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

August 22, 2014

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

PSF No.:12KD-062

Kauai

Request for Mutual Cancellation of Term, Non-Exclusive Grant Easement No. S-4414 and Issuance of New 65-Year Term, Non-Exclusive Easement to John M. Mehan and Tina Mehan, Trustees of the John M. and Tina Mehan Revocable Living Trust, for Access and Utility Purposes, Waioli, Hanalei (Halelea), Kauai, Tax Map Key: (4) 5-5-006:020.

APPLICANT:

John M. Mehan and Tina Mehan, Trustees of the John M. and Tina Mehan Revocable Living Trust

LEGAL REFERENCE:

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

LOCATION:

Portion of Government lands of Waioli, situated at Hanalei (Halelea), Kauai, identified by Tax Map Key: (4) 5-5-006:020, as shown on the attached map labeled **Exhibit A**.

AREA:

0.212 acres, more or less.

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act

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

CURRENT USE STATUS:

Encumbered by Grant of Easement No. S-4414 ("Easement S-4414"), to John M. Mehan and Tina Mehan, Trustees of the John M. and Tina Mehan Revocable Living Trust ("Mehan Trust"), Lessee, for access and utility purposes. Easement to expire on August 7, 2039.

CHARACTER OF USE:

Access and utility purposes.

NEW EASEMENT TERM:

Sixty-five (65) years.

CONSIDERATION:

One-time payment to be determined by independent appraisal establishing fair market rent, subject to review and approval by the Chairperson. The appraisal shall also determine any credit due to Applicant for the early cancellation of Easement S-4414.

RENTAL REOPENINGS:

Not applicable.

CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

In accordance with the "Division of Land Management's Environmental Impact Statement Exemption List", approved by the Environmental Council and dated April 28, 1986, the subject request is exempt from the preparation of an environmental assessment pursuant to Exemption Class No. 1, that states "Operations, repairs or maintenance of existing structures, facilities, equipment or topographical features, involving negligible or no expansion or change of use beyond that previously existing." **Exhibit B.**

DCCA VERIFICATION:

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

APPLICANT REQUIREMENTS:

Applicant shall be required to:

1) Pay for an appraisal to determine one-time payment, as well as any credit due to Applicant for the early cancellation of Easement S-4414;

2) Obtain a title report to ascertain ownership, where necessary, at Applicant's own cost and subject to review and approval by the Department.

REMARKS:

On September 14, 1973, the Board of Land and Natural Resources ("Land Board"), under agenda item F-27, authorized a term, non-exclusive Easement S-4414 to Rose Marie Kuntz, Donald Thomas Kuntz, Barbara Ann Kuntz, Donna Marie Kuntz, James Stephen Kuntz and Michael John Kuntz, for 65 years beginning on August 8, 1974 and expiring on August 7, 2039. This easement served the private parcel formerly owned by the Kuntzes – Tax Map Key: (4) 5-5-006:021 ("Parcel 21").

On October 11, 2002, the Kuntzes conveyed Parcel 21 to Applicant Mehan Trust. On March 8, 2013, the Land Board, under agenda item D-4, authorized an after-the-fact consent to assign Easement S-4414 from the Kuntzes to the Mehan Trust, and amended the easement to "run with the land" and be assignable in the future without the prior written consent by the Land Board.

On May 24, 2013, the Mehan Trust submitted an application to the Department of Land and Natural Resources ("Department") to convert the easement from the term of years to perpetual. The reason for the requested conversion, according to Applicant, is that as the easement term shortens, it becomes increasingly difficult to get a new mortgage on their home or to sell their property should they choose to do so in the future.

Generally, staff recommends perpetual easements for kuleana lots, and term easements for parcels that are not kuleana lots. On June 25, 2013, the Department notified the Mehan Trust that its abstractor had determined that the subject land was a remnant portion of the Government Ahupuaa of Waioli. The Ahupuaa of Waioli is considered konohiki land. Applicant's parcel is not a kuleana. Accordingly, staff recommends that Easement S-4414 be cancelled and a new term easement of 65 years be issued to the Mehan Trust. The cancellation of the existing easement and grant of a new easement will be back-to-back transactions so that the Mehan Trust retains easement rights in the subject land while the transaction is completed.

The Mehans have retained counsel who makes a legal argument for the issuance of a perpetual easement by necessity, even though Parcel 21 is not a kuleana. A summary of the Mehans' position as articulated by their attorney is attached as **Exhibit C** (February 14, 2014 letter) and **Exhibit D** (May 12, 2014 letter).[1] Staff believes the Land Board retains discretion to determine the duration of any easement it authorizes on State lands.

1 Exhibit C includes a legal memorandum prepared by the Applicant's attorney, but does not include the exhibits referenced in the memorandum. Exhibit D does not include a copy of the Hawaii Intermediate Court of Appeals decision referenced in the May 12, 2014 letter.

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

The Department of Health and the County of Kauai's Public Works Division had no comments/objections to the subject request. The State Historic Preservation Division, Commission of Water Resource Management, the County of Kauai's Planning Office and the Office of Hawaiian Affairs had not responded by the due date.

