

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

May 8, 2015

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

OAHU

Authorize the Chairperson Enter into Escrow Agreement and Right of Entry with ORF, LLC Regarding Removal of Encroachments on State Lands; Waikiki, Honolulu, Oahu; TMK (1) 2-6-004:010

BACKGROUND:

ORF, LLC (“Owner”) is contemplating a redevelopment project of the Outrigger Reef Waikiki Beach Resort located on the subject property. During the shoreline certification process, a concrete step and 12 tiki torches, i.e. encroachments, were found to be located makai of the shoreline. Subsequently, the shoreline was certified on December 19, 2014 contingent upon the Owner assuring the removal of the above mentioned encroachments.

Following the discussion between the Owner’s representative and the shoreline team, it was agreed that the Owner and the State would enter into an escrow agreement and right of entry (“Agreement”) in which the Owner would deposit \$17,000 (twice the written estimate for the removal costs), pursuant to the conditions stipulated in the Agreement.

REMARKS:

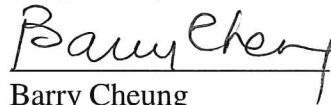
According to the conditions in the draft Agreement prepared by the Owner’s attorney attached as **Exhibit A**¹, Owner will remove the encroachments within 90 days after all necessary permits are available for the redevelopment project. If the Owner cannot meet such deadline, the State may enter the property and remove the encroachments using the funding in the escrow account. Staff and the shoreline team have no objection to the draft Agreement, and recommend the Board authorize the Chairperson to enter into the Agreement for the purposes described above.

¹ Due to the size of the actual shoreline certification map mentioned in the Agreement, staff prepared two excerpts marked as **Exhibit B1** and **B2** showing the map and photo of the subject encroachments.

RECOMMENDATION: That the Board authorize the Chairperson to enter into the Agreement attached as Exhibit A herein under the terms and conditions cited above, which are by this reference incorporated herein and further subject to the following:

- A. Review and approval by the Department of the Attorney General; and
- B. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

Respectfully Submitted,



Barry Cheung
District Land Agent

APPROVED FOR SUBMITTAL:



Carty S. Chang, Interim Chairperson



ESCROW AGREEMENT AND RIGHT OF ENTRY

This Escrow Agreement and Right of Entry (“**Agreement**”) is made _____ (“**Effective Date**”) by the State of Hawaii, Department of Land and Natural Resources (“**DLNR**”), ORF, LLC, a Hawaii limited liability company (“**ORF**”), and Title Guaranty Escrow Services, Inc., a Hawaii corporation (“**TG**”).

ORF owns the real property located in Waikiki, Island of Oahu, State of Hawaii designated as Tax Map Key (1) 2-6-004-010, on which the Outrigger Reef Waikiki Beach Resort is located (“**Property**”). ORF is contemplating a redevelopment project at the Property (“**Project**”).

Pursuant to and for purposes of Hawaii Rev. Stat. 205A, DLNR certified the shoreline on the Property, as shown on the Shoreline Survey dated December 19, 2014 attached as **Exhibit A** to this Agreement (“**Survey Map**”).

A concrete step (shown in Picture 8 on the Survey Map) and 12 tiki torches (collectively, “**Encroachments**”) are located in that area of the Property makai of the certified shoreline, as shown on the Survey Map.

Before DLNR certified the shoreline, ORF and DLNR agreed that ORF would provide certain assurances to DLNR that ORF would remove the Encroachments. ORF and DLNR are entering into this Agreement to memorialize and agree to those assurances in writing.

Therefore, DLNR, ORF, and TG (collectively, “**Parties**”) agree as follows:

1. ORF’s Obligation to Remove Encroachments. ORF will, at ORF’s cost, remove the Encroachments within 90 days of commencement of construction of the Project (“**Removal Deadline**”), after all necessary and desirable permits and approvals for the Project have been granted to ORF. ORF will notify DLNR after ORF has removed the Encroachments, and provide DLNR with photos or other evidence reasonably requested by DLNR to demonstrate that the Encroachments have been removed.

