

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

March 24, 2016

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

Oahu, Maui, Hawaii

Status Report on Revocable Permits (“**RP**”) to Surf N’ Sea, Inc. (RP No. BO-1170) at Haleiwa, Oahu, Hawaii, Tax Map Key No. (1) 6-2-003:039; Wilson Keahi (RP No. S-5867) at Lahaina, Maui, Hawaii, Tax Map Key No. (2) 4-5-005:019; and GKM, Inc. (RP No. BH-010-07) at Kealakehe, North Kona, Hawaii, Tax Map Key No. (3) 7-4-008:003 (por)

APPLICANT

Department of Land and Natural Resources, Division of Boating and Ocean Recreation (“**DOBOR**”)

LEGAL REFERENCES

Sections 171-14, 36, 41, 55, 59 of Chapter 171, Hawaii Revised Statutes, as amended (“**HRS**”) and applicable county zoning and subdivision ordinances, rules and regulations. Relevant HRS excerpts are attached as **Exhibit “A”**.

BACKGROUND

On July 24, 2015, the Board of Land and Natural Resources (“**BLNR**”) approved Agenda Item J-3, which approved the continuation of the 33 RPs managed by DOBOR, on a month-to-month basis for up to one additional year, retroactively from July 1, 2015 through June 30, 2016.

The renewals of the RPs were subject to various conditions, including: (1) the permittee being in compliance with the terms of its RP; (2) increases to the monthly rents; and (3) execution of new RPs in the most current RP form approved by the Department of the Attorney General (“**AG**”). In addition, the BLNR delegated to the Chairperson the authority to subsequently adjust the rent for any RP in accordance with the terms of the RP and authorized DOBOR to procure the services of a licensed appraiser(s) to assist in determining market rents.

At the BLNR meeting, three (3) of the RP permittees testified that they had previously requested long-term leases, but that DOBOR had not responded to their requests.¹ DOBOR explained that its leasing function is handled by DOBOR’s Property Manager, but that the Property Manager had transferred to another position, leaving the Property Manager position vacant. DOBOR explained that it would be seeking to hire a new Property Manager to fill the vacancy. In the interim, two (2) Land Division staff members with commercial real estate planning, development, and appraisal experience have been assisting DOBOR part-time with various income generation projects and helping ensure rent revenues to DOBOR’s boating

¹ RPs are issued pursuant to HRS §171-55 and are intended to be short-term dispositions. The entire text of HRS §171-55 is provided in **Exhibit “A”**.

special fund represent market rents. These Land Division staff members also assisted with some of DOBOR's property management issues as their workload permitted.

The BLNR requested that DOBOR report back to the BLNR in six (6) months on the status of the three permittees' requests for long-term leases and the status of DOBOR's vacated Property Manager position. DOBOR recently requested the two Land Division staff members assist in analyzing the three RPs, and in preparing the status report requested by the BLNR.

The three (3) RPs are:

1. Surf N' Sea, Inc. (RP No. BO-1170)
Haleiwa, Oahu, Hawaii
TMK: (1) 6-2-003:039
2. Wilson Keahi (RP No. S-5867)
Lahaina, Maui, Hawaii
TMK: (2) 4-5-005:019
3. GKM, Inc. (RP No. BH-010-07)
Kealakehe, North Kona, Hawaii
TMK: (3) 7-4-008:003 (por)

COMMENTS

Status of the Three (3) DOBOR RPs. Staff reviewed the files for each of the three RPs, but was unable to determine why RPs were initially offered instead of long-term leases. Staff did, however, discover land use and subdivision issues that may prevent DOBOR from offering long-term leases in the immediate future.