The proposed use has continued since 1974 and will continue. Such use has resulted in no known significant impacts, whether immediate or cumulative, to the natural environmental and/or cultural resources in the areas. As such, staff believes that the proposed use would involve negligible or no expansion or change in use of the subject area beyond that previously existing.

RECOMMENDATION: That the Board:

1. Declare that, after considering the potential effects of the proposed disposition as provided by Chapter 343, HRS, and Chapter 11-200, HAR, this project will probably have minimal or no significant effect on the environment and is therefore exempt from the preparation of an environmental assessment.

2. Authorize the mutual cancellation of Grant of Easement No. S-4414 under the terms and conditions cited above, which are by this reference incorporated herein and further subject to the following:

    A. The standard terms and conditions of the most current mutual cancellation of easement document form, as may be amended from time to time;

    B. Review and approval by the Department of the Attorney General; and

    C. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

3. Subject to the Applicant fulfilling all of the Applicant requirements listed above, authorize the issuance of a term non-exclusive easement to John M. Mehan and Tina Mehan, Trustees of the John M. and Tina Mehan Revocable Living Trust covering the subject area for access and utility purposes under the terms and conditions cited above, which are by this reference incorporated herein and further subject to the following:

    A. The standard terms and conditions of the most current term easement document form, as may be amended from time to time;

B. The easement shall run with the land and shall inure to the benefit of the real property described as Tax Map Key: (4) 5-5-002:021, provided however: (1) it is specifically understood and agreed that the easement shall immediately cease to run with the land upon the expiration or other termination or abandonment of the easement; and (2) if and when the easement is sold, assigned, conveyed, or otherwise transferred, the Grantee shall notify the Grantor of such transaction in writing, and shall notify Grantee's successors or assigns of the insurance requirement in writing, separate and apart from the easement document;

C. Review and approval by the Department of the Attorney General; and

D. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

Respectfully Submitted,

Kevin E. Moore
Acting Land Administrator

APPROVED FOR SUBMITTAL:

William J. Aila, Jr., Chairperson

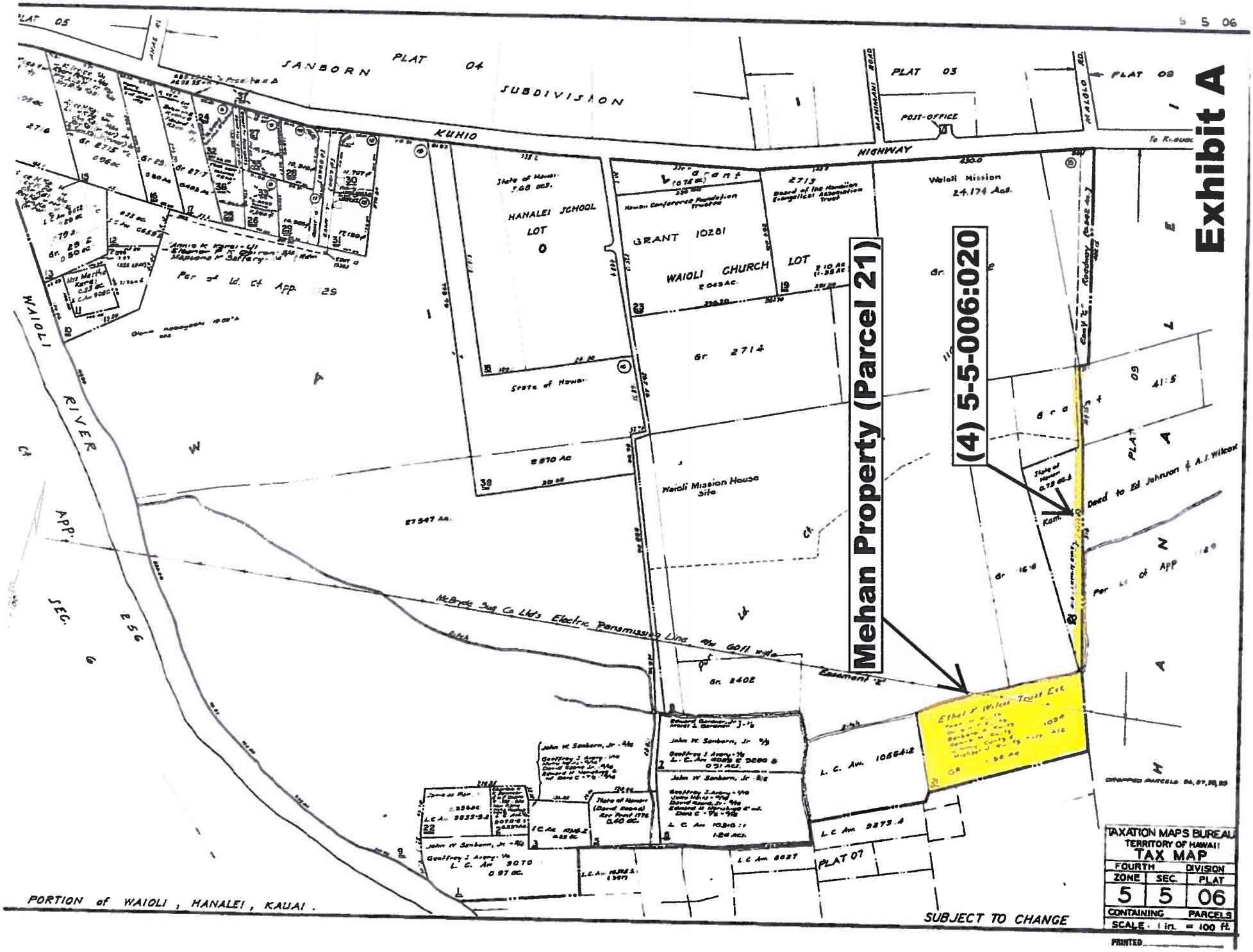
Exhibit A
Mehan Property (Parcel 21)
(4) 5-5-006:020
SANBORN SUBDIVISION
PLAT 04
PLAT 05
PLAT 03
PLAT 09
KUHIO HIGHWAY
POST-OFFICE
HANALEI SCHOOL LOT
GRANT 10281
WAIOLI CHURCH LOT
Waioli Mission
24.174 Acs.
Gr. 2714
Waioli Mission House Site
Gr. 2402
Deed to Ed Johnson & A.J. Wilcox
Ethel K. Wilcox Trust Est.
L. C. Aw. 10564:2
L. C. Aw. 9273:4
L. C. Aw. 8037
PLAT 07
WAIOLI RIVER
McBride Sug Co Ltd's Electric Transmission Line
PORTION of WAIOLI, HANALEI, KAUAI.
SUBJECT TO CHANGE
TAXATION MAPS BUREAU
TERRITORY OF HAWAII
TAX MAP
FOURTH DIVISION
ZONE 5
SEC. 5
PLAT 06
CONTAINING PARCELS
SCALE: 1 in. = 100 ft.
PRINTED

