a minimum cost to the STATE. The STATE shall consider the wishes of the adjoining land owner and the engineering and architectural feasibility of construction on the part of the OWNERS in the fulfillment of the intentions expressed in this Section in the construction of the structure provided for under subparagraph 6(c).

The OWNERS agree to the following:

(1) Any structure constructed pursuant to subparagraph 6(a) herein over any roadway shall have a minimum clearance above such roadway of fourteen (14) feet.

(2) Any structure constructed pursuant to subparagraph 6(b) herein over any roadway shall have a minimum clearance above such roadway of sixteen (16) feet.

(3) Any structure constructed pursuant to subparagraph 6(c) herein over any roadway shall have a minimum clearance of sixteen (16) feet; provided, however, with the approval of the Director of Transportation, a structure of a lesser clearance may be constructed.

(4) Any structure constructed pursuant to paragraphs 4 and 5 herein over any roadway shall have a minimum clearance of sixteen (16) feet over such roadway.

b. The structures specified in subparagraphs 6(a), 6(b) and 6(c) herein shall be used only for pedestrian traffic and shall be forever open to the use of the public.

c. The OWNERS shall keep any and all structures and improvements constructed pursuant to paragraphs 4 and 5, and subparagraphs 6(a), 6(b) and 6(c) of this agreement in good order and repair and shall comply with all rules, regulations, ordinances, and laws of the proper county and state authorities, and will indemnify and hold harmless the applicable county and the STATE against all actions, suits, damages, and claims by whomsoever brought or made by reason of the nonobservance and nonperformance of this covenant or of the said rules, regulations, ordinances, and laws.

d. The OWNERS shall allow the STATE at all times to enter upon and examine the condition of any and all structures and improvements constructed pursuant to paragraphs 4 and 5 and subparagraphs 6(a), 6(b) and 6(c) of this agreement and the OWNERS shall repair any defects within thirty (30) days after receipt of written notice thereof from the STATE.

e. The OWNERS shall hold the STATE harmless from any claim or demand by third persons for loss or damage, including claims for property damage, personal injury or wrongful death, arising out of any accident within said perpetual overhead easement, right-of-way, pedestrian ramp, overpasses and any other constructions and structures constructed pursuant to paragraphs 4 and 5 and subparagraphs 6(a), 6(b) and 6(c) herein or occasioned by any nuisance or damage or claims growing out of or caused by any failure on the part of the OWNERS to observe or perform the covenants on their part to be observed and performed, and shall reimburse the STATE for any reasonable attorney's fees and/or other costs incurred in connection therewith.

f. The OWNERS shall not commit or suffer any act or neglect whereby said right-of-way, pedestrian ramp, and overpasses mentioned in subparagraphs 6(a), 6(b) and 6(c) herein, including improvements thereon, shall become subject to any attachment, lien charge or encumbrance whatsoever, and shall indemnify and hold the STATE harmless from all such liens, charges and encumbrances and all expenses resulting therefrom, including reasonable attorney's fees; provided, however, that in the event that subordination of the STATE's interests in the structures constructed pursuant to subparagraphs 6(a), 6(b) and 6(c) herein is required by any lending institution financing their construction, the STATE hereby agrees and consents to said subordination; provided, further, that in any event, said structures shall be used only for pedestrian traffic and shall be forever open to the use of the public.

g. In case the STATE shall, without any fault, be made a party to any litigation commenced by or against the OWNERS, in connection with said perpetual overhead easement, right-of-way, pedestrian ramp, and overpasses, mentioned in paragraphs 4 and 5, and subparagraphs 6(a), 6(b) and 6(c) herein, the OWNERS shall pay all costs and reasonable attorney's fees incurred by or imposed on the STATE and shall also pay all costs and reasonable attorney's fees which may be incurred or paid by the STATE in enforcing the covenants herein.

h. The OWNERS shall not (except as provided in subparagraph 8 f herein), without the consent in writing of the STATE, assign or mortgage any interest in said right-of-way, pedestrian ramp, and overpasses mentioned in subparagraphs 6(a), 6(b) and 6(c) herein;

provided, however, that the STATE shall not unreasonably withhold such consent and shall not require the payment of any money for giving such consent, other than reasonable charge for the processing of an application for and preparation of the form of consent.

1. The OWNERS shall procure at their own cost and expense and keep in force a policy or policies of comprehensive general liability insurance in form and with such insurance company or companies as shall be satisfactory to the STATE, with minimum limits of not less than \$200,000 for injury to one person and not less than \$500,000 for injury to more than one person, and not less than \$25,000 against the claim of third persons for property damages, and will deposit a copy of said policy or policies with the STATE.

9. The OWNERS further agree that the STATE shall be granted without cost any excess fill from any construction of the land described in the third "WHEREAS" paragraph hereinabove, as and when available, immediately upon excavation for the purpose of widening that portion of the Harbor Road adjoining the above described premises of the OWNERS or for such other purpose as the STATE may require for the development of Ala Wai Harbor; provided, however, that if such fill is not accepted by the STATE, as and when available, immediately upon excavation, the OWNERS shall deal with said fill as they see fit in their sole discretion. The cost of transporting said fill away from the place of excavation for the above stated purposes shall be the responsibility of the STATE.

10. Approval of the State whenever required pursuant to this agreement shall not be unreasonably withheld by the STATE.

11. The parties hereto shall do any and all acts and shall

delivery any and all documents and papers necessary to effectuate the terms and covenants of this agreement.

12. This Agreement shall be binding upon and inure to the benefit of the parties herein and their successors and assigns.

13. The term "OWNERS" whenever and wherever used herein, shall mean the OWNERS, their successors and assigns; and the term "STATE" whenever and wherever used herein shall mean the State of Hawaii and any political subdivision, agency, department, instrumentality, or officer thereof.

14. The certain unrecorded Agreement dated July 11, 1961 hereinabove mentioned is hereby cancelled.

AND, CAPITAL PROPERTIES, LIMITED, a Hawaii corporation, the Buyer of said Lot 1-B under an Agreement of Sale dated December 1, 1960, and filed in the Office of the Assistant Registrar of the Land Court as Document No. 278,530 and KAISER FOUNDATION HOSPITALS, a California corporation, the Buyer of Lot 1-D-2 under an Agreement of Sale dated August 15, 1963, and filed in the said Office of the Assistant Registrar as Document No. 315,145, in consideration of the foregoing premises and the mutual promises of the parties herein, do hereby consent to and join in the terms and conditions of this Agreement.

AND, BANK OF HAWAII, a Hawaii corporation, the Mortgagee of Lots 1-A-1 and 1-A-2 under that certain Mortgage dated January 2, 1962, and filed in said Office of the Assistant Registrar as Document No. 284,430, in consideration of the foregoing premises and the mutual promises of the parties herein, does hereby consent to the terms and conditions of this Agreement.

AND, DILLINGHAM CORPORATION, (formerly known as

*Approved for Registration  
This 12th day of Feb. 1964.  
Sec. Rec. No. 285283.  
Kathleen T. Espinoza  
Assistant Registrar*

Hawaiian Dredging & Construction Company, Ltd.), a Hawaii corporation, the Assignee/Mortgagee of that certain Mortgage dated October 1, 1960, filed in said Office of the Assistant Registrar as Document No. 263,994 affecting Lot 1-B pursuant to an Assignment of the same from Ala Moana Properties, Limited, dated November 28, 1960, and filed in said Land Court as Document No. 266,364, in consideration of the foregoing premises and the mutual promises of the parties herein, does hereby consent to the terms and conditions of this Agreement.

IT IS HEREBY FURTHER AGREED by and among the parties herein that this Agreement shall be noted on Transfer Certificates of Title Nos. 85,450, 81,553, 85,451, 84,862 and 66,816.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed the day and year first above written.

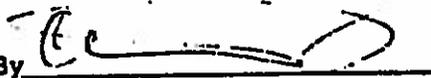
STATE OF HAWAII  
BY ITS DEPARTMENT OF TRANSPORTATION

  
Lijia Matsuda  
Its Director

APPROVED AS TO FORM:

  
Deputy Attorney General

ILIKAI, INCORPORATED

By   
Its President

By   
Its Secretary

APPROVED:

BOARD OF LAND AND NATURAL RESOURCES

By *J. P. Leary*  
Its Chairman and Member

By *K. L. Summers*  
Its Member

MAKAHA VALLEY FARMS, LIMITED

By *[Signature]*  
Its PRESIDENT

By *Alta Mae Soffice*  
Its SECRETARY

CAPITAL PROPERTIES, LIMITED

By *William H. Mean*  
Its PRESIDENT

By *Alta Mae Soffice*  
Its SECRETARY

-KAISER FOUNDATION HOSPITALS

By *Robert Jack*  
Its Regional Manager

By *Conrad [Signature]*  
Its Regional Controller

-BANK OF HAWAII

By *[Signature]*  
Its Vice-President

By \_\_\_\_\_  
Its



STATE OF HAWAII )  
 : SS.  
CITY AND COUNTY OF HONOLULU )

On this 23<sup>rd</sup> day of December, 1963, before me appeared  
CHINN HO and ALTA MAE GOFFIN,  
to me personally known, who, being by me duly sworn, did say that they  
are the PRESIDENT and SECRETARY, respectively,  
of MAKAHA VALLEY FARMS, LIMITED, a Hawaii corporation; that the seal  
affixed to the foregoing instrument is the corporate seal of said corpora-  
tion; that said instrument was signed and sealed in behalf of said corpora-  
tion by authority of its Board of Directors; and said \_\_\_\_\_  
CHINN HO and ALTA MAE GOFFIN acknow-  
ledged said instrument to be the free act and deed of said corporation.