The status of each of the three RPs is as follows:

1. **Surf N' Sea, Inc. (RP No. BO-1170)**
Location: Haleiwa, Oahu, Hawaii
Tax Map Key: (1) 6-2-003:039
State LUC: Urban
County General Plan: Further research required
County Comm Plan: Public/Quasi-Public or Country Town²
County Zoning: R-5, Residential District & Haleiwa Special District
RP Effective Date: October 1, 2011
RP Land Area: 5,227 Square Feet (0.120 Acres)
RP Permitted Use: Hardware and sporting goods store
RP Current Mo Rent: \$5,491.64 (\$65,899.68/Year)³

In 1967, the State Department of Transportation ("DOT") acquired certain lands (including the RP lands) by condemnation for the construction of the Haleiwa Small Boat Harbor. DOT subsequently issued RP No. 4433 to the permittee, effective October 1, 1969. DOBOR's research of county building records indicates the existing building improvements include a 4,728 square foot wood-framed structure constructed in 1968 with alterations

² There is conflicting information that may require further research. Preliminary research indicates that the City's Department of Planning and Permitting has designated the lot as "Public/Quasi-Public", while the City's North Shore Sustainable Communities Plan Land Use Map shows the lot within the area designated "Country Town".

³ The amount reflects the increased rent approved by the BLNR on July 24, 2015, Item J-3.

and/or repairs performed in 1988, 1995, and 1997.⁴ The improvements are operated as a retail store.

In July 1992, the jurisdiction for the small boat harbors, launching ramps, jetties, wharves and landings in Hawaii was transferred from DOT to DLNR as part of the State's Recreational Boating Program pursuant to Act 272, Sessions Laws of Hawaii, 1991. At its meeting on May 27, 2011 under Agenda Item J-4, the BLNR approved the cancellation of RP No. 4433 and the issuance of the current RP.

The RP area (shown in orange on **Exhibit "B"**) does not appear to be a legally subdivided lot and is instead a portion of a larger bulk lot that includes the adjacent 2.546-acre DOBOR lot (shown in green on **Exhibit "B"**). DOBOR is not able to offer a long-term lease for an unsubdivided portion of a larger lot. Leasing unsubdivided lands is also prohibited under the City and County of Honolulu's ("**City**") subdivision ordinance.⁵ DOBOR will conduct further research to confirm if the RP area is a legally subdivided lot, and if subdivision of the larger 2.6-acre lot is required, DOBOR would first need to determine: (a) an appropriate subdivision configuration (i.e., how many lots should be created, the minimum lot size required under the zoning code, and the configuration of each lot); (b) the estimated cost of the subdivision (including the cost of any utility infrastructure required under the City's subdivision ordinance, rules and regulations); and (c) who will bear the responsibility and cost of seeking subdivision approval.

Staff also discovered the lands are zoned R-5 residential use under the City's Land Use Ordinance ("**LUO**"), and that commercial uses are not permitted under the LUO. HRS §171-41(a) states that "[l]eases for commercial, industrial, and other business uses shall be made only pursuant to a development plan which provides for careful placement of complementary enterprises consistent with county zoning requirements", which the AG has indicated reflects the legislative intent that such leases conform to county zoning. See **Exhibit "A"** for the complete text of HRS §171-41(a). However, this use may precede the City's LUO and may be "grandfathered".⁶ If rezoning of the lot is required, DOBOR would first need to determine: (a) whether an amendment to the City's North Shore Sustainable Communities Plan would first be required; and (b) who will bear the responsibility and cost of seeking the required land use approvals.

DOBOR also notes that with respect to the permittee's request for a long-term lease, HRS §171-14 requires that all disposition of public lands be made by public auction unless otherwise provided by law. The primary statutory exception to the public auction requirement that is available to DOBOR is provided in HRS §171-59(b), which allows DOBOR to issue direct leases for "marine" purposes (see **Exhibit "A"**). However, this exception does not apply to the subject land and existing uses, and therefore, a long-term

⁴ DOBOR's records indicate a structure was originally constructed on the site in the 1930's by a previous owner. It is not clear whether that structure was demolished or whether it, or portions thereof, are part of the existing structure.

⁵ Revised Ordinances of Honolulu Section 22-3.10 states: "No person shall sell or transfer, or advertise, offer or agree to sell or transfer, any interest in land located in a subdivision or consolidation until a final map thereof has been duly approved by the director and filed with the department of land utilization." Staff notes the exemption of agricultural lands from certain subdivision requirements provided in HRS §205-4.5(f), Act 271, SLH2006, but none of DOBOR's RPs involve agricultural uses.