2. Escrow.

(a) Within two business days after the Effective Date, ORF will deliver to TG \$17,000.00 (“**Escrow Funds**”) to hold in escrow as security for ORF’s obligation to remove the Encroachments as and when specified above. TG will hold the Escrow Funds in escrow and not disburse them to ORF or DLNR except as permitted by this Agreement. The Parties acknowledge and agree that the amount of the Escrow Funds equals twice the written estimate ORF obtained for the cost of removing the Encroachments.

(b) DLNR will notify and instruct TG to release the Escrow Funds to ORF within 10 business days of receiving notice and reasonable evidence from ORF demonstrating that the Encroachments have been removed. Upon receiving such notice from DLNR, TG will release the Escrow Funds to ORF (less any applicable escrow fees). Upon ORF’s receiving the Escrow Funds, this Agreement will terminate and the Parties will have no further rights or obligations under this Agreement except for those which survive termination of this Agreement.

EXHIBIT “A”

3. Removal of Encroachments by DLNR. If ORF does not remove the Encroachments by the Removal Deadline, then:

(a) DLNR may give notice to TG that ORF has failed to remove the Encroachments by the Removal Deadline and instruct TG to release the Escrow Funds to DLNR, in which case TG will release the Escrow Funds (less any applicable escrow fees) to DLNR without further instructions from ORF.

(b) DLNR may enter the Property and remove the Encroachments using the Escrow Funds. Subject to the terms of this Agreement, ORF grants a nonexclusive right of entry to DLNR to enter the Property solely for the purpose of removing the Encroachments. DLNR will not, and will cause all DLNR Agents to not, enter the Property or take any actions on the Property other than for the limited purpose of removing, and except as are necessary to remove, the Encroachments. DLNR will give ORF at least 10 business days' notice before entering the Property pursuant to this right of entry, and will only enter the Property during reasonable daytime hours, for reasonable periods. DLNR will generally cooperate with ORF on the scheduling of such visits. DLNR may only enter the portions of the Property reasonably necessary to remove the Encroachments. This right of entry is not, and should not be construed to be, a conveyance of any interest in the Property to DLNR or any DLNR Agent. The foregoing right-of-entry grant is contingent upon and will not be effective unless and until ORF fails to remove the Encroachments by the Removal Deadline. As used in this Agreement, "**Agents**" means a party's agents, directors, officers, shareholders, owners, managers, members, partners, incorporators, organizers, employees, attorneys, consultants, advisors, lenders, representatives, and affiliates.

(c) After removing the Encroachments, DLNR will refund any remaining portion of the Escrow Funds to ORF (if any). Upon ORF's receiving the remaining Escrow Funds (if any), this Agreement will terminate and the Parties will have no further rights or obligations under this Agreement except for those which survive termination of this Agreement.

(d) If DLNR enters the Property to remove the Encroachments and the Escrow Funds are not sufficient to complete the removal work, DLNR shall give written notice to ORF of the additional monetary amount necessary to complete the work, together with cost documentation from DLNR's retained contractor(s) evidencing the need for additional monies. ORF shall then, within five business days of receiving such written notice and documentation, pay to DLNR the additional monetary amount necessary to complete the work.

4. Miscellaneous.

(a) Notices. Unless otherwise stated in this Agreement, notices must be in writing and delivered in person or sent by facsimile, email, or certified or registered mail with postage prepaid and return receipt requested, to the person entitled to receive the notice at the last physical address, fax number, or email address provided in writing by that person. Notices given by email or facsimile will be deemed given when sent unless the sending Party is notified that the notice was not received or the email or facsimile address is invalid. All other Notices will be deemed given on the date actually received.

(b) Headings and Sections. All section headings in this Agreement are for convenience only. They are not a part of this Agreement and do not define, limit, extend, or describe the scope or intent of any provisions.