G. F. ...  
Notary Public, First Judicial  
Circuit, State of Hawaii.

My commission expires: 7/6/64

STATE OF HAWAII )  
 : SS.  
CITY AND COUNTY OF HONOLULU )

On this 23<sup>rd</sup> day of December, 1963, before me appeared  
WILLIAM H. HEEN and ALTA MAE GOFFIN,  
to me personally known, who, being by me duly sworn, did say that they  
are the PRESIDENT and SECRETARY, respectively,  
of CAPITAL PROPERTIES, LIMITED, a Hawaii corporation; that the seal  
affixed to the foregoing instrument is the corporate seal of said corpora-  
tion; that said instrument was signed and sealed in behalf of said corpora-  
tion by authority of its Board of Directors; and the said  
WILLIAM H. HEEN and ALTA MAE GOFFIN  
acknowledged said instrument to be the free act and deed of said corpora-  
tion.

G. F. ...  
Notary Public, First Judicial  
Circuit, State of Hawaii.

My commission expires: 7/6/64

STATE OF HAWAII )  
 : SS.  
 CITY AND COUNTY OF HONOLULU )

On this 17<sup>th</sup> day of ~~December~~ <sup>January, 1964.</sup> 1963, before me appeared

Robert Jack and Conrad Bohuslav, to me personally known, who, being by me duly sworn, did say that they are

the Regional Manager and Regional Controller, respectively, of KAISER FOUNDATION HOSPITALS, a Nevada corporation; that the seal affixed to the foregoing instrument is the corporate seal of said corporation; that said instrument was signed and sealed in behalf of said corpo-

ration by authority of its Board of Directors; and said \_\_\_\_\_

Robert Jack and Conrad Bohuslav acknowledged said instrument to be the free act and deed of said corporation.

Donald H. Allen  
Notary Public, First Judicial  
Circuit, State of Hawaii.

My commission expires: 11-3-1966

STATE OF HAWAII )  
 : SS.  
 CITY AND COUNTY OF HONOLULU )

On this 2nd day of ~~December~~ <sup>January</sup> 1963, before me appeared

D. S. Austin Jr and \_\_\_\_\_, to me personally known, who, being by me duly sworn, did say that they are

the is a Vice President and \_\_\_\_\_, respectively, of BANK OF HAWAII, a Hawaii corporation; that the seal affixed to the foregoing instrument is the corporate seal of said corporation; that said instrument was signed and sealed in behalf of said corporation by autho-

rity of its Board of Directors; and said D. S. Austin Jr

and \_\_\_\_\_ acknowledged said instrument to be the free act and deed of said corporation.

Barbara Truman  
Notary Public, First Judicial  
Circuit, State of Hawaii.

My commission expires: 11-11-1966

STATE OF HAWAII )  
 : SS.  
CITY AND COUNTY OF HONOLULU )

On this 13<sup>th</sup> day of <sup>December</sup> ~~December~~, 1962, before me appeared

R. A. CROCK and R. A. GIBSON,

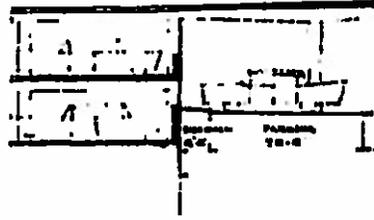
to me personally known, who, being by me duly sworn, did say that they are the FINANCIAL VICE PRESIDENT and VICE PRESIDENT and SECRETARY, respectively, of DILLINGHAM CORPORATION, a Hawaii corporation; that the seal affixed to the foregoing instrument is the corporate seal of said corporation; that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors; and said R. A. CROCK and R. A. GIBSON acknowledged said instrument to be the free act and deed of said corporation.

*Louise H. Hurd*  
Notary Public, First Judicial  
Circuit, State of Hawaii.

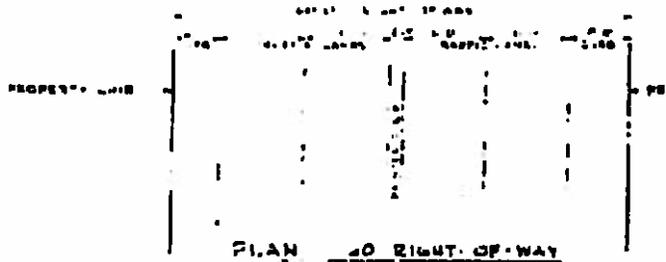
My commission expires: MAY 3, 1963

PROPERTY LINE

ST. W. 100 FT.



PRO

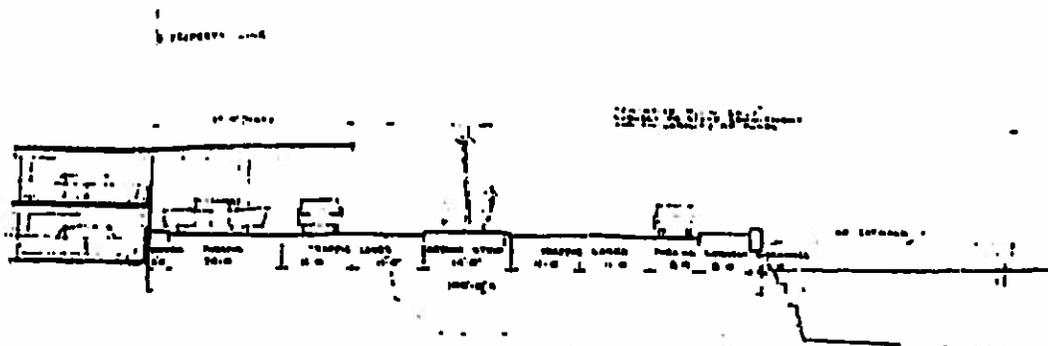


PLAN TO RIGHT OF WAY  
SCALE 1/8" = 1'-0"

NOTE: SEE PLAN REFERENCE  
AT DRAWING TITLE 101-1

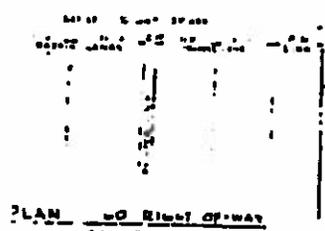
ALA MOANA





**TYPICAL SECTION  
PROPOSED HARBOR ROAD SYSTEM**

NOTE: MINIMUM CLEARANCE OVER SPANNING AREA = 15'0"  
MINIMUM CLEARANCE OVER STRUCTURE SPANNING AREA = 15'0"



PLAN - NO RIGHT OF WAY  
SCALE 1" = 10'