⁶ Staff has not confirmed with the county whether the existing use may continue (i.e., be "grandfathered") as a non-conforming use.

lease would need to be issued by public auction. At the July 24, 2015 BLNR meeting, the permittee indicated it did not wish to pursue a long-term lease via the public auction process since it would risk losing its business if it were not the successful bidder.

With respect to the City's subdivision and zoning ordinances, a standard term in all DLNR leases and RPs is that all lessees and permittees must comply with all applicable laws, ordinances, rules, and regulations of all governmental authorities (i.e., municipal, state, and federal) during the term of the lease or RP. As such, DOBOR needs to address these subdivision and zoning issues before it can offer a long-term lease for the RP area and any surrounding lands.⁷

2. Wilson Keahi (RP No. S-5867)

Location: Lahaina, Maui, Hawaii
Tax Map Key: (2) 4-5-005:019
State LUC: Urban
County General Plan: Further research required
County Dev Plan: Further research required
County Zoning: R-2, Residential District
RP Effective Date: September 1, 1981
RP Land Area: 18,644 Square Feet (0.428 Acres)
RP Permitted Use: Landscaping, maintenance and storage of small boats/trailers
RP Current Mo Rent: \$709.54 (\$8,514.48/Year)³

In response to complaints, DOBOR requested DLNR's Division of Conservation and Resources Enforcement ("**DOCARE**") conduct an investigation into allegations that the permittee was utilizing lands outside of the RP area, illegally tapping into water lines, and that individuals may be residing in structures located on the property contrary to the terms of the RP. The DOCARE investigation revealed that the permittee was utilizing lands outside of the RP area, but the allegations of tapping into the water and residing within the structures could not be substantiated. DOBOR reminded the permittee that he was only allowed to use the area authorized by the RP, and that he needed to remove the vessels stored on areas outside the RP area. DOBOR confirmed the vessels were removed.

Staff's preliminary research indicates the RP was originally issued by the Land Division in 1981, and subsequently transferred to DOBOR in 2011. Staff's research also indicates the RP area (shown in orange on **Exhibit "C"**) is likely not a legally subdivided lot and is instead a portion of a larger bulk lot that includes two adjacent DOBOR lots (shown in green on **Exhibit "C"**). As indicated above, DOBOR is not able to offer a long-term lease for an unsubdivided portion of a larger lot. Maui subdivision ordinances also prohibit sales and offers to sell lands prior to final subdivision approval, but it is not clear whether the prohibition only applies to sales or whether it also applies to leases.⁸ Staff will need to conduct further research on this issue, but if County subdivision approval is necessary, the same issues described above for the Surf N' Sea RP would also need to be addressed for this RP to Wilson Keahi.

⁷ DOBOR may also need to confirm compliance with special management area requirements and recently revised FEMA flood zone maps.

⁸ See, County of Maui Code of Ordinances Section 18.04.020.B.

DOBOR also understands the permittee may be conducting commercial and/or industrial operations on the site, including offering vessel storage services for a fee and possibly allowing vessel repairs to be conducted. Such uses are prohibited on residential zoned lands under the county's zoning code.⁹ Further research on this issue may be required. However, as indicated above, HRS §171-41(a) requires leases for commercial, industrial and other business purposes be consistent with county zoning requirements, and all DLNR leases and RPs require compliance with all applicable county, state and federal laws, ordinances, rules and regulations. As such, the permittee may be in violation of the RP terms.

DOBOR has identified the RP area and surrounding areas as one of the areas it would like to offer under a long-term lease. However, the subdivision and land use concerns mentioned above likely prohibits this.