NEIL ABERCROMBIE
GOVERNOR OF HAWAII

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

JESSE K. SOUKI
FIRST DEPUTY

WILLIAM M. TAM
DEPUTY DIRECTOR - WATER

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

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
POST OFFICE BOX 621
HONOLULU, HAWAII 96809

August 22, 2014

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

Project Title:	Request for Mutual Cancellation of Term, Non-Exclusive Grant Easement No. S-4414 and Issuance of New 65-Year Term, Non-Exclusive Easement to John M. Mehan and Tina Mehan, Trustees of the John M. and Tina Mehan Revocable Living Trust, for Access and Utility Purposes
Project / Reference No.:	Grant of Easement S-4414
Project Location:	Waioli, Hanalei (Halelea), Kauai, Tax Map Key: (4) 5-5-006:020
Project Description:	Request for Mutual Cancellation of Term, Non-Exclusive Grant Easement No. S-4414 and Issuance of New 65-Year Term, Non-Exclusive Easement to John M. Mehan and Tina Mehan, Trustees of the John M. and Tina Mehan Revocable Living Trust, for Access and Utility Purposes
Chap. 343 Trigger(s)	Use of State Land
Exemption Class No. and Description:	In accordance with the "Division of Land Management's Environmental Impact Statement Exemption List", approved by the Environmental Council and dated April 28, 1986, the subject request is exempt from the preparation of an environmental assessment pursuant to Exemption Class No. 1 that states "Operations, repairs, or maintenance of existing structures, facilities, equipment, or topographical features, involving negligible or no expansion or change of use beyond that previously existing."
Consulted Parties:	DLNR – Historic Preservation and Water Resources Management; Department of Health; County of Kauai Planning and Public Works; Office of Hawaiian Affairs

Exhibit B

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

William J. Aila, Jr., Chairperson

8/11/14
Date

Ashford & Wriston

A LIMITED LIABILITY LAW PARTNERSHIP LLP

JAMES K. MEE
Direct: (808) 539-0416
Fax: (808) 533-4945
jmee@awlaw.com

February 14, 2014

HAND DELIVERY

Mr. Kevin E. Moore
Assistant Administrator
Land Division
Department of Land and Natural Resources
Kalanimoku Building
1151 Punchbowl Street
Honolulu, HI 96813

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Marvin T. Mikasa
Department of Land and Natural Resources
Land Division
3060 Eiwa Street, Room 208
Lihue, HI 96766

Re: Application for Conversion of Grant of Easement S-4414 from a Term of Years to a Perpetual Term (John M. Mehan and Tina Mehan, Trustees of the John M. and Tina Mehan Revocable Living Trust), Waioli, Hanalei (Halelea), Kauai, Hawaii, Tax Map Key: (4) 5-5-006:020

Dear Mr. Moore and Mr. Mikasa:

I am writing to request that the above-referenced application, which was first submitted by me to Mr. Mikasa on May 24, 2013, be submitted to the Board of Land of Natural Resources for their consideration and be put on the agenda for hearing at the next available Board meeting.

I would also request that copies of the enclosed memorandum regarding the position of the Mehans be submitted to the Board along with the application. The memorandum sets forth the legal and factual arguments why the Mehans believe they are legally entitled to receive a perpetual easement for access to their Kauai property.