NOTE: ALL DIMENSIONS  
IN FEET AND INCHES

**A MOANA BOULEVARD**



NOTE: ALL DIMENSIONS  
IN FEET AND INCHES

ALA MOAN

WATER FRONT

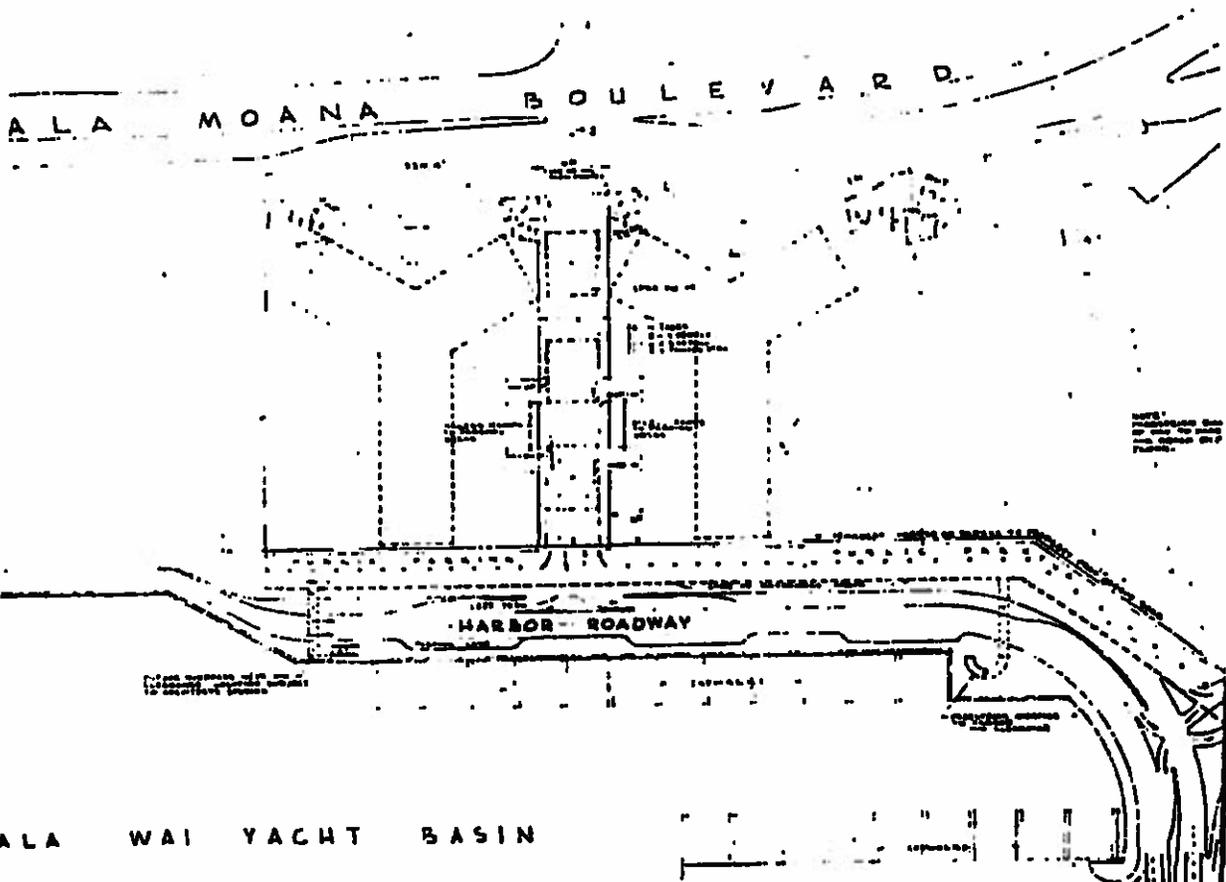
LEGAL DESCRIPTION OF THE LAND  
CONTAINING THE YACHT  
TO BE BUILT THEREON

ALA WAI YACHT

ACCESS R

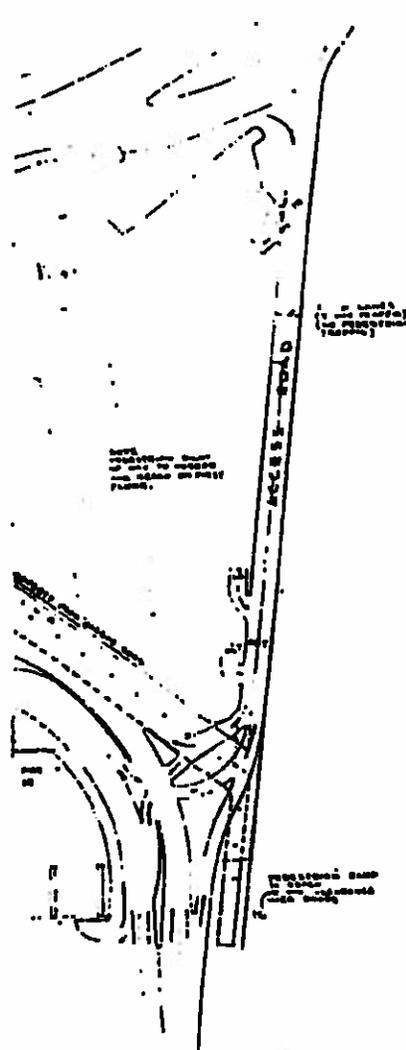
END





PLAN  
MAY 1950

ACCESS ROAD & HARBOR ROAD WIDENING



NING

### EXHIBIT A

|   |                   |          |          |
|---|-------------------|----------|----------|
| 10/10/10  |                   | 10/10/10 |          |
| DATE  | 10/10/10          | DATE     | 10/10/10 |
| PROJECT   | ILIKAI APARTMENTS | PROJECT  | P        |
| LOCATION  | HONOLULU, HAWAII  | LOCATION | I        |
| JOHN GRADY AND COMPANY ARCHITECTS AND ENGINEERS |                   |          |          |

**CASE LOMBARDI & PETTIT**  
A LAW CORPORATION

Lissa H. Andrews  
James M. Cribbley  
Stacey W.E. Foy  
Gregory M. Hansen  
Michael L. Lam  
Dennis M. Lombardi†  
Michael R. Marsh

Ted N. Pettit, Ph.D.  
Esther H. Roberts  
Lauren R. Sharkey  
Mark G. Valencia  
Nancy J. Youngren  
John D. Zalewski

PACIFIC GUARDIAN CENTER, MAUKA TOWER  
737 BISHOP STREET, SUITE 2600  
HONOLULU, HAWAII 96813-3283

TELEPHONE: (808) 547-5400  
FACSIMILE: (808) 523-1888  
E-mail: [info@caselombardi.com](mailto:info@caselombardi.com)  
<http://www.caselombardi.com>

David G. Brittin  
Melis S.L. Day  
Ryan M. Hamaguchi\*  
Lisa K. Johnson  
Megan K. Kau  
Michael G. Kozak  
Dana R.C. Lyons  
Kate S. Metzger

\*Admitted California only

Of Counsel  
Daniel H. Case  
Frederick W. Rohlfing III

Bruce C. Bigelow (1946-2001)

† A Law Corporation

**LETTER OF TRANSMITTAL**

To: Mr. Edward Underwood – DLNR Administrator      Date: May 13, 2011  
State of Hawaii  
Department of Land and Natural Resources  
333 Queen Street, Suite 300  
Honolulu, Hawaii 96813

From: David G. Brittin

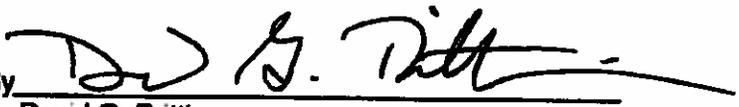
Re: Submittal of Application to Board of Land and      Our File: 28490-3  
Natural Resources

I am transmitting to you the following:

1. Case Lombardi & Pettit's May 13, 2011 correspondence with enclosures addressed to Board of Land and Natural Resources, Attention: Mr. William J. Aila, Jr.

|   |   |
|---|---|
| <input type="checkbox"/> For your information   | <input checked="" type="checkbox"/> <u>For necessary action</u> |
| <input type="checkbox"/> For your files         | <input type="checkbox"/> For signature in <b>BLACK</b>          |
| <input type="checkbox"/> For review and comment | <input type="checkbox"/> <b>INK</b>                             |
| <input type="checkbox"/> Per your request       | <input type="checkbox"/> For payment                            |
| <input type="checkbox"/> Per our agreement      | <input type="checkbox"/> Disapproved                            |
| <input type="checkbox"/> Per our conversation   | <input checked="" type="checkbox"/> <u>See remarks below</u>    |

**REMARKS:** I have enclosed our May 13, 2011 application to the Board of Land and Natural Resources. If you have any questions, please feel free to contact me. Thank you.

By   
David G. Brittin

DGB:11-05  
Enclosures  
28490/3/1281838.1

**EXHIBIT "C"**

**CASE LOMBARDI & PETTIT**  
A LAW CORPORATION

Lissa H. Andrews  
James M. Cribley  
Stacey W.E. Foy  
Gregory M. Hansen  
Michael L. Lam  
Dennis M. Lombardi†  
Michael R. Marsh

Ted N. Pettit, Ph.D.  
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Kate S. Metzger

\*Admitted California only

Of Counsel  
Daniel H. Case  
Frederick W. Rohlfing III

Bruce C. Bigelow (1946-2001)

† A Law Corporation

May 13, 2011

Board of Land and Natural Resources  
Kalanimoku Building  
1151 Punchbowl St.  
Honolulu, HI 96813  
Ph: (808) 587-0400  
Honolulu, Hawai'i  
Attention: Mr. William J. Aila, Jr.

Application to: 1) amend a 1963 Agreement, recorded in Land Court as Document No. 324984, for Tax Map Key No. (1) 2-3-37:12, so that it conforms to the as built configuration of the improvements in Lot 25 of Land Court Consolidation 32, and 2) clarify permissible uses within a portion of the elevated deck described in the Application and the Agreement to reflect all the authorized uses that have existed since 1967, or, in the alternative, 3) obtain a lease or exclusive easement for the elevated deck area adjacent to Applicant's property.

**APPLICANT (PETITIONER):**

M Waikiki, LLC,  
c/o Dennis M. Lombardi, Esq.  
Case Lombardi & Pettit  
737 Bishop St., Suite 2600 Mauka Tower  
Honolulu, Hawai'i 96813

**LEGAL REFERENCE:**

Sections 171-13, 35, 54 and 55, Hawai'i Revised Statutes. Reference is also made to the July 15, 1991 Opinion of the Attorney General of the State of Hawaii regarding the power of the State to enter into a disposition of the State owned land subject to this Application, attached hereto as Exhibit "A".

**LOCATION:**

Elevated deck over Lot 25 of Land Court Consolidation 32, Honolulu, Hawai'i, Tax Map Key No. (1) 2-3-37:12, as shown on the attached map. See Exhibit "B". The elevated deck extends from Lot 1-B, as shown on Map 2, Land Court Consolidation 64, which is owned by the Applicant, and continues along the adjacent Lot 1-A, as shown on Map 2, Land Court Consolidation 64. The Applicant seeks either to amend the Agreement as to the portion of the

lands subject to the Agreement that are abutting Applicant's property, or to obtain a lease or easement from the State of Hawaii on the portion of the elevated deck abutting Applicant's property that would permit the continuation of outdoor dining and pool deck uses.

**AREA AFFECTED BY APPLICATION:**

The portion of the Elevated State Deck, defined below, abutting Lot 1-B, as shown on Map 2, Land Court Consolidation 64 containing approximately 6,584 square feet.

**ZONING:**

|                                  |                 |
|----------------------------------|-----------------|
| State Land Use District:         | Urban           |
| City and County of Honolulu LUO: | Public Precinct |

**CURRENT USE STATUS:**

The Elevated State Deck has been used for outdoor dining, pool deck space, and other recreational purposes continuously since construction of the property in 1967.

**CHAPTER 343 – ENVIRONMENTAL ASSESSMENT:**

In accordance with Hawai'i Administrative Rules §11-200-8, the subject request is exempt from the preparation of an environmental assessment based on the following exemption:

(1) "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."

**BACKGROUND:**

This application relates to the elevated deck over Lot 25 of Land Court Consolidation 32, Honolulu, Hawai'i, Tax Map Key No. (1) 2-3-37:12 (the "Elevated State Deck"). The Elevated State Deck was created pursuant to that certain Agreement, dated December 23, 1963, by and between Ilikai, Inc., Makaha Valley Farms, Ltd. ("Makaha") and the State of Hawaii (the "1963 Agreement"). A copy of the 1963 Agreement is attached hereto as Exhibit "C". The 1963 Agreement defines Ilikai and Makaha as the "Owners".

Ilikai, Inc. owned Lots 1-A and 1-C as shown on Map 2 of Land Court Consolidation 64, and Makaha owned Lots 1-D-1 and 1-D-2 (now Lot 6 as shown on Map 6 of Land Court Consolidation 64). Ilikai, Inc. had previously sold Lot 1-B to Capital Properties, Limited, which we believe was an affiliated company, through an Agreement of Sale, but still held bare legal title to Lot 1-B pursuant to the terms of that document. The Ilikai Apartment Building was constructed on Lot 1-A (the "Ilikai Parcel"), the Waikiki Edition building was constructed on Lot 1-B (the "Edition Parcel"), and the Ilikai Marina Apartment Building was constructed on Lot 6 (the "Marina Parcel").