3. GKM, Inc. (RP No. BH-010-07)

Location: Kealakehe, North Kona, Hawaii
Tax Map Key: (3) 7-4-008:003 (por)
State LUC: Urban
County General Plan: Open
County Zoning: Open
RP Effective Date: October 1, 2012
RP Land Area: 392,040 Square Feet (9.000 Acres)
RP Permitted Use: Operation of a boat/trailer storage facility and employee parking
RP Current Mo Rent: \$7,311.45 (\$87,737.40/Year)³

The RP area is located adjacent to lands leased to GKM under a long-term lease (Harbor Lease No. H-82-4). GKM has filed a lawsuit against DLNR regarding a prior lease rent reopening under the long-term lease, and DLNR has contested the allegations.

In addition to the lawsuit, staff also discovered that GKM has issued numerous subleases and allowed tenants to occupy the premises without first obtaining the consent of the BLNR, which consent is required under Section 13 of the lease and HRS §171-36(a)(6). See **Exhibit "A"** for the full text of HRS §171-36(a)(6). GKM has submitted requests to DOBOR seeking the BLNR's consent to several subleases, but the required consents have not yet been approved. GKM, however, has allowed the tenants to take occupancy without the required BLNR consents, which is a violation of the lease.

Staff recommended that DOBOR resolve the lawsuit and sublease consent issue before addressing GKM's request for a long-term lease for the RP area. Staff just recently learned from the AG that the lawsuit has been settled. Therefore, only the issue of the subleases issued without the BLNR's consent remains. DOBOR will be bringing this matter to the BLNR in the near future.

With respect to GKM's request for a long-term lease, staff also recommended that DOBOR evaluate the RP area from a long-term planning perspective, including whether the size, configuration, location and use fit within DOBOR's long-range plans for the harbor and surrounding lands, and whether a long-term disposition would be appropriate.

⁹ See, County of Maui Code of Ordinances §19.08.020.

DOBOR must also determine the appropriate method for offering any such disposition (i.e., public auction, request for proposals, direct negotiation). However, given the size, location, and prominence of the Honokohau Harbor, staff believes it would be prudent for DOBOR to develop and lease the lands surrounding the harbor pursuant to a comprehensive long-range master plan rather than in a piecemeal fashion. Such analyses will fall within the responsibilities of DOBOR's new Planning and Development Section which, once staffed, will be responsible for the long-term planning and development of all of DOBOR's small boat harbors and adjacent lands. For this reason, the RP provides DOBOR with the most flexibility.

Staff also believes the RP area (shown in orange on **Exhibit "D"**) is not a legally subdivided lot, and is instead only a 9.000-acre portion of a larger bulk lot that includes adjacent DOBOR lands (shown in green on **Exhibit "D"**). It is also possible that the larger bulk lot (which would be over 125 acres) is also not a legally subdivided lot, but is actually a portion of an even larger parcel that includes the adjacent 218-acre lot owned by DLNR and managed by the Land Division (tax map key parcel 71). If that is the case, a large lot or bulk subdivision may first be required. As stated above, DOBOR is not able to offer a long-term lease for an unsubdivided portion of a larger lot. The leasing of unsubdivided lands is also prohibited under the County of Hawaii's subdivision ordinance.¹⁰

Staff also needs to conduct further research to determine whether GKM's proposed use of the RP area is permitted within the Open zoning district and whether a use permit from the county is required.¹¹ If rezoning is required, it may be necessary to first seek an amendment to the County's general plan. As stated above, HRS §171-41(a) requires leases for commercial, industrial and other business purposes be consistent with county zoning requirements, and all DLNR leases and RPs require compliance with all applicable county, state and federal laws, ordinances, rules and regulations. As is the case with the other two RPs discussed above, these subdivision and land use issues need to be addressed prior to any offering of a long-term lease.

Status of the Remaining DOBOR RPs. As indicated above, the BLNR approved the renewal of DOBOR's 33 RPs, subject to certain conditions, including: (1) the permittee being in compliance with the terms of its RP; (2) increases to the monthly rents; and (3) execution of new revocable permits in the most current RP form approved by the AG. In addition, the BLNR delegated to the Chairperson the authority to retain a licensed appraiser(s) to determine market rents for the RPs and adjust the RP rents.