I would also be happy to discuss the application with you or with the Deputy Attorney General that may be assigned to review the application and memorandum. It is my hope that given the further information contained in this memorandum, on further review the staff will concur that a perpetual access should be granted in this specific situation.

Thank you for your assistance on this, and, again, I would be happy to discuss the application with you.

Very truly yours,

ASHFORD & WRISTON
A Limited Liability Law Partnership LLP

By
James K. Mee

JKM:pnh
Enclosures

MEMORANDUM

DATE:

February 14, 2014

TO:

Chair William Aila and Members of the Board of Land and Natural Resources

FROM:

James K. Mee, Esq.
Ashford & Wriston

RE:

John and Tina Mehan: Request for Grant of Perpetual Access Easement

Dear Chair Aila and Members of the Board:

My name is James Mee. I am an attorney in the law firm of Ashford & Wriston, and am appearing before you in connection with an application for a grant of perpetual easement by John and Tina Mehan.

The Mehans presently have access to their property in Waioli, Hanalei, Kauai, by Grant of Easement No. S-4414, originally issued by the State to the predecessors in interest of the Mehans on August 8, 1974 ("Easement"), for a term of years that expires in 2039. On March 8, 2013, the Board approved an after-the-fact consent of assignment of the Easement to the Mehans, and converted the Easement from an easement in gross (that is, personal to the grantee) to an appurtenant easement that runs with the Mehans' property.

Subsequently, on May 24, 2013, the Mehans applied to the Department to convert the easement from a term of years into a perpetual easement. The reason the Mehans wish to convert their Easement into a perpetual one is the concern that as the term of the Easement shortens, it could be increasingly difficult to get a new mortgage on their home or to sell the home, if that should become necessary.

A copy of the Mehans' application is attached as Exhibit "A." The Mehans have been willing to pay consideration for the extension of the present easement term as determined by an appraiser (although, as will be seen in this memorandum, it appears they are entitled to a perpetual easement without payment of consideration).

On June 25, 2013, Marvin Mikasa of the Kauai office for DLNR informed me that the Department would not grant a perpetual easement for the parcel because the Mehan parcel is not a *kuleana*:

> Our abstractor has determined that the Government Land of Waioli, being a remnant portion of the Government Ahupuaa of Waioli.
>
> The Ahupuaa of Waioli is considered konohiki land. It is not part of a kuleana.
>
> Therefore, the Board cannot change the easement from term to perpetual."

See Exhibit "F" attached hereto. Subsequent to that, I also spoke with DLNR Assistant Administrator Kevin Moore, who confirmed that the present policy of the Department was only to approve granting perpetual access for *kuleana* parcels. However, Mr. Moore indicated that the Mehans could still continue to apply and take the matter before the Board for decision.

Accordingly, I have requested that the application be put before the Board for its consideration. We believe, as set forth in this memorandum, that as a matter of longstanding Hawaii law a grant of Government land (in this case, by a Royal Patent Grant issued in 1852) carries with it a right of access through surrounding Government land.

It is the Mehans' position that the Board should grant their request to convert their Easement from one for a term of years to a perpetual easement for the following reasons:

1. The granting of a perpetual easement is specifically authorized by the Department's governing statutes. There is no restriction to granting a perpetual easement only for *kuleana* parcels.

2. There is no other access route to the Mehan's property and the property would be landlocked except for the access over State land. Under these circumstances, the decisions of the Hawaii Supreme Court state that the Mehans would be entitled to a perpetual "way of necessity" or "easement by implication" from the State.

3. The Board has previously granted perpetual easements in similar circumstances, and the Attorney General has apparently advised the Department that those with Government land who would otherwise be landlocked are entitled to perpetual access over surrounding State land. The present staff policy restricting the granting of perpetual access only to *kuleana* parcels finds no basis in the law and is not supported by statute, past practices of the Department, or the advice of the Attorney General.

4. The easement being requested has been of longstanding historical existence and passes over a remnant of State land which has no utility or use by the State. There is no economic or other reason for the State to deny granting a perpetual easement in favor of the Mehan property. Further, granting such an easement to the Mehans would be based on the specific historic

background of their property and would not be creating any sort of new precedent that would compel the granting of other perpetual easements.

I. HAWAII STATUTES AUTHORIZE GRANTING A PERPETUAL EASEMENT

Respectfully, the position of the staff of the Department is not supported by the Department's governing statutes. There is nothing restricting the granting of perpetual easements only to *kuleana* parcels.

Hawaii Revised Statutes ("HRS") Section 171-13 specifically authorizes the Board to grant perpetual easements:

> §171-13 Disposition of public lands. Except as otherwise provided by law and subject to other provisions of this chapter, the board may:
>
> (1) Dispose of public land in fee simple, by lease, lease with option to purchase, license, or permit; and
>
> (2) Grant easement by direct negotiation or otherwise for particular purposes in perpetuity on such terms as may be set by the board, subject to reverter to the State upon termination or abandonment of the specific purpose for which it was granted, provided the sale price of such easement shall be determined pursuant to section 171-17(b).
>
> No person shall be eligible to purchase or lease public lands, or to be granted a license, permit, or easement covering public lands, who has had during the five years preceding the date of disposition a previous sale, lease, license, permit, or easement covering public lands canceled for failure to satisfy the terms and conditions thereof.