Section 6 of the 1963 Agreement creates a right to construct and obligates the Owners to maintain and improve the Elevated State Deck:

**The OWNERS shall have the right to construct, repair, replace, maintain, and improve for and on behalf of the STATE, and the STATE shall accept, substantially as shown and designated in Exhibit A, the following:**

(a) An elevated pedestrian right-of-way over Lots 25 and 26 of Land Court consolidation 32 (said Lot 26 now being designated as Lot 2, as shown on Map 1 of Land Court Consolidation 64) and the public right-of-way adjoining Land Court Consolidation 1716.

(b) Two elevated public pedestrian overpasses extending from said elevated pedestrian right-of-way in 6(a) herein above, provided, however, that said overpasses may be relocated with the approval of the STATE; and

(c) An elevated public pedestrian ramp to descend from the Waikiki (East) end of said elevated public pedestrian right-of-way of 6(a) hereinabove.

Together with the foundations and columns to support the structures in subparagraphs 6(a), 6(b) and 6(c) hereinabove, and, also, together with the installation, repair, replacement, and maintenance of utilities and other similar appurtenances in conjunction with the structures mentioned in subparagraphs 6(a), 6(b) and 6(c) hereinabove.

(Emphasis added).

Section 8 provides in pertinent part:

Notwithstanding anything contained in Exhibit A to the contrary, the reservations contained in paragraphs 4 and 5 herein and the structures specified in subparagraphs 6(a), 6(b) and 6(c) herein shall be, whenever applicable, subject to the following:

a. The structures to be constructed pursuant to paragraphs 4 and 5, and subparagraphs 6(a), 6(b) and 6(c) herein shall be constructed only in accordance with plans and specifications approved by the STATE; it being the intent of the STATE to provide easy, safe, and aesthetically beautiful access to Duke Kahanamoku Beach and Ala Wai Boat Harbor for the public at a minimum cost to the STATE.

...

b. The structures specified in subparagraphs 6(a), 6(b) and 6(c) herein shall be used only for pedestrian traffic and shall be forever open to the use of the public.

c. The OWNERS shall keep any and all structures and improvements constructed pursuant to paragraphs 4 and 5, and subparagraphs 6(a), 6(b) and 6(c) of this

agreement in good order and repair and shall comply with all rules, regulations, ordinances, and laws of the proper county and state authorities, and will indemnify and hold harmless the applicable county and the STATE against all actions, suits, damages, and claims by whomsoever brought or made by reason of the nonobservance and nonperformance of this covenant or the said rules, regulations, ordinances, and laws.

Section 6 is in contrast to Sections 4 and 5 of the 1963 agreement which specifically refer to the creation of perpetual easements. For example, Section 4 provides, in pertinent part:

4. A perpetual overhead easement over and across the aforementioned Lot 1-C . . .

Section 5 provides, in pertinent part:

5. A perpetual easement under, over and across said Lot 1-C . . .

Furthermore, Section 8 provides:

Notwithstanding anything contained in Exhibit A to the contrary, the reservations contained in paragraphs 4 and 5 herein and the structure specified in paragraphs 6(a), 6(b) and 6(c) herein.....

Therefore, the parties to the 1963 Agreement made a clear distinction between the easements that were created pursuant to paragraphs 4 and 5, and the structures constructed for and on behalf of the State. Once the Elevated State Deck was completed, ownership transferred to the State automatically pursuant to Section 6's requirement that the State "shall" accept the improvements. Only the maintenance and repair obligations remain as to the Ilikai and Waikiki Edition properties<sup>1</sup>.

While Section 8 of the 1963 Agreement provides that the Elevated State Deck is to be used for pedestrian purposes, and is to be open to the public in perpetuity, it is undisputed that the portion of the Elevated State Deck on Lot 1-B, the Edition Parcel, which is now owned by M. Waikiki and operated as the "Waikiki Edition" hotel, has been used for outdoor dining, pool deck, and other recreational purposes since construction of the Edition property in 1967. Historic photos demonstrating these uses are attached hereto as Exhibit "D".

Furthermore, it is also undisputed that historically the Elevated State Deck appurtenant to the Ilikai was used for a wide variety of purposes, including a putting green and planters. Subsequent to the removal of the putting green, a large planter was constructed on the Ilikai property that completely obstructed access across the Elevated State Deck from Ilikai property to the Edition Parcel and visa-versa. The Ilikai planter was only removed in 2010 after numerous demands from M. Waikiki that access across the Elevated State Deck no longer be obstructed.

---

<sup>1</sup> Arguably the Ilikai Marina has a maintenance obligation as to the Elevated State Deck as well; however, we understand that historically, the Ilikai Marina has not contributed toward maintenance of the Elevated State Deck.

While the 1963 Agreement is binding on the successors and assigns of the Owners, the Ilikai AOA is not the successor in interest to Ilikai, Inc. Nothing in the 1963 Agreement states that the Agreement shall run with the land, and therefore, other than the easements created pursuant to Sections 4 and 5, the rights and obligations contained in the 1963 Agreement were easements in gross and personal to Ilikai, Inc. and Makaha. The Certificates of Title for the Ilikai do not contain a "together with" identifying the 1963 Agreement, and the First Restatement of the Declaration of Condominium Property Regime of the Ilikai Apartment Building likewise does not contain any conferral of the benefits of the 1963 Agreement to the Ilikai AOA. The 1963 Agreement is noted only as an encumbrance.

The Ilikai Marina and Lot 1-B were conveyed rights with regard to Section 6 of the 1963 Agreement, but this transfer appears to convey to each the right to create an additional pedestrian walkway over what is now Holomoana. Section 6(c) of the 1963 Agreement authorized the construction of two Elevated State Decks over Lots 25 and 26, as shown on the Exhibits to the 1963 Agreement. The Exhibit shows that the original intent was to have the Elevated State Deck continue along the makai side of the Ilikai Marina property. The Exhibit also shows a dashed line drawing labeled as "Future Overpass W/1[6]<sup>2</sup> Min Clearance Location Subject to Architects Studies" adjacent to the Ilikai Marina, and a separate dashed line drawing labeled "Pedestrian Overpass to Harbor [16'] Min Clearance" across from the Ilikai. The Marina CPR Declaration transfers the right to build only one overpass, and the legal description for Lot 1-B also contains the right to build only one overpass. Therefore, it appears that the intent was to have the Ilikai Marina build one overpass, and the owner of the Edition property build the other.

As ownership of the improvements of the Elevated State Deck has transferred to the State, the Elevated State Deck is State property. The State, by law, has the exclusive authority to dispose of such property as it sees fit. See HRS §§171-13, 55. While the 1963 Agreement makes clear that the Elevated State Deck is open to the public, nothing in the 1963 Agreement states that the Elevated State Deck is for the benefit of either the Ilikai or the Waikiki Edition. Indeed, the 1963 Agreement states that "it being the intent of the STATE to provide easy, safe, and aesthetically beautiful access to Duke Kahanamoku Beach and Ala Wai Boat Harbor for the public at a minimum cost to the STATE." Nothing in the 1963 Agreement requires that the State obtain the consent of any of the parties prior to exercising its statutory authority to dispose of State property. Therefore, the State may freely grant a permit, license, lease, or easement over any portion of the Elevated State Deck, and no consent from the Ilikai or Ilikai Marina is required. This is precisely what happened when Forward One obtained the Revocable Permit for use of a portion of the Elevated State Deck for outdoor dining and pool deck purposes, and no consent was required from either the Ilikai or Ilikai Marina. The fact that Ilikai, Inc. and Makaha agreed to repair, maintain, insure the Elevated State Deck and indemnify the State from claims arising out of use of the Elevated State Deck as part of the consideration for the 1963 Agreement does not change this analysis.

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<sup>2</sup> The writing is poorly legible. It appears to state "19'", however Section 8 of the 1963 Agreement calls for a 16' clearance.

Furthermore, the original plan for the Elevated State Deck was never fully realized. This original plan would have provided access from the boat harbor across Holomoana and would have run the entire length of the three lots at issue. Had such a system been fully constructed, it may have made sense to have the Elevated State Deck be solely for pedestrian uses. However, in this case, where only a truncated portion of the original plan was developed, the Elevated State Deck is essentially a walkway to nowhere, and has never provided the type of access intended, as is clearly shown by the fact that the Iikai blocked off the Elevated State Deck in its entirety for many years. The Elevated State Deck has always been used as primarily an extension of the Edition and Iikai pool decks, and there is little reason for such uses to change.

**RESERVED RIGHT TO SUPPLEMENT:**

Applicant reserves the right to further supplement this application and to submit further evidence supporting the continued use of the Elevated State Deck in the manner the Elevated State Deck is currently used.

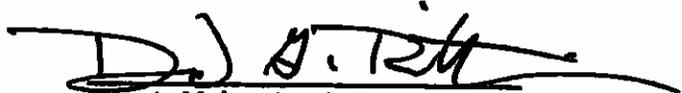
**PROPER PARTIES TO THE APPLICATION:**

Notwithstanding the parties to the Agreement, the State is the owner of the Elevated State Deck pursuant to the express terms of the Agreement, and by statute has the exclusive authority to dispose of State lands. Furthermore, as the Applicant's request relates only to the portion of the Elevated State Deck abutting Applicant's property, the rights and obligations of other parties, such as the Iikai and Iikai Marina, who may or may not be the successors in interest to the original parties to the Agreement, are not implicated, and thus no other consent or joinder is required.