To date, DOBOR has reviewed all RPs to verify the permittees are in full compliance with all RP terms and conditions, and the AG is currently preparing new RPs for execution by the

¹⁰ See, Hawaii County Code Section 23-76.

¹¹ Hawaii County Code Section 25-5-162(b) states: "In addition to those uses permitted under subsection (a) above, the following uses may be permitted in the O district, provided that a use permit is issued for each use: . . . (3) Yacht harbors and boating facilities; provided that the use, in its entirety, is compatible with the stated purpose of the O district." The purpose of the O district is stated in Section 25-5-160 as follows: "Purpose and applicability. The O (open) district applies to areas that contribute to the general welfare, the full enjoyment, or the economic well-being of open land type use which has been established, or is proposed. The object of this district is to encourage development around it such as a golf course and park, and to protect investments which have been or shall be made in reliance upon the retention of such open type use, to buffer an otherwise incompatible land use or district, to preserve a valuable scenic vista or an area of special historical significance, or to protect and preserve submerged land, fishing ponds, and lakes (natural or artificial tide lands)."

permittees.¹² In addition, DOBOR has commenced the procurement process to hire a licensed appraiser to determine the market rent for all of DOBOR's RPs. On January 21, 2016, staff had an in-depth meeting with an independent appraisal firm to discuss determining market rents for DOBOR's RPs. The preliminary scope of work anticipates:

1. the appraiser and interim staff jointly classifying assets into core and non-core sub-groups based on location, zoning, land use, and existing improvements;
2. an appraisal report valuing the market rents for the rights and privileges of using DOBOR's lands underlying designated base yard, storage, commercial, industrial, parking, and landscaping RPs; and
3. the determination of annual rent escalators for all DOBOR RPs over the next five (5) years.

Subsequently, staff researched, prepared, and provided the appraisers with (1) a detailed asset inventory of all DOBOR RPs (e.g., land use designations, zoning, assessed values, etc.), and (2) copies of all RP documents.

Staff also acknowledges that a task force was recently established to address various issues with DLNR's RPs, and that a representative of DOBOR is a participant of the task force. DOBOR is prepared to implement the recommendations of the task force in all of DOBOR's future requests to issue any new RPs or renew any RPs. In addition to the task force's recommendations, staff has recommended that DOBOR include in its future submittals involving RPs an explanation of (1) why a long-term disposition is not feasible or appropriate; and (2) how the rent was determined. Furthermore, staff reminded DOBOR that public lands are held in public trust, and that DLNR has a fiscal responsibility and fiduciary duty in managing these public lands for the benefit of the public trust beneficiaries. As such, staff has also recommended that any future submittals regarding RPs also include a statement of DLNR's fiduciary duties and an analysis of how DOBOR's recommended action is consistent with this duty and is in the best interest of the public trust beneficiaries.

Status of DOBOR's Property Manager Position. DOBOR requested the internal and external recruitment of the Property Manager position. On October 29, 2015, the internal recruitment for the position was posted; however, it did not produce any qualified applicants. On February 6, 2016, the Department of Human Resources Development ("DHRD") recruited externally for the position which resulted in a single qualified applicant. On March 3, 2016, DOBOR interviewed the applicant, and offered the applicant the position of Property Manager. DHRD is currently processing the applicant's paperwork (e.g., background, medical, etc.).

DOBOR's New Planning and Development Section. In addition to filling the Property manager position, DOBOR recently received authorization for three (3) new positions to establish a Planning and Development Section within DOBOR. This new Planning and Development Section will be responsible for the long-term planning and development of

¹² DOBOR has also discovered that three (3) of the thirty-three (33) RPs are for areas under the jurisdiction of DOT, not DOBOR. DOBOR has contacted DOT and referred the permittees to DOT.

DOBOR's public lands, small boat harbors, and other boating and ocean recreational facilities, including the request for a long term disposition of this property.