(Emphasis added.) There is no restriction in the statute that the land being benefited by a perpetual easement must be a *kuleana*. Indeed, as is shown more specifically in Section III below, the Board in the past has approved perpetual easements for Government Grants such as this, and the Attorney General's office has apparently advised that such Grants are entitled to access as "easements by necessity" where they would otherwise be landlocked.

Further if there is now a policy to restrict granting of perpetual access to *kuleana* parcels, it must be supported by administrative rules promulgated after public hearing and opportunity to comment. I am not aware of the existence of any such rules.

II. HAWAII JUDICIAL PRECEDENT HOLDS THAT THE MEHANS WOULD BE ENTITLED TO RECEIVE A PERPETUAL EASEMENT BY NECESSITY TO ACCESS THEIR PROPERTY.

Hawaii case law holds that where a grantor grants land the grantor is presumed also to have granted access over the grantor's remaining land so that the parcel is not landlocked, even if there is no express easement described in the conveyance. This is alternatively referred to in the cases as an "easement by implication," "easement by necessity" or "way of necessity," and reflects that a seller would be presumed not to sell, nor a buyer to buy, land that does not have legal access.

The doctrine was first discussed by the Hawaii Supreme Court in its 1893 decision in Kalaukoa v. Keawe:

> A way of necessity so-called is, strictly speaking, not created by necessity. It is created by grant or reservation. . . .
>
> A way of necessity is merely a way created by an implied grant or reservation, the necessity being only evidence of the intention of the parties to make the grant or reservation. If it is not in the power of the grantor to create a way, no necessity however strict or absolute, can be evidence of an intention to do so, --as where the only means of access to the land is over the land of a stranger. But if it is in the power of the grantor, strict necessity alone is sufficient evidence – as where the only means of access is over the land conveyed or reserved by the grantor. And even where there is not a strict, but only a reasonable necessity, as where some other way is possible though very difficult or expensive, this, if coupled with additional evidence of a way actually used and which is apparent and of a continuous nature, has been held to be sufficient evidence of an intention to grant or reserve the way.

Kalaukoa v. Keawe, 9 Haw. 191, 192-93 (1893)(emphasis added).

According to the Court in Kalaukoa, a way of necessity can be implied when a lot would be landlocked without the access. A way of necessity may also be implied where, although there may be alternative routes to the property, there is evidence that the access route has been actually and continuously used as the access for the property.

A number of subsequent cases have followed Kalaukoa. In 1894, the Court applied the doctrine with regard to a *kuleana* parcel. Henry v. Ahlo, 9 Haw. 490 (1894). In Calaca v. Caldeira, 13 Haw. 214 (1900), the Hawaii Supreme Court again set forth the doctrine, by saying

that "[a] way of necessity may be implied from a grant in favor of either the grantor or the grantee, and cannot be implied in favor of or against a stranger to the grant." Id.

The doctrine was most recently applied by the Intermediate Court of Appeals in Kanahele v. Brodbeck, 129 Hawai'i 170 (2013) (unpublished disposition). The ICA set forth the doctrine as follows:

> At common law, an easement can be implied on the basis of necessity. See, e.g., Kalaukoa v. Keawe, 9 Haw. 191, 2 (1893) ("A way of necessity is merely a way created by an implied grant or reservation[.]" It is well established, however, that "[a]ll implications of easements necessarily involve an original unity of ownership of the parcels which later become the dominant and servient parcels." Ass'n of Apartment Owners of Wailea Elua v. Wailea Resort Co., Ltd., 100 Hawai'i 97, 105, 58 P.3d 608, 616 (2002) (quoting Neary v. Martin, 57 Haw. 577, 561 P.2d 1281 (1977); see also 28A C.J.S. Easements § 112 ("Ways of necessity cannot exist where there was never any unity of ownership of the alleged dominant and servient estates.") In Kalaukoa v. Keawe, the Supreme Court of the Republic of Hawai'i concluded that the defendant established entitlement to an implied easement by necessity by showing, inter alia, that plaintiff's and the defendant's lands formerly belonged to the same person. Kalaukoa, 9 Haw. at 1.

Kanahele v. Brodbeck, 190 Hawai'i at 170, *4.

In this case, the Mehan parcel was originally a Grant of Government lands of the Kingdom. Attached as Exhibit "B" is a copy of the Royal Patent Grant to Nahau (in Hawaiian) of land located in the Government Land of Waioli in Hanalei. A copy of the deed of the property to the Mehans is attached as Exhibit "C", and the property description attached as Exhibit "A" to that deed shows the derivation of title from Nahau.

As far as I have been able to determine, the legal form of the Royal Patent Grants issued by the Kingdom for Government lands did not have any express language regarding granting access rights (although there was language reserving mineral rights to the Kingdom).[1] The Grant to Nahau does not contain any language regarding access.