**REQUEST FOR ACTION:**

M. Waikiki respectfully requests that the Board: 1) amend the 1963 Agreement so that it conforms to the as built configuration of the improvements in Lot 25, and 2) clarify permissible uses within a portion of the elevated deck described in the Application and the Agreement to reflect all the authorized uses that have existed since 1967, or, in the alternative, 3) issue a lease or exclusive easement for the elevated deck area adjacent to Applicant's property that would permit the continuation of outdoor dining and pool deck uses. To the extent a declaratory ruling by the Board is required pursuant to the Hawaii Administrative Rules Section 13-1-27, such a ruling is also requested by Applicant.

Respectfully Submitted,



Dennis M. Lombardi, Esq.  
David G. Brittin, Esq.

EXHIBIT "3"  
C4/11/14 mtg.  
submital)

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

**DATE:** FRIDAY, OCTOBER 12, 2012  
**TIME:** 9:00 A.M.  
**PLACE:** KALANIMOKU BUILDING  
LAND BOARD CONFERENCE ROOM 132  
1151 PUNCHBOWL STREET  
HONOLULU, HAWAII 96813

Chairperson William Aila called the meeting of the Board of Land and Natural Resources to order at 9:09 a.m. The following were in attendance:

**MEMBERS**

William Aila, Jr.  
David Goode

Jerry Edlao  
Dr. Sam Gon

**STAFF**

Ed Underwood/DOBOR  
Dave Smith/DOFAW  
Emily Fielding/DOFAW  
Stephen Soares/PARKS

Kevin Moore/LAND  
Randy Kennedy/DOFAW  
David Quisenberry/DOFAW  
Dan Quinn/PARKS

**OTHER**

Cindy Young, Deputy Attorney General (AG)  
David Brittin, J-1  
Nancy Muetting, J-1  
John Popavits, J-1  
Gary Rubio, D-3

Pam Matsukawa, Deputy AG  
Bryson Chow, J-1  
Bob Romo, J-1  
Keith Avery, D-7

(NOTE: Language for deletion is [bracketed], new/added is underlined.)

**Item A-1      September 14, 2012 Minutes**

Member Gon recused himself. No quorum item deferred.

**Deferred**

**Item A-2 September 28, 2012 Minutes**

Item A-2 was not available.

**Item M-1 Second Amendment to Prior Land Board Action of May 11, 2007, Under Agenda Item M-1, Regarding Issuance of Direct Lease and Right-of-Entry to Ameron International Corporation, dba Ameron Hawaii, Adjacent to and in Vicinity of Pier 60 and Ke'ehi Lagoon, Tax Map Key: (1) 1-2-23: portion of 33, Honolulu Harbor, Kapalama and Iwilei, Honolulu, Oahu**

Calvert Chun representing Department of Transportation (DOT)/Harbor asked for an extension on the right-of-entry to December 31, 2012 and an issuance of a right-of-entry to the adjacent 2 acre parcel until December 31, 2012 for Ameron to use for heavy equipment.

It was asked by Member Goode whether there was sufficient time to do this and Mr. Chun confirmed that Ameron assured it will be done.

**Unanimously approved as submitted (Goode, Gon)**

**Item J-1 Request to (1) Realign the Perpetual Public Access Easement Created by a 1963 Agreement, Recorded in Land Court as Document No. 324984 and Affecting Tax Map Key No. (1) 2-3-37:12, Over the Modern Honolulu (Hotel) Property Owned by M Waikiki LLC; (2) Accept a Perpetual Non-Exclusive Easement From M Waikiki LLC Over Pedestrian Overpass Above Hobron Lane as a Portion of the Realigned Easement; and (3) Grant a 55-Year Non-Exclusive Easement to M Waikiki LLC for Pool Deck and Outside Dining Purposes on Elevated Deck Adjacent to Second Floor of the Modern Honolulu**

Ed Underwood, Administrator for the Division of Boating and Ocean Recreation (DOBOR) and Deputy Attorney General (AG) Pam Matsukawa introduced themselves. Mr. Underwood said they were here to request the realignment of a public access easement created in a 1963 agreement. He summarized back in 1963 an agreement was entered into by DOT, the Ilikai and Makaha Farms at the Ala Wai Harbor and is the main hotel which spans across Hobron Lane including the Ilikai Marina property. On Exhibit A, staff highlighted what this public access easement was going to look like. It was an elevated public access easement that fronted all of the properties, spanned Hobron Lane, fronted the Ilikai Marina property and it had 2 access ways down to the Harbor as well as one that lead down to the Hilton Lagoon. What happened was only the yellow/lighter colored portion of this access way was built. The darker colors were never constructed. What happened is we moved forward to today where the M Waikiki LLC came to staff last year requesting use of a portion of the public access easement that fronted their property and historically DOBOR had issued revocable permits (RP) to the Hotel for outdoor use – pool, dining, etc. Staff began discussions with M Waikiki LLC on what was going on because that public access easement goes to nowhere and dead ends in front of their property and there is

no real public access to get over to the Ilikai Marina property where the parking garage is. Staff wanted a continuous public easement and began discussions with M Waikiki, but they entered into bankruptcy proceedings last year and that is all resolved now. Staff met on numerous occasions and did site visits. Staff met with the Ilikai representatives and based on that they came to an agreement to have the public come up to where the new hotel is and they've agreed to allow the general public to access through their property, over their pool deck to access their elevators for ADA because there is a connector that takes you to the parking garage. When it was built it wasn't required to be ADA. Staff agreed to this and is a fair fix. It does what the access was always intended to do which doesn't do it now. Staff is not here to ask to change the 1963 agreement in any way they are asking to realign the public easement so it does its intended purpose. Staff is asking the Board to execute 3 easement agreements/documents. The first one is a perpetual easement granted to the State by M Waikiki, LLC for the realignment for the public access easement across the second floor pool deck which is on their property and the lobby of the M Waikiki Hotel. The second easement will be a perpetual easement to the State that runs with the first for the span over Hobron Lane which is the overhang that goes to the public parking garage. The third easement would be a non-exclusive 55 year easement granted to M Waikiki LLC for the use of that area that has been historically on an RP (revocable permit) that staff wants to put it on a 55 year and appraise at appraised value and they would pay the appraised rent for that. Staff looked at the requirements of Chapter 343 and we feel this project is exempt from that because it is existing use. What staff is asking the Board to do is accept the staff recommendations as outlined in the submittal.

Deputy Attorney General (AG) Pam Matsukawa said that the attorney for M Waikiki is here and he has a full presentation of what they would like to do. In addition, he represented to me that M Waikiki is willing to take full responsibility of all maintenance and indemnification of the elevated walkway of which they are asking for that non-exclusive easement. Because according to the 1963 agreement all of the private parties had maintenance indemnifications requirements. If they have an easement they agreed to its obligation. Generally speaking this whole situation has been a mess because this walkway was not entirely completed. If it had been entirely completed it would've been much more of a public easement, but because they cut off this walkway at the end of M Waikiki property, in effect, this elevated walkway only serves the 2 hotels – M Waikiki and the Ilikai. We are trying to negotiate a remedy here and we are not touching the 1963 agreement. We are taking the fact that agreement gave to the State the elevated walkway and also created a public access easement over the space held on behalf of the public and that is what we are working with. If we have to deal with the 1963 agreement we need to deal with the issue of what other private entities are and what the successors are going to do to remedy the situation for their non-compliance with their promises in that agreement.

Member Goode asked whether they had met with the Ilikai and Mr. Underwood said yes they have. They had one meeting last year and offers were made where M Waikiki initially was going to allow them through a hallway in their property which led directly to the overpass parking garage. The Ilikai folks didn't agree with that and felt it should be widened and restrooms should be removed and it should create a better access way into their property. Those two are in negotiations together and there is on-going litigation between the two, but we are not a party to that. Member Goode asked whether that litigation pertains to this issue and Mr. Underwood said it does. Ms. Matsukawa said we are not a party to that and are not keeping up

on everything that's happened except I do know that M Waikiki and Ilikai have gone through mediation and could not resolve the issue. The Ilikai would like a public access easement to lead to the elevated walkway and cut through their lanai area to get to an area where they have retail shops and create some kind of hallway between their retail area and M Waikiki. She understands that the Ilikai and M Waikiki have not been able to agree as to all the specifics on how to create where the public is supposed to pass through. They did have one meeting before the bankruptcy proceedings and everyone said okay that they will try. The bankruptcy proceedings went on for a year or so and staff was contacted by Dave Brittin, the attorney for M Waikiki who said the Ilikai doesn't want to settle, but they want to so staff has been working with M Waikiki.

Member Gon asked considering all the unresolved issues that may or may not be related directly to this request why is this coming before us before these are resolved. Ms. Matsukawa said because the public easement doesn't go through lanai areas or retail areas of the Ilikai or M Waikiki and that is what she thinks they are fighting over. All we are trying to do is resolve the legal issues with regard to the use of that elevated deck and being able to legally have the public cross over Hobron Lane to get to that parking lot. She sees this as a separate situation between the Ilikai and M Waikiki they can negotiate as long as they want, but that doesn't resolve our legal situation.

Member Gon asked why the 1963 plan didn't get realized. Why was it truncated? Ms. Matsukawa said she doesn't know if anyone knows that. Staff doesn't have it in their records. It was a long time ago. We just don't know. Member Gon asked what issue came up that made this 50 years later that this needed to be resolved when for 50 years it had not been. Ms. Matsukawa said the Ilikai and M Waikiki have at different times obstructed the elevated walkway by using it for their own hotel uses and then there were some RPs issued and the last RP that came up our office said "no." The way the situation is, the public access and all that, we can't approve this RP because we have a public access easement over this elevated walkway and until that is realigned we can't ask the Board to issue an RP that would restrict the public's access. For any use other than a public access we would have to realign the public access easement and then the elevated walkway would be available for the Board to issue an easement or an RP or whatever the Board thinks is appropriate.