Respectfully Submitted,



Edward R. Underwood, Administrator

APPROVED FOR SUBMITTAL:


Suzanne D. Case

EXCERPTS FROM HAWAII REVISED STATUTES

HRS §171-14 Auction. Except as otherwise specifically provided, all disposition of public lands shall be made at public auction after public notice as provided in section 171-16. All such auctions shall be held at the door of the office of the land agent or at such other place as is convenient in the district in which the land is located, and shall be conducted by the chairperson or the land agent or by any other authorized employee of the department of land and natural resources under the direction of the board of land and natural resources, all of whom shall perform this service without extra compensation.

HRS §171-36 Lease restrictions; generally. (a) Except as otherwise provided, the following restrictions shall apply to all leases: * * * * *

- (6) The lessee shall not sublet the whole or any part of the demised premises except with the approval of the board; provided that prior to the approval, the board shall have the right to review and approve the rent to be charged to the sublessee; provided further that in the case where the lessee is required to pay rent based on a percentage of its gross receipts, the receipts of the sublessee shall be included as part of the lessee's gross receipts; provided further that the board shall have the right to review and, if necessary, revise the rent of the demised premises based upon the rental rate charged to the sublessee including the percentage rent, if applicable, and provided that the rent may not be revised downward;

HRS §171-41 Commercial, industrial, and other business uses. (a) Leases for commercial, industrial, and other business uses shall be made only pursuant to a development plan which provides for careful placement of complementary enterprises consistent with county zoning requirements; except that development plans for leases of parcels in industrial parks developed under section 171-134(b) shall provide for careful placement of complementary enterprises consistent with the final plans and specifications under section 171-134(b). Where a disposition for any such use is made without advance parcelization, the board shall make adequate provisions for the compatibility of the proposed enterprises with any existing surrounding private developments. The board, wherever possible, shall control the landscaping and architecture of the enterprises and protect the public against the creation of nuisances of smoke, soot, irritating odors and gases, and harmful wastes.

HRS §171-55 Permits. Notwithstanding any other law to the contrary, the board of land and natural resources may issue permits for the temporary occupancy of state lands or an interest therein on a month-to-month basis by direct negotiation without public auction, under conditions and rent which will serve the best interests of the State, subject, however, to those restrictions as may from time to time be expressly imposed by the board. A permit on a month-to-month basis may continue for a period not to exceed one year from the date of its issuance; provided that the board may allow the permit to continue on a month-to-month basis for additional one year periods.

HRS §171-59 Disposition by negotiation. * * * * *

- (b) Disposition of public lands for airline, aircraft, airport-related, agricultural processing, cattle feed production, aquaculture, marine, maritime, and maritime-related operations may be negotiated without regard to the limitations set forth in subsection (a) and section 171-16(c); provided that:
 - (1) The disposition encourages competition within the aeronautical, airport-related, agricultural, aquaculture, maritime, and maritime-related operations;
 - (2) The disposition shall not exceed a maximum term of thirty-five years, except in the case of:
 - (A) Maritime and maritime-related operations, which may provide for a maximum term of seventy years; and
 - (B) Aquaculture operations, which may provide for a maximum term of sixty-five years; provided that aquaculture operations in good standing may seek to renew a lease issued under this section and, during the lease term, may engage in supportive activities that are related to or integrated with aquaculture; and

For the purposes of this subsection: * * * * *

"Maritime-related" means a purpose or activity that requires and is directly related to the loading, off-loading, storage, or distribution of goods and services of the maritime industry.

HRS §205-4.5 Permissible uses within the agricultural districts. * * * * *

[(f)] Notwithstanding any other law to the contrary, agricultural lands may be subdivided and leased for the agricultural uses or activities permitted in subsection (a); provided that:

(1) The principal use of the leased land is agriculture;

(2) No permanent or temporary dwellings or farm dwellings, including trailers and campers, are constructed on the leased area. This restriction shall not prohibit the construction of storage sheds, equipment sheds, or other structures appropriate to the agricultural activity carried on within the lot; and

(3) The lease term for a subdivided lot shall be for at least as long as the greater of:

(A) The minimum real property tax agricultural dedication period of the county in which the subdivided lot is located; or

(B) Five years.

Lots created and leased pursuant to this section shall be legal lots of record for mortgage lending purposes and shall be exempt from county subdivision standards.