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[1] The form of the Royal Patent Grant in was first prescribed in Section VI of Article II of An Act to Organize the Executive Departments of the Hawaiian Islands, Laws of 1846, as follows:

"SECTION VI. The form of all royal fee simple patents shall be as follows:

When the existing Easement for a term of years was first granted in 1973 to the Mehans' predecessors in interest, the DLNR staff at that time recognized that although the parcel had had historic access over State land, it did not have legal access and was landlocked. The staff submittal for the initial grant of the Easement, dated September 14, 1973, stated that

> "[a]lthough there is an unimproved roadway which provides access to the Kuntz property from Kuhio Highway (a portion of which crosses State land), the applicants' property can be said to be technically landlocked inasmuch as the accessway does not exist in the formal sense."

KAMEHAMEHA, ---, by the grace of God, king of the Hawaiian Islands, by this his royal patent, makes known unto all men that he has for himself and his successors in office, this day granted and given, absolutely, in fee simple unto . . . . . ., his faithful and loyally disposed subject, for the consideration of . . . . . dollars, paid into the royal exchequer, all that certain piece of land, situated at . . . . . , in the Island of . . . . . , and described (by actual survey or by natural boundaries as the case may be) as follows:

containing . . . . . acres, more or less; excepting and reserving to the Hawaiian government, all mineral or metallic mines, of every description.

To have and to hold the above granted land in fee simple, unto the said . . . . . , his heirs and assigns forever, subject to the taxes to be from time to time imposed by the legislative council equally, upon all landed property held in fee simple.

In witness whereof I have hereunto set my hand, and caused the great seal of the Hawaiian Islands to be affixed, at Honolulu this . . . . . day of . . . . . , 18 . . . . .

(L. S.) . . . . . .

Attest, ... ,

Premier."

See Exhibit "D" attached hereto, Revised Law of Hawaii 1905 at 1240.

The Nahau Grant substantially follows this form, although some of the clauses are in a slightly different order. See Exhibit "B" attached hereto.

(Emphasis added.)[2] A copy of the 1973 staff submittal is attached as Exhibit "E".

The Department has also confirmed in its recent communication that the land involved is *konohiki* land which was held by the Government as the *konohiki*:

> "Our abstractor has determined that [this is] the Government Land of Waioli, being a remnant portion of the Government Ahupuaa of Waioli.
>
> The Ahupuaa of Waioli is considered konohiki land. It is not part of a kuleana."

See Exhibit "F" attached hereto.

Second, there is evidence of long-standing use of this route to access the Mehan property. In addition to the 1973 staff submittal which refers to an existing "unimproved roadway" that existed as of that date, a Land Court map of the area prepared between March 1934 and January 1935 clearly shows the road comprising the Easement between the Mehan property and the "Government Main Road" (now Kuhio Highway). A copy of the Land Court map with the roadway highlighted in yellow is attached as Exhibit "G."[3] Title to the area now believed to be owned by the State of Hawaii is referred to on that Land Court map as "Title Uncertain Probably Government."[4]

Thus, not only is the test for strict necessity under Kalaukoa met (being landlocked), the test for reasonable necessity or easement by implication under Kalaukoa is also met (historical evidence of actual and apparent use).

Since the common owner of the Nahau parcel and of the remnant parcel now owned by the State was the Government of the Kingdom of Hawaii, the doctrine of implied easement would be applicable. This would be true even if the State of Hawaii was deemed to be a different landowner than the Kingdom, because the implied easement would have passed down

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[2] Portions of the roadway also run over land owned by Waioli Mission. The Mehans' predecessors in title obtained a perpetual right of way for access and utility purposes over the Waioli Mission portion of the roadway, so that is not an issue here. See the Property description of Exhibit "C" at the bottom of page 6 of that document.

[3] A scaleable copy of this map can be found online at the following website maintained by the Department of Accounting and General Services: http://ags.hawaii.gov/survey/map-search/ . To locate the map, enter Land Court Application No. 1161, Land Court Map No. 1. A full-size copy of the Land Court map will be brought to the hearing and will be available for examination by the Board members and Department staff.

[4] The reason for this is there is no evidence that the area had ever been granted to a private party. The *ahupua'a* being a Government land, it was presumed that the title to unsold portions would remain in the Government

through succeeding conveyances even if the owners of the "dominant" and "servient" parcels change. See, e.g., Kawika v. Pakeokeo, 5 Haw. 293 (1885).

Finally, it makes sense that that Grants of Government land during the Kingdom carry with them access rights through the surrounding Government land. When *kuleana* parcels were granted, what is now Section 7-1 of the Hawaii Revised Statutes guaranteed that the *kuleanas* were entitled to access across surrounding property. See, e.g., Rogers v. Pedro, 3 Haw.App. 136, 642 P.2d 549 (1982).