Member Goode asked who was supposed to build that section. Ms. Matsukawa said she thinks Ilikai and Makaha Valley. Member Goode asked who their successor is. Ms. Matsukawa said M Waikiki, there is another Ilikai entity and Ilikai apartments entity – there are 3 separate entities. Member Goode asked whether we are the successor to DOT-Harbor and Ms. Matsukawa confirmed that. Mr. Underwood said at that time all the properties were owned by one individual. Ms. Matsukawa said a Mr. Chin Ho was involved.

David Brittin representing the M Waikiki, LLC and is now the Modern Honolulu distributed his presentation to the Board and testified that the relevant language is on page 2 which he read the underlined bolded section and referred to page 3 showing the map. There was going to be an integrated access way to run from the Hilton Lagoon along Holomoana Street to the end of the Ilikai Marina property with 2 causeways so the public wouldn't have to cross traffic at street level. Once the improvements were constructed our position was the State owns them and the rights transferred to the State because it was constructed on behalf of the State that the part that

overhangs is a State owned easement property. The State is the owner of the improvements and there is an easement created in favor of the public. On page 4 is the portion that was actually constructed and an overpass over Hobron Lane. The 1963 agreement was a trade between the State and the developer. It wasn't owned by one person that there was a variety of entities – Ilikai, Inc. was one. Lot 1B was already sold under an agreement of sale to a different entity called Capital Properties, Ltd. and Makaha Valley Farms owned the Ilikai Marina. Chin Ho was involved and was the party of interest in all 3 of those, but as to who owned what not one entity owned all 3 properties. Page 5, is the 1963 Agreement Section 4, a perpetual overhead easement...To build the overhead easement was never transferred to the Ilikai partners. It is in the title for the Ilikai apartments and the M Honolulu. Next page, 1963 Agreement, section 8 says the intent is to provide easy, safe and aesthetically beautiful access to the beach and the Ala Wai Harbor to the public. The intent is not in favor of any of the 3 development parties and the easement is in favor of the public. He read subsection 8.b. There are two easements – the Hobron overpass runs from the garage in the Ilikai Marina over to the Modern Honolulu property and the garage property in the Ilikai Marina was owned by Chin Ho. The elevated walkway is a completely separate right and there is no connection between the two because no connection was needed looking at the original plan. The problem arises when you only build half the plan there is no way for the public to get from the beach to the Ilikai Marina.

Mr. Brittin related the history of who sold and bought the property that would become the Modern Honolulu. The M Waikiki undertook a complete renovation of the hotel and the access ways were changed. They wanted to continue using the space that was used since 1982 for restaurant and dining purposes where they asked DLNR for another RP. They entered into discussions with their neighbors and have been unsuccessful in reaching a resolution with them resulting in their objection as to our plan. As to the law suit, essentially was a claim to our client saying there is no connection between the Hobron Overpass and the elevated walkway - there is no legal access across the property that they are two separate things. Land Court properties are when people walk back and forth on the path doesn't give the right to continue walking. They counter claimed against us. They filed a motion to dismiss on that case because they think this Board has authority to enter into these agreements and have sole exclusive jurisdiction enforcement if any violations in the 1963 agreement as they alleged. If the deal is presented and is accepted that it will essentially weed out the law suit. The claims will terminate and they will be able to have a resolution. The Solution (referring to diagram) is a realignment of the public access way which M Waikiki is going to grant to the State in a perpetual easement shown in blue over its pool deck along with permission to use the elevators for people with disabilities. M Waikiki has rights over the Hobron Overpass it's going to grant the rights it has to the State so a public access way is created across there and is consistent with the 1963 agreement. In exchange the State would grant an easement for the right to use the portions in green for pool deck and outdoor dining purposes and would retain the portions in yellow for the public to walk through the property and get over there. At the end of the day we have created the maximum possible the public access easement to go on the beach over to the Ilikai Marina property even though it's not what it was originally designed this is still a pretty good deal. It is something that is at no cost to the State and in fact M Waikiki will be purchasing the right to use those easements for 55 years. We are giving up quite a bit more than what they are getting for perpetual easements in exchange for easements that will expire. They believe this is an appropriate resolution and he knows there is a lot of talk about permissible uses on the elevated walkway referring to the 1974 B&W photo

showing a putting green, planters, pool chairs on the Modern Honolulu side of the property. Second B&W photo where the Morimoto Restaurant is shows a planter blocking the area to create a private use area. Both the Ilikai and Modern Honolulu properties have used this area for non-pedestrian uses for years. After the putting green was taken out the Ilikai completely blocked the easement by placing a planter, chairs, umbrellas and the public access was completely blocked off. There was no way to use the elevated walkway other than clearly use for their guests and owners in that corner. As far as they know there was never any request by the Ilikai to occupy the elevated walkway, no RP was issued; no payment was made by them and used the area for their own use. The planter was removed by their request. The Fire Department told M Waikiki to remove the fire egress off the property and that the elevated walkway was the place to do it.

Member Gon asked the planter has been removed then. Mr. Brittin said the planter was removed in 2010 by the Ilikai. Since August 2010 the Ilikai sent a letter to DLNR requesting that no RP be issued and there was an October letter from DLNR to M Waikiki saying they could not issue an RP and we wrote back saying we would like to present more information. We've been in contact with DLNR the whole time working closely with them and we believe this represents a win for everybody. The public will have access across the property including members of the Ilikai who said our intent is to cut access, but our intent is the complete opposite that they intend to provide access across the property to the maximum extent possible given affect to the 1963 agreement and at the same time we would like to continue using that area that has continuously been used for outdoor dining and pool deck purposes and they are willing to pay the going rate for it.

Member Gon asked if he could speak to the realization or lack thereof the intent of the 1963 agreement section 8 to provide easy, safe and beautiful access to the beach and Ala Wai Boat Harbor. Mr. Brittin said clearly the intent was to build a nice public access way which is what Mr. Ho was supposed to provide and he did what he wanted. He convinced the State to build this access way and why he didn't complete it, probably cost that he doesn't think they will ever know. He never saw any record on what happened. The State did approve the plans as built, but what happened initially was the Ilikai apartment building was built first with the elevated walkway then the Modern Honolulu building then the Ilikai Marina and built the overpass, but they never pressed on. Don't know whether there was push back from the State probably not. They may have felt it was cheaper not to do it. I never saw any documents on it.

Member Goode asked essentially your taking where it ends and meander through the hotel to get to Hobron Overpass and to the Ilikai Marina to be finished with the elevated walkway. Per the agreement you wouldn't need this meandering through the hotel. Mr. Brittin says they will give up their perpetual easement and will exist in perpetuity unless circumstances change. He believes the Ilikai Marina has the right to construct it if it would like to and get permission to, but he hasn't heard if they were interested in that.

Bryson Chow representing the Association of Apartment Owners (AOAO) of the Ilikai Apartment Building and AOAO of the Ilikai Marina and intended to focus on the Association's written request for a contested case hearing and that the Board should not make a ruling today because they requested a contested case hearing, but really disputed the successors and interests

that Mr. Brittin has presented some dispute on the topic. The two Associations and its members are the successors and interests in the 1963 agreement since they have property rights in that agreement constitutionally they are entitled to a contested case hearing on this application as it affects that agreement. The Deputy AG said in her testimony that they are not intending to alter that agreement just the easement which is created by that very agreement, but doesn't make sense. They are trying to alter a contract with all the parties consent and that is why they were meeting with all the parties, but when they couldn't reach a resolution Mr. Brittin apparently called the AG's Office and said AOA is not willing to negotiate. Now the Deputy AG is correct it is a mess, but you cannot just ignore the other parties of the contract and try to back door a lot to the 1963 agreement and say don't change the obligations on the agreement and allow M Waikiki to reduce that 33+ foot public access way and have it meander through its hotel and not have people go out in the open air go through their hotel and catch their elevator. People are not able to meander through their hotel to access the Hobron Bridge because when the M Waikiki was built despite the Association's objections M Waikiki or its predecessor built a door and blocked it off and they have people standing there to not allow the public walk through their hotel and to reach the Hobron Bridge and that is part of the counter point in this civil action right now. And correct, the State is not a party.

Mr. Chow said there has been so much misinformation given to the Board I have to correct all these things instead of why they shouldn't make a ruling today and instead wait for the contested case hearing. Because of this misinformation I have to set the record straight. At the beginning, yes, there were encroachments by all the parties on the public easement area. Once the Association learned about it they said to M Waikiki make sure you have the public easement from the walkway to the Hobron Bridge. What M Waikiki did was put up a door and leased the space to Morimoto's blocking off that entire area and extending onto the 33 foot public easement area. Has there been restaurant use in the past? Yes there has open air use with umbrellas. Now it's completely blocked off and closed off to the public and leased out to private parties. The Association says that is a violation and how are they doing that and to find out they are getting revocable leases. An objection letter goes to DOBOR saying hey these guys are applying for another revocable license and they can't have it because of the 1963 agreement and this was August of 2010. In September, M Waikiki getting wind of the objection sends us a letter and says that planter on the Association property is also blocking the easement. They voluntarily removed it, but M Waikiki wanted them to remove it faster and they were going to seek damages if they didn't remove it fast enough. They did remove it from the easement, but Morimoto's is still there serve alcohol on the public easement area. The public access easement is being used for commercial purposes which is improper. That is the reason why this came up after so many years. Although there are encroachments by all the parties with seating and outdoor delivery of drinks and what not, when M Waikiki leased the space to Morimoto's they completely shut that area off. Now we have a dispute and now the public nor do the Associations members have free flowing access across the 3 properties via the Hobron Bridge. Now there is litigation in State Court. Mr. Brittin is correct that they have filed a motion that the Board has exclusive jurisdiction, but he finds it funny that they don't mention that in their motion it also says if you want to continue in this case we also have to sue the State. They are going to bring the State into this and no one mentions that to you. He is trying to pull the wool over your eyes. They cannot modify the 1963 written agreement or the easements created without the consent of all the parties. They tried to get the consent and the parties could not work it out. Now they tried to

back door this agreement by saying we are just going to move the easement that we are not changing the agreement that created the easement, described the easement or placed the easement. We are just going to change where it goes and how big it is. From 33+ feet down to a little corridor hallway, enclosed, not open air space through M Waikiki's property and they can catch their elevator. The public is going to lose out on this. It will be a breach of the 1963 agreement on the part of the State, on the part of M Waikiki and that leads to why they are entitled to a contested case hearing that under Hawaii law if you have a property interest you have constitutional due right to a contested case hearing as both successors and interest both the AOA O Iikai and AOA O Iikai Marina and their owners, our successors, the original owners requested in writing yesterday for a contested case hearing reiterating that request today pursuant to HRS 13, 1-27F the Board is authorized to rule on a declaratory order if that rule is hypothetical or speculative as a contested case hearing is clearly required in this matter. Not to mention if there are issues as to jurisdiction here or in Circuit Court a ruling would be speculative or hypothetical without the consent of all the parties which they (M Waikiki, DOBOR) initially sought. Without that consent there can be no alteration of the 1963 agreement or easements created from it and is the reason why to refuse the declaratory order and allow this to get into a contested case hearing.