Surf N' Sea, Inc. (RP No. BO-1170)
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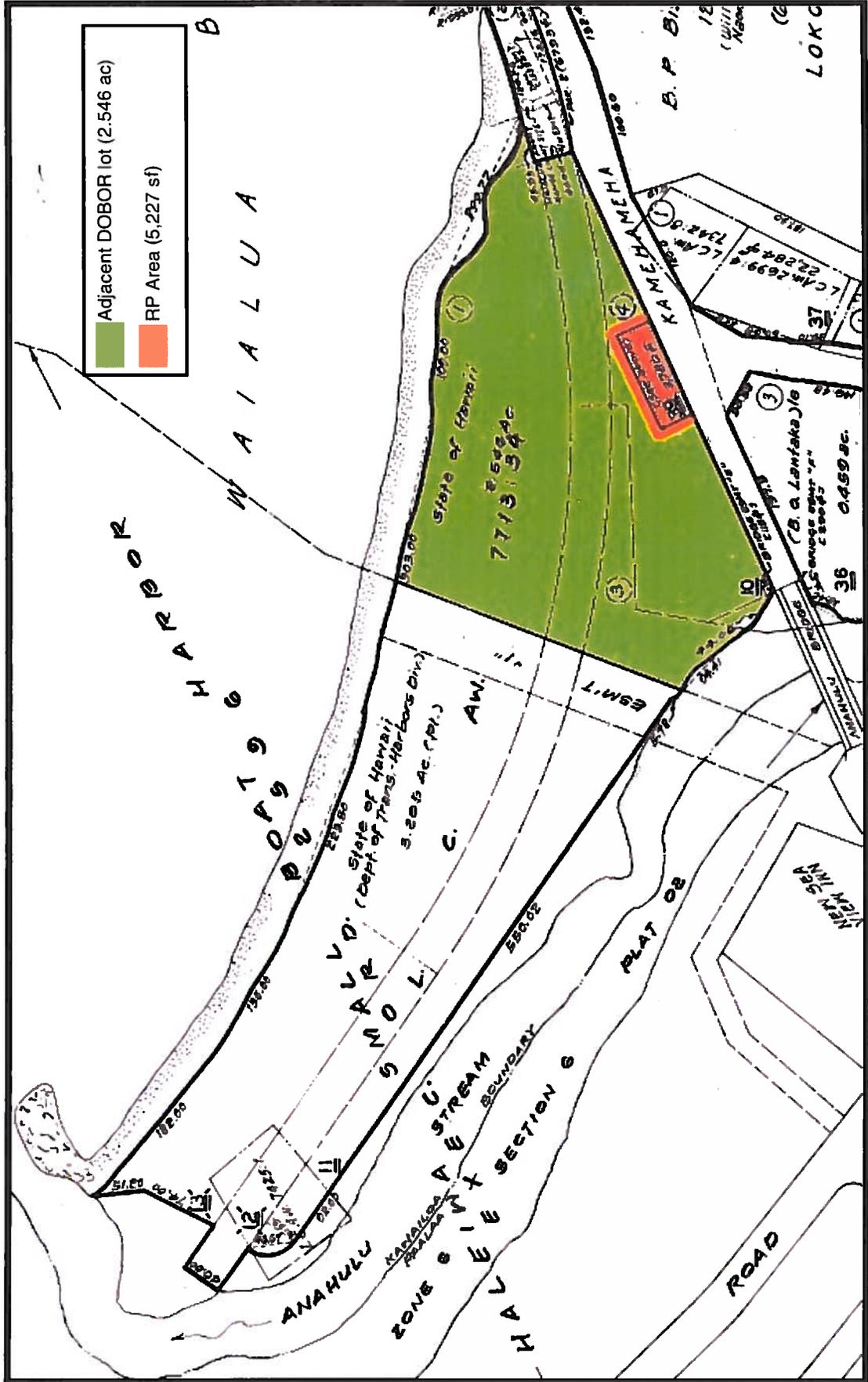


EXHIBIT "B"