A number of natives, for various reasons, either did not have *kuleana* parcels or did not timely apply to the Land Commission for recognition of their ownership and thereby lost them. The Kingdom was concerned that such native Hawaiians needed to be given an opportunity to purchase Government land, and in 1851 passed legislation to send land agents out into the remote parts of the islands to make land available to such persons. The law provided, in pertinent part:

> AN ACT TO PROVIDE FOR THE APPOINTMENT OF AGENTS TO SELL GOVERNMENT LANDS TO THE PEOPLE
>
> WHEREAS, many persons in the remote districts of the islands are entirely destitute of any land of their own; And whereas from their ignorance of the steps necessary to be taken to purchase lands, and their great distance from the seat of government, they are likely to remain destitute, while others not occupying or improving any land, are enabled to make large purchases: Therefore—
>
> BE IT ENACTED *by the Nobles and Representatives of the Hawaiian Islands in Legislative Council assembled:*
>
> SECTION 1. The minister of the interior shall, upon the application of fifty persons resident in any district in which there are Government lands for sale, appoint a suitable agent for the sale of such lands to the natives resident in such district, or such other natives as may declare their intention to become permanent residents in such district, and occupy and improve a portion of such lands. Said agents shall be paid a reasonable compensation, for their services, in the discretion of the minister of the interior, out of the proceeds of sale of land.
>
> SECTION 2. Every Agent appointed to sell lands in any district, shall have the power to sell such Government lands as may be placed in his hands by the Minister of the Interior for sale to the

> natives, in lots of from one to fifty acres, in fee simple, to such natives as may not be otherwise furnished with sufficient lands at a minimum price of fifty cents per acre.

Exhibit "D" at 1245-46. Nahau received his Grant in 1852, about a year after the passage of this new legislation. It can be presumed that he was one of the "natives" that was intended to be benefited by the legislation.

It would certainly be incongruous if the Government of the Kingdom, which had provided *kuleana* tenants with access rights, would have denied those rights to other natives that had acquired Grants for the same purposes. It stands to reason that those purchasing Government Grants under the 1851 law would have been entitled to access to reach those lands. Indeed, that can be presumed to be the case, since there do not appear to be any reported cases dealing with the denial of access by the Government of the Kingdom to a native owning a Government Grant.

III. THE DEPARTMENT HAS PREVIOUSLY GRANTED PERPETUAL EASEMENTS IN SIMILAR CIRCUMSTANCES

The Department has recognized the right to such access in other similar situations. For the Board's information I have attached a sampling of applications, most of which are relatively recent, where similar access has apparently been granted:

1. PSF No. : 05MD-148 (March 24, 2006); Grant of Perpetual, Non-Exclusive Easement to John Ellis and Claudia Johnson-Ellis for Access and Utility Purpose, Makawao, Maui, Tax Map Key: (2) 2-9-5: portion 20. (Exhibit "H")

   This application involved a Government Grant, where there was previously a 55-year Easement from the State and the new owners wished to convert the term-of-years easement into a perpetual easement.

2. PSF No. : 10KD-032 (September 9, 2011); Amend Prior Board Action of May 13, 2011 (D-3), Grant of Perpetual, Non-Exclusive Easement to Maxwell Klutke for Access and Utility Purposes, Kapaa Homesteads, 1st and 2nd Series, Kawaihau, Kauai, Tax Map Key: (4). (Exhibit "I")

   This involved a perpetual grant of access over former Crown and Government land to get to a Government Grant (Homestead).

3. PSF No. : 08HD-190 (October 28, 2011)(Hawaii); Grant of Perpetual, Non-Exclusive Easement to James A. Scanlon and Sarah N. Scanlon for Access Purposes, Kaiaakea, North Hilo, Hawaii, Tax Map Key: 3rd/3-4-03:11. (Exhibit "J")

Here, applicants took the position they were entitled to a way of necessity / implied dedication.) The nature of the derivation of the title to the applicants' land is not clear from the application.

4. PSF No. : 12HD-052 and -053 (May 25, 2012); Grant of Perpetual, Non-Exclusive Easement to Henk Brouwer Rogers and Akemi Matsumoto Rogers for Primary Access Purposes, Hale Piula, Puuwaawaa, North Kona, Hawaii, Tax map Key: (3) 7-1-001: portions of 006 & 007; Grant of Term Non-Exclusive Easement to Henk Brouwer Rogers and Akemi Matsumoto Rogers for Secondary Access Purposes, Hale Piula, Puuwaawaa, North Kona, Hawaii, Tax map Key: (3) 7-1-001: portions of 006 & 007. (Exhibit "K")

This application is important because the Attorney General apparently recognized in that cases that landlocked portions of Government land are legally entitled to a perpetual way of necessity over other Government lands. The following excerpts from the Staff Submittal support this:

"The Applicant has requested an easement over the subject State lands between Parcel 2 and Parcel 3 for access purposes.

Hale Piula (Parcel 3), was created via subdivision, removed from State ownership and conveyed as part of a land exchange to Mr. Robert Hind in 1940 for water tank site in support of Mr. Hind's grazing operation, as he held a pasture lease over the subject State lands at that time. It is unclear why no access easement easement exists for this land-locked parcel, which is completely surrounded by State lands. The State Abstractor has confirmed that Parcel 3 is not a landlocked 'kuleana' parcel. The Department of the Attorney General advised staff that the Applicant is entitled to an "easement by necessity" from the State for Parcel 3. The "easement by necessity" was created at the time of the 1940 land exchange. According, the Department of the Attorney General further advises that issuance of an express easement on the implied easement should be at gratis."

Staff submittal at 5 (emphasis added).