Member Gon asked what is the extent of public use of this walkway at present, close to zero. Mr. Chow said he didn't think so. Often a lot of the public go there to watch the fireworks. With respect to the tenant agreement the intent was solely for public access alone and no one else benefits, but the public. If we look at how this works in a practical matter the intent of the agreement with the owners constructed this large walkway to provide more space for their guests and members to get down to the beaches and also to provide the public a nice way to walk through their properties and do business with their concessions, restaurants, snack bars, etc. It was initially described as a wall of sorts. The intent was to also provide public access was to also benefit each of the 3 parcels by bringing in higher foot traffic.

Member Gon asked it's interesting that the specific wording in the portion presented earlier was that the structure specified in the sub-paragraph about it shall be used only for pedestrian traffic and shall be forever open to use by the public. It doesn't say anything about hotel use or majority of the walkway to be used for hotel guests. It is only for pedestrian traffic and opened for public use. Mr. Chow confirmed that is correct which is why DOBOR in October 2010 said they had sent a letter to M Waikiki and said they had consulted with the Deputy AG and we can only use that public access area for public access only and related structures. The encroachments that were on their before and the Deputy AG indicted in this letter that planters and things that consisted for beautification was part of the intent of the 1963 agreement of that public access were acceptable, but anything else that encroached upon that area was not acceptable. The only other thing encroaching and completely shutting off public access is M Waikiki's use and their lease to Morimoto's restaurant making money off of this commercial use. There is no public access about it.

Member Gon asked the section of the walkway that was constructed adjacent to the Modern Honolulu has continuity and seems to run by one corner of the Iikai. Is there a direct pathway between the Iikai and this walkway? Mr. Chow said yes, right in front of the Iikai. There are large platforms there. Member Gon asked whether the Iikai make use of any portion of the deck

for its guests or the like. Mr. Chow said anything now existing after the planter was removed ...and when the planter was there the Association provided another 30 foot area within which the public could make its way around, but they realized they needed to take the planter out and that is why they did voluntarily removed not by the request of M Waikiki.

Member Goode asked you represent 2 of the 3 private parties and are your clients prepared to finish building what was supposed to be built. Mr. Chow confirmed representing 2 of the 3 and said he wasn't sure and would have to check with them. The question is who is going to contribute as initially both the 2 owners were responsible for constructing what was originally planned. As Mr. Britton said what has been built did receive State approval and he wasn't sure by what the Deputy AG represented there would be any breach of contract with what was supposed to be built and wouldn't know if the Association would have a problem. Member Goode asked you are relying heavily on the 1963 agreement and Mr. Chow confirmed that. Member Goode said and you can't have it both ways. If that were to happen then we would want to keep the easement we currently have with the Modern. Mr. Chow said he assumed that.

Member Goode asked in the submittal they are realigning is what you are objecting to, but if we were to keep that easement as it currently exists and add additional easement that goes through the hotel that would at least provide the opportunity if the rest is built it would benefit the public that it is still there. Do you guys object to that? Mr. Chow said honestly he can't answer that. It's never been raised as an option and would be consistent with the agreement, but he wasn't sure if it would be consistent with subsequent approvals of all parties as to what was built. As the 1963 agreement alone a continued pathway would be consistent with that agreement.

Ms. Matsukawa clarified the State's intent. When they met with all the parties we were working with M Waikiki perhaps they could do a universal settlement to include the Ilikai as well. But, we were not talking about amending the 1963 agreement. We were looking at some universal settlement that would satisfy both hotels as well as accommodate the public in terms of access. She wanted to clarify we didn't say "yes" to have a meeting to agree to amend the 1963 agreement - "no." We approached everybody to say we are willing to be the facilitator and that's all it was.

Chair Aila said the other alternative before us is to enforce the 1963 agreement and require everything to be built and that is another universal idea and Ms. Matsukawa agreed that is a good idea.

Mr. Brittin said that Mr. Chow was incorrect with the facts in the plan that they had sent a letter May 18, 2010 to the Board of the Ilikai requesting that they remove the planter and they offered to pay for the removal and the relocation that Mr. Chow's statement that it was done voluntarily and not at our request was completely incorrect. There were multiple opportunities to remove it and it wasn't suddenly one day they said oh wait were in violation and should go ahead and remove this. It was our insistence that they remove it. It's very unusual for someone who completely disregarded the State's interest in the elevated walkway built first the putting green the planter blocked the elevated walkway for 20-25 years and then to come and say these guys are doing something bad. In affect the RP showed that the property had been used for outdoor dining and pool deck purposes and if you are talking about things like servitudes once you allow

the uses that are in contradiction of a servitude agreement those servitude starts to lose their affect. We have 40 plus years of non-compliant use and maybe longer - maybe the entire use of the hotels. Suddenly they want to come in and enforce those terms on one party and clearly if this would be adjudicated would have issue with unclean hands that they've done everything they can to just take the property without paying the State and without requesting permission. They've also sat on their hands and acknowledged in their pleadings that they were aware of the non-pedestrian uses and chose not to pursue them that all these years later they are suddenly raising an objection. The intent of the agreement is the public had access and it was never stated that they were to provide additional foot traffic for the Ilikai business operations. If that is a benefit then that's a benefit. The public easement over the elevated walkway is not in favor in their property. It is in favor of the public. They don't own that and only by the State is there an easement in favor of the public and administered by the State. This Board has the authority to make these positions and has the authority to modify contracts. HAR 171-63 gives the Board the expressed right to modify agreements including agreements of sales and deeds both of which are contracts. We are not changing the central terms of the 1963 agreement we are saying let's do the best we can to give the State and the public the access they were promised and they believe this is the best deal to accomplish that.

Member Goode asked whether this is a realignment, are we banning the easement we currently have. Mr. Brittin said that we are not that the easement is in place that you own it so you can make a disposition of that easement and you are gaining an easement that you don't have. There is no right to cross in the 1963 agreement to the M Waikiki properties. Member Goode asked is this submittal banning that easement. Mr. Brittin said not at all. You are keeping it. You are expressly retaining it referring to the map and you are selling to use that pool deck and other dining uses solely for 55 years and all those rights go away. The State retains ownership control and this Board will always have the authority over that area.

Member Goode asked and if the rest of the walkway is built. Mr. Brittin said if the event the rest of the walkway is built it will be for the State and the State will own it. It will be public accessed easement across it all the way and at which point we could address a perpetual easement across M Waikiki's property would still be appropriate. It's no longer needed and you can realign it back. He finds it unlikely anyone will step up and build the remainder and it's not sure whether the State wants it at this point. I think the plan in 1963 is different from what's there now wouldn't be necessary something the State wants. That is for you guys to decide. This deal allows people to have public access. People talk about walking to the corner of Hobron and Holomoana, how likely is that? Not very. I also take issue that they've enclosed the pool area and preventing people from walking across the access. People walk across that access way every day. They don't even walk across the area they request them to. They walk across to the pool bar through the center of the hotel and people walk all over the place and no one is ever cited or arrested. No one is ever stopped from crossing. At Morimoto's Restaurant you have to go through the front door of the restaurant and there is a liquor control issue. You have to have some boundaries of where you are going to be sitting to retain service space for the restaurant. It's outdoor, clearly the whole area is outdoor. Previously, in fact, the walkway was under an overpass. We believe it's a good deal for the State.

Member Gon asked to reiterate the statement he just made that the realignment is entirely outdoors. Mr. Brittin said the area through the elevator walkway is completely outdoor. The realignment is referring to that exhibit right along the pool is all outdoor and that last part you walk under the breeze way by Morimoto's and past the retail shop to the Hobron Overpass. You don't have to take the elevator down. You could go across the Hobron Overpass like everyone has and that piece is not changing at all. It is not ADA compliant that it has issues that need to be addressed, but that is not going to happen. There is very little change that is going to happen here.

Member Gon asked to clarify whether Morimoto's is on the easement walkway. Mr. Brittin said the restaurant itself is not that a portion that they put a canopy over it for outdoor shade where you can sit indoors or outdoors. The portion indoors is not on the elevated walkway. Member Gon asked whether the portion outdoors obstructs the pedestrian walk through. Mr. Brittin said it does. There is a planter right there. You have the restaurant and then you have the walkway outside of it. There is nothing to access except the end of the walkway that you don't go anywhere. As to what the 1963 agreement was to provide you were supposed to continue the walk down from that area to either the Ilikai Marina property or overpass down to the Boat Harbor. What is constructed is essentially a walkway to nowhere. To how much the public uses it, people walk through, but tend to be Ilikai guests or M Honolulu guests. The public doesn't have a great excitement of walking up and going nowhere. Some people come up and take a look around and go down to the pool bar or go to Morimoto's, but in providing access with design so you wouldn't have to cross the street to walk to the Boat Harbor since it doesn't provide that kind of access no true public access was ever provided.