Wilson Keahi (RP No. S-5867)
 Lahaina, Maui, Hawaii
 TMK: (2) 4-5-005:019

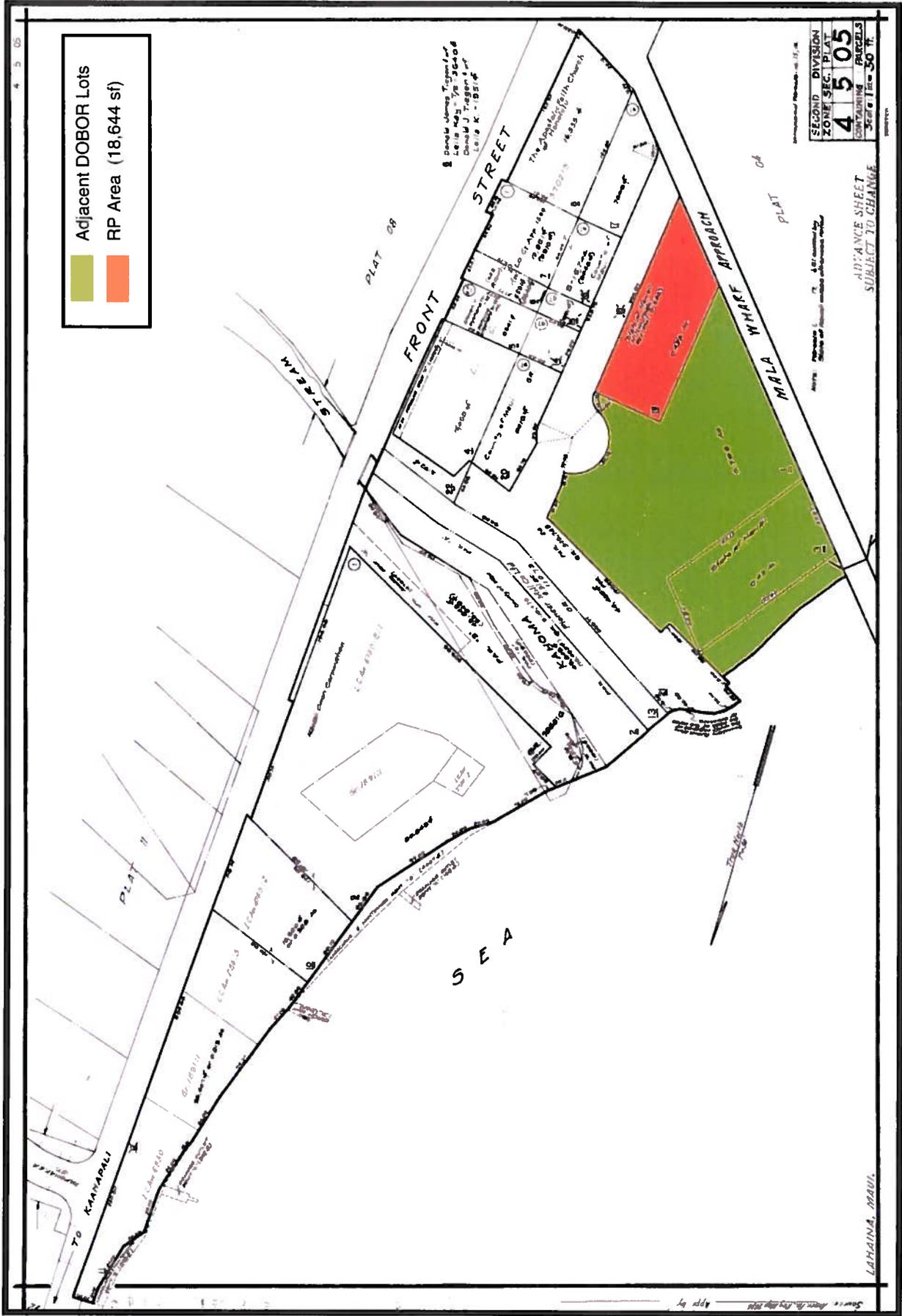


EXHIBIT "C"