The staff submittal noted that this was because of the parcel's landlocked nature as Government land, and not because it had any rights as a kuleana, because the Abstractor and concluded the parcel did not qualify as a kuleana.

As can be seen by a review of these applications, perpetual easements have been granted in other similar situations, so it is not a correct statement that perpetual easements will only be granted where there is the applicant is the owner of a *kuleana* parcel. In fact, as seen in the Rogers application, the Attorney General has apparently advised the Department that landlocked former Government parcels are entitled to a perpetual easement as a matter of law.

IV. THERE IS NO ECONOMIC INTEREST OF THE STATE OR OTHER REASON TO DENY A PERPETUAL EASEMENT TO THE MEHANS.

As can be seen from the Land Court map, the Mehan Easement crosses over a remnant of Government land. There is no use being put to this land by the State, nor does it seem likely that there will be any use in the future. Similarly, the land over which the Mehan Easement crosses has been an historic road of long standing, dating back to the mid-1930s if not earlier. There is no practical use to which this Easement can be put other than to continue its historical use as a roadway.

Second, this is not a situation where a property owner with no pre-existing legal rights is attempting to claim access over State land. This is a situation where a property that has had historic access, and legal access through a term of years, is seeking to make that access perpetual as authorized by the statutes, the case law, and past practice of the Department. Thus, granting perpetual access to the Mehans would not create any sort of precedent expanding access over State lands (at least as a matter of right) to other private lands.

Third, this would not create any sort of negative precedent for the State. As demonstrated in this memorandum, this parcel is entitled to access because, factually, it is Government land with an historic roadway existing between it and the nearest public road.

V. CONCLUSION

For the foregoing reason, we urge the Board to authorize issuance of a perpetual easement to the Mehans. This would be in conformance with what is permitted by the statutes governing State land, as well as being in conformance with case law and prior decisions of the Board.

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May 12, 2014

HAND DELIVERY

Mr. Kevin E. Moore
Assistant Administrator
Land Division
Department of Land and Natural Resources
Kalanimoku Building
1151 Punchbowl Street
Honolulu, HI 96813

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Marvin T. Mikasa
Department of Land and Natural Resources
Land Division
3060 Eiwa Street, Room 208
Lihue, HI 96766

Re: Citation of Additional Authority Supporting Application for Conversion of Grant of Easement S-4414 from a Term of Years to a Perpetual Term (John M. Mehan and Tina Mehan, Trustees of the John M. and Tina Mehan Revocable Living Trust), Waioli, Hanalei (Halelea), Kauai, Hawaii, Tax Map Key: (4) 5-5-006:020

Dear Mr. Moore and Mr. Mikasa:

On May 5, 2014, the Hawaii Intermediate Court of Appeals came out with a decision that further supports our request for a perpetual easement from the State for our clients' property. A copy is enclosed for your information. In our submittal to you with our letter of February 14, 2014, we stated that under Hawaii law, the Mehans were entitled to an implied easement over the State's land because their predecessor in interest had received his grant from the Kingdom of Hawaii, and that the Kingdom would not have conveyed the property to him without also impliedly granting an access to get from the parcel to the nearest government road.

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Exhibit D

In Malulani Group v. Kaupo Ranch, Ltd., a published decision issued on May 5, 2014, the Intermediate Court of Appeals has confirmed that a grantee of Government land can be entitled to an implied easement over adjacent land retained by the Government. The facts in this case are similar to what occurred with the Mehan parcel.

In Malulani, the Kingdom issued a Royal Patent in 1857 to the predecessors of the Malulani Group, retaining the land around the parcel. In 1859, the Kingdom issued a Royal Patent for the surrounding land to the predecessors in interest of Kaupo Ranch. The issue on appeal was whether the principle regarding unity of ownership applied to government lands as well as to private lands. In this opinion, the Intermediate Court of Appeal held the principle applied to government lands where the first grantee of government land is claimed an implied grant to cross over the remaining government land:

> [W]e hold that the "unity of ownership" requirement for implying an easement can be satisfied by prior government ownership of the parcels when the question is whether the government impliedly *granted* an easement, *i.e.* at the time of severance, the government conveyed the quasi-dominant parcel which would benefit from the claimed easement and retained the quasi-servient parcel over which the implied easement is claimed. Because this case involves the question whether the Kingdom of Hawai'i impliedly *granted* an access easement over the Kaupo Parcel that it retained at the time of severance, the circuit court erred it granting summary judgment for Kaupo Ranch based on its view that the Kingdom of Hawaii's prior ownership could not, as a matter of law, satisfy the unity of ownership requirement.

Malulani, slip op. at 14-15.

The facts in the Mehan case are the same, except for the fact that the government still owns the land over which the Mehans' access passes.

As I have discussed with Mr. Moore, we want to be put on the Board agenda to have this matter considered by the Board. Mr. Moore had indicated that it was possible that we might get on the agenda for the second Board meeting for May, but more likely the first meeting of June. Can you please let me know a definite meeting we will be scheduled on to hear this matter.

Thank you in advance for your cooperation on this.

Very truly yours,

ASHFORD & WRISTON
A Limited Liability Law Partnership LLP

By
JAMES K. MEE

JKM