(c) Definitions. The bolding, capitalizing of initial letters, and enclosing of a word or phrase in quotation marks in this Agreement means that word or phrase is defined by the surrounding text, as suggested by the context (each a “**Defined Term**”). Unless otherwise stated or logically required by the context, each use of a Defined Term with capitalized initial letters but without bolding and quotation marks incorporates the corresponding definition. An uncapitalized word or phrase is not a Defined Term and retains its common or legal term-of-art meaning, as applicable, notwithstanding that the word or phrase may contain the same text as a Defined Term.

(d) Pronouns and Plurals. Whenever the context may require, any pronoun used in this Agreement includes the corresponding masculine, feminine, or neuter forms. The singular form of Defined Terms, nouns, pronouns, and verbs includes the plural, and vice versa.

(e) Further Action. The Parties will execute and deliver all documents, provide all information, and take or refrain from taking action as may be necessary or appropriate to achieve the purposes of this Agreement.

(f) Binding Effect. This Agreement binds and inures to the benefit of the Parties and their successors, legal representatives, and permitted assignees.

(g) Integration of Entire Agreement. This Agreement is the final, entire agreement among the Parties pertaining to the subject matter of this Agreement, and supersedes all previous agreements and understandings pertaining to this Agreement or its subject matter. All recitals (i.e., any background information provided after the opening paragraph of this Agreement), Exhibits, and Schedules (if any) referenced in this Agreement are a part of this Agreement.

(h) No Waiver. A failure by a Party to require strict performance of any provision of this Agreement, or to exercise any right or remedy arising because of a breach, is not a waiver of that breach or any other covenant, duty, agreement, or condition. Any extension or waiver by any Party of any provision in this Agreement will be valid only if set forth in writing signed by that Party.

(i) Amendment. This Agreement may not be amended or modified except by a written instrument executed by ORF and DLNR.

(j) Severability. If any provision of this Agreement is determined to be invalid, illegal, or unenforceable in any respect for any reason, the validity, legality, and enforceability of that provision in every other respect and the remaining provisions of this Agreement will not, at the election of the Party for whose benefit the provision exists, be in any way affected or impaired.

(k) Applicable Law. This Agreement will be governed by the laws of the State of Hawaii without regard to the choice of law or principles of conflict of law.

(l) Survival. The Parties' rights and obligations under this Miscellaneous Section will survive termination of this Agreement.

(m) Counterparts. This Agreement may be executed in counterparts. Signature pages may be delivered personally, by mail, or electronically.

Signature page follows.

Each Party is executing this Agreement effective as of the Effective Date.

STATE OF HAWAII, DEPARTMENT OF
LAND AND NATURAL RESOURCES

ORF, LLC

By: _____
Printed Name: _____
As: _____

By: _____
Printed Name: _____
As: _____

Address for Notice Purposes:

Address for Notice Purposes:

Email: _____

Email: _____

With copy to:

With copy to:

Bruce D. Voss, Esq.
Bays Lung Rose & Holma
700 Bishop St., Ste. 900
Honolulu, Hawai'i 96813
E-mail: bvoss@legalthawaii.com

Email: _____

TITLE GUARANTY ESCROW SERVICES,
INC.

By: _____
Printed Name: _____
As: _____

Address for Notice Purposes:

Email: _____

10 FT. LANE
City and County of Honolulu (owner)

Ap. 1 to Nalaweha



SHO
OUTRIG

TMK: (1) 2-
Land Court
Land Court
at Kalia, Wa

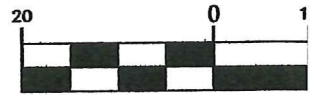


EXHIBIT "B1"

True North
Scale: 1 In. = 20 FT.