Nancy Mueting, a resident at the Ilikai full time testified that she overlooks the whole public right-of-way every day and see the activities that go on having been there for 12 years. In negotiations between the Ilikai and Modern she thinks they came up with a good compromise and the Modern doesn't want to cooperate as you know. The assertion that Modern's property is private and they are going to allow access across their property for this so called re-alignment she didn't know if that is exactly true because in the 1963 agreement states that access rights affecting Lot 1A and Lot 1B are conveyed to the State. To me that means the public can walk across your courtyard and we noticed that the Ilikai we don't have private property here or there so the need to create a new alignment are already in the deed that that public can cross and in fact anywhere because its across their whole lot. The Ilikai has had a lot of hotel control over the years and that is why they were able to push us around on the public right-of-way and DOBOR is interested in getting some money out of it. They've complied and created a lot of other uses. The Modern's attorney was saying that the Board has the right to change the easement according to the law make new uses that they could do what they want with it. If you look at the situation the property or easement has been leased and the law states if a property has been abandoned then the State could make another use. In this case DOBOR jumped in from the very beginning and been a willing participant in the misuse of the public right-of-way and you can't claim it's not used. People have been using it and if it was open you would have a nicer long walk. The Ilikai is also interested that the public right-of-way be reduced in width and doesn't need to be quite that big, but still allow it and allow a straight path to parking garage in front of the ballrooms. They are claiming this is an implied easement because it's been in use since day one where the Ilikai can go straight to the garage if they allow people from the Ilikai to punch

through the wall they built and open to street like it used to the garage it would give more privacy to their special guests who are now bombarded by all the public and handicapped people and other people who might be a nuisance to their guests. I do see that the public bothers the ladies propositioning them in their bathing suits. I think they need more privacy. If that implied easement could get them through then their pool would have more privacy. The planter was removed after a meeting with DLNR in June 2010. Bob Romo and I went to the DLNR explaining the situation and it sounded like Modern was building all kinds of things on the public right-of-way and we are responsible according to the deed what they do there and what structures they put on there to obstruct. A DLNR representative came out and took pictures and said you can't have this planter there and she has the letter to Mr. Romo to please remove the planter to facilitate the public right-of-way. Unfortunately, this meeting was very short notice and her testimony is hand written and her exhibits are very rough. There is another opportunity that she would like this to work out for everyone that she has a background in landscape architecture and she knows there is a workable solution.

Member Gon asked whether she is suggesting they do not approve the proposed realignment that they have before us. Ms. Muetting said no. If you read page 2 of the agreement where it says where the public access was conveyed to the State of Hawaii across Lot 1A and Lot 1B where Lot 1B is the Modern property and she displayed an illustration showing that Lot 1A is the Ilikai and Lot 1B is the Modern. There is public access across these properties and they don't need to realign it that it is not a dead end. People walk along the right-of-way and according to the agreement they cross the right-of-way and you have public access across any parts of the Ilikai and the Modern and they might wander over to the bridge and finish going down the stairs which could be changed to allow the public on that bridge because right now it's for the owners of the 3 properties and their guests. There has never been any signs posted – the public not permitted. This area you need to control it, but it could be re-written in the deed.

Bob Romo testified that he has been with this thing since the beginning when they met with a representative from M Waikiki and what he said is they don't want you on their property and we want to put a wall all the way up to the rail. They don't want to have anything to do with you people and that was a quick 15 minute meeting. When they started researching that the 33 feet 8 inches from the rail was State property and they were already putting flooring in and planters which were fine. We brought to their attention that they couldn't have both ends of the stick and couldn't use that which was used in the past and closed the 30 feet that used to go past the ballrooms, but they made the decision that they can have both of those things. Even if the easement comes to a dead end it still overlooks the Yacht Harbor, the ocean and a great place to watch the sun go down and so on. The public is having that taken away from them. It will be turned into a commercial space. They tried to negotiate to half to what they used to have for a straight shot to go to the bridge that ties to the Marina to the other 2 buildings and warned them ahead of time before they put these little bathrooms in that, in fact, they couldn't have both of those things. They (M Waikiki) were the ones to break off the negotiations and they were the ones that went to the State DLNR and they were removed from the equation from that particular point. We've been trying to negotiate. We've been trying to get something that we had before to cross over to the Marina Building and then work out a deal with them the 33 feet 8 inches of prime property for the rest of our use and whatever else they want to do. As far as the planter goes when we realized that our planter was blocking also something done by the owners of both

buildings at one time. We as an Association realized we were blocking it with the planter Bill Andrews brought it to my attention personally, we were the ones at fault at that, and we were the ones that did it. There was no threat by the other side. They threatened us when it was closed to their opening and we hadn't finished putting the tiles back in, but we did everything we need to do to open that area back up again. If you saw the area that our easement sits on there is not a chair out there. We keep all our chairs back from the 33 feet 8 inches on our side of the property.

Chair Aila asked what his solution was. Mr. Romo said he would like to have the half of what they used to have pass through by the ballrooms where there was 30 feet of open space and a straight shot to the bridge tying all 3 buildings in nicely. When they have special events they have private parties there they put guards at that entrance on the easement and he watched them turn people away. I forced the issue myself and went through. When they approached me I told them this is a State easement and I'm entitled to come here and then they backed away. But, for the most part when they have a private party they close that entrance down. If you don't know any better they will close it down and turn you around.

John Popavits, General Manager of the Ilikai AOA testified that he has been there for 3-1/2 years, but was affiliated with the Ilikai for 15 years. It was unfortunate in 2006 when the developers split the property when it was never been split. Bob was right, for the longest time it was E Realty and then it was M Waikiki, nobody wanted to talk to the homeowners association. The first representative that came in said they were going to block this off and they told him they couldn't do that and they said watch me. They came in with plans showing what they wanted to do. They told them to keep the access the way it was and they didn't want to listen. Their attorney did threaten them with a planter when it got close to the opening of the addition back then. Everything was in place. Mr. Romo is a director on the Board and he instructed Mr. Popavits to do some things and they did it. A lot of things they are telling you are misleading. There were no complaints about the easement back in the 1970s.

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

10:23 AM EXECUTIVE SESSION

10:55 AM RECONVENED

Member Goode said he would like to make a motion. After listening to everything and conferring with their Deputy AG he feels that the public is getting screwed here because parties are bickering, but he thinks in general what's been proposed makes sense to the public with the exception based on the testimonies that we've heard is for the ability for the public to enjoy that makai view along the edge of the walkway. He would like to move that the staff submittal be accepted and that part of that submittal say that other terms and conditions as prescribed by the Chair to the best interest of the State and shall be applicable to two conditions he would like to see are that the public access along the makai edge of the walkway be preserved as appropriate

and should for any reason the balance of the walkway be built (it was never built) than any 55 year easement that is granted to the Modern would have some kind of clause to address any future walkway being built. Member Edlao seconded that. All voted in favor.

**The Board:**

**Amended staff's recommendation by adding the following conditions after recommendation #8. That other terms and conditions as prescribed by the Chairperson to serve the best interests of the State shall be applicable to the following:**

- 1) That the public access along the makai edge of the walkway be preserved as appropriate and**
- 2) Should the balance of the walkway be built then any 55 year easement granted to the Modern would have some kind of clause to address any future walkway being built.**

**Otherwise, staff's submittal was approved as submitted.**

**Unanimously approved as amended (Goode, Edlao)**

**Item D-4 Resubmittal: Approve the Withdrawal of Approximately 3 Acres from General Lease No. S-5320, Peter H. Jose and Richard A.J. Jose, Lessees; Authorize Amendment of General Lease No. S-5320, Peter H. Jose and Richard A.J. Jose, Lessees, to Reflect the Withdrawal, Decrease the Acreage of the Premises, Reduce the Rent, and Clarify that There is No Improved Legal Access to the Lease Premises from a Public Highway; Laupahoehoe, Hawaii, TMK: 3<sup>rd</sup>/ 3-6-6: portion of 46.**

Kevin Moore, Assistant Administrator for Land Division reported that items D-4, D-5 and D-6 are related pertaining to land in Laupahoehoe that the U.S. Department of Agriculture (USDA) Forest Service is requesting a 65 year lease on a 3 acre parcel as part of their experimental tropical forest in the area. The 3 acres is permitted pasture lease. At the Board's meeting of January 2012, the Board approved the issuance of this lease subject to conditions and staff is ready to go ahead with the final approvals of this lease. This withdraws the 3 acres from Jose's pasture lease and make some related amendments to that lease which reduces their acreage and will decrease their rent which is a simple prorata down because there is a rental reopening for the Jose's in June 2013. Staff is including an acknowledgement in the Jose lease that they don't have approved access, but they do have an access road and they would have to approve that. He referred to pages 2 & 3 on the USDA's withdrawal that the USDA would have to fence in this 3 acre portion to keep the livestock from escaping. USDA is going to pay the Jose's \$1560.00 to reimburse them for costs. Staff's recommendation is to approve the withdrawal of the 3 acres from the Jose lease with those conditions.

**Item D-5 Resubmittal: Amend Prior Board Action of January 27, 2012, Item D-2, and Prior Board Action of April 25, 2008, Item D-9, Regarding Issuance of Direct Lease to United States of America, Department of Agriculture (USDA), for Research and Educational Purposes, Laupahoehoe, North Hilo, Hawaii, TMK: (3) 3-6-6: portion of 46. The Purpose of the Amendment is to Clarify**