Shoreline as located and certified as of April 22, 1987

Shoreline follows along edge of Planter Wall and Concrete Landing as located on October 3, 2014

Shoreline as located and certified as of April 21, 1986

Shoreline follows along edge of Concrete Landing as located on October 3, 2014

Shoreline follows seaward face of Barrier as located on October 3, 2014

Shoreline follows along seaward face of

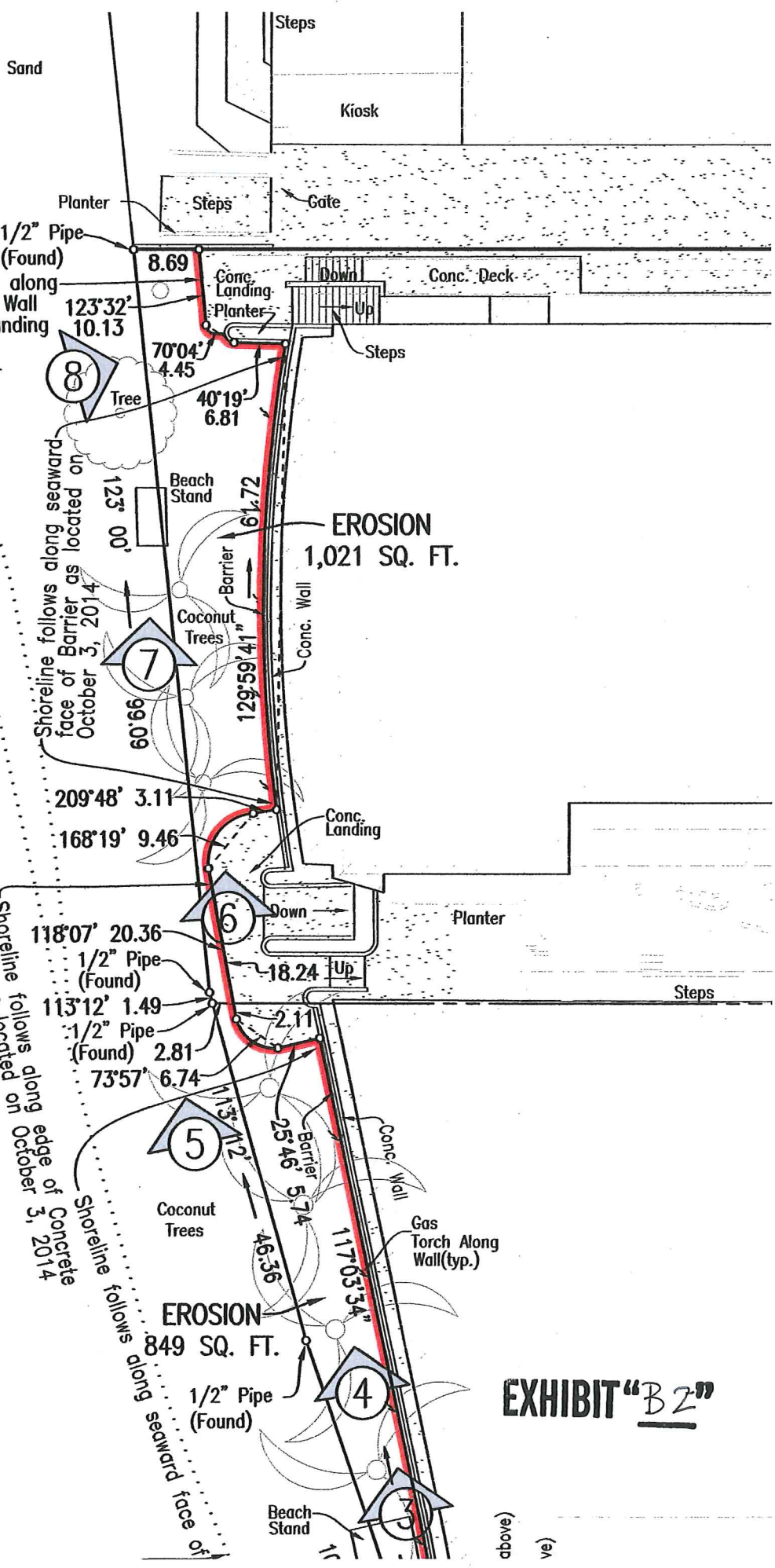


EXHIBIT "B2"

above)
(ve)