

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

April 22, 2016

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

PSF No.: 14MD-206

Maui

Amend prior Board of Land and Natural Resources action of August 10, 1990, under agenda item F-7, as amended: *Direct Sale of a Perpetual, Non-Exclusive Easement for Repair and Maintenance of Existing Seawall Seaward of and Fronting Tax Map Key: (2) 3-9-11:7 and 8; Waiohuli-Keokea Homesteads and Beach Lots, Waiohuli-Keokea (Kihei), Wailuku, Maui, Hawaii.* The purpose of the amendment is to change the Applicant requesting the easement as to Parcel 7 to Garry A. Weber, include an exemption notification under Hawaii Revised Statutes Chapter 343, amend the term of the easement from perpetual to 65 years, include requirements that Applicant obtain a concurrent resolution from the Legislature for the issuance of the easement and provide an updated survey map, and authorize the issuance of an immediate management right-of-entry to Garry A. Weber.

APPLICANT:

Garry A. Weber, tenant in severalty ("Applicant")

CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

In accordance with Hawaii Administrative Rule Sections 11-200-8 and the Exemption List for the Department of Land and Natural Resources approved by the Environmental Council and dated June 5, 2015, the subject request is exempt from the preparation of an environmental assessment pursuant to Exemption Class No. 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" and Item No. 46, that states "Creation or termination of easement, covenants, or other rights in structures or land." See **Exhibit A**.

DCCA VERIFICATION:

Not applicable. The Applicant is a natural person and is not required to register with the Department of Commerce and Consumer Affairs.

BACKGROUND:

In or around May 1990, staff of the Department of Land and Natural Resources investigated and found that portions of a seawall were built on government beach reserve lands in Kihei, Maui without proper State authorization.

At its meeting of August 10, 1990, under agenda item F-7, a copy of which is attached as **Exhibit B**, the Board of Land and Natural Resources approved the assessment of a \$500 fine and a direct sale of a perpetual, non-exclusive easement to Charles E. Hickman Trust and Virginia S. Hickman Trust (“Hickman Trust”), for the repair and maintenance of existing seawall seaward of and fronting Tax Map Key: (2) 3-9-11:7 and 8 (hereinafter the “1990 Land Board Approval”).¹

In August 1990 and pursuant to the terms of the 1990 Land Board Approval, the Hickman Trust submitted payments for the assessed fine and for the cost of an independent appraisal report contracted for by the Department (the “1990 Appraisal”). The 1990 Appraisal determined that the one-time payment for the above described perpetual non-exclusive easement was \$4,000.00, effective as of September 1, 1990. On June 23, 1992, a check from Hickman Trust in the amount of \$4,055.00 was received by the Department to cover the consideration for the perpetual easement as well as document and mapping fees assessed by Land Division. A copy of the map is attached as **Exhibit C**.

Notwithstanding the above, and for reasons that are unknown, the formal easement document was not finalized despite administrative approval and payment for the same.

Hickman Trust has since conveyed its interest in TMKs (2) 3-9-11: 7 and 8. The current owner of TMK (2) 3-9-11:7 (“Parcel 7”) is Applicant Garry A. Weber, while TMK (2) 3-9-11:8 (“Parcel 8”) was developed into a two-unit residential condominium project identified as 1688 Halama Street Condominium.² Applicant Garry A. Weber is now seeking to finalize the easement previously approved in 1990 as to Parcel 7.

1 The original request to the Board of Land and Natural Resources (“Land Board”) was for the direct sale of a 65-year non-exclusive easement. Meeting minutes, however, indicate Land Division staff requested that the proposed easement be amended from a 65-year term to a perpetual easement. Meeting minutes do not indicate any further discussion and pursuant to staff’s request, Land Board approved item F-7, as amended.

2 At its meeting of May 8, 2015, item D-8, the Board approved the amendment of the Board’s 1990 action to allow for the grant of a 65-year easement to the condominium association. The staff submittal notes: “Although the 1990 Land Board Approval authorized issuing an easement for portions of the seawall fronting Parcel 7 and Parcel 8, the amended terms being recommended for approval are exclusive to Parcel 8. Land Division has not discussed the pending easement or any proposed amendments with the current owner of Parcel 7. Prior to the documentation of any easement for Parcel 7, Land Division will discuss proposed amendments with the current owner of Parcel 7 and bring a recommendation to the Land Board for consideration.”

REQUESTED AMENDMENTS/REMARKS:

In order to both comply with the 1990 Land Board Approval while remaining consistent with current Land Board actions, Land Division is recommending the 1990 Land Board Approval to be amended as follows with respect to Parcel 7:

1. Change the Applicant from Charles E. Hickman Trust and Virginia S. Hickman Trust to Garry A. Weber, subject however to the Applicant obtaining and providing Land Division with appropriate state and county tax clearances.

Garry A. Weber 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.

2. Include an exemption notification under Chapter 343, Hawaii Revised Statutes (HRS). The 1990 Land Board Approval did not address HRS Chapter 343, which is inconsistent with the Board's current practice. The exemption notification as attached as Exhibit A.
3. Amending the subject easement from a perpetual easement to a 65-year term easement, commencing retroactively on August 10, 1990.

Notwithstanding the 1990 Land Board approval, the Land Board no longer issues perpetual easements for encroachments in the shoreline area. Rather, in response to requests of non-exclusive easements for seawall related purposes, the Land Board issues term easements to allow periodic reviews to determine if an easement is still needed, or if any special conditions are required to address changes in shoreline conditions over time. The Applicant is agreeable to forgoing a perpetual easement and accepting a 65-year easement.

Moreover, in lieu of reopening the appraisal process for the proposed term easement, the Applicant is agreeable to proceed with acquiring the 65-year easement based on the 1990 Appraisal of the previously approved perpetual easement. The 1990 Appraisal would logically have a greater value than the same easement having a 65-year term, which is being recommended as an amendment. Whereas compensation based on the 1990 Appraisal was received by Land Division in 1992, no further compensation or refund shall be required by the State or the Applicant.

4. Including requirements that the Applicant: (a) provide an amended survey map covering the easement area seaward of Parcel 7, and (b) obtain a concurrent resolution from the Legislature pursuant to Section 171-53(c), HRS. The 1990 Land Board Approval did not require compliance with HRS Section 171-53(c). However, the Department of the Attorney General will not process the easement without a resolution from the Legislature.

5. Include the issuance of an immediate management right-of-entry permit to the Applicant containing indemnification and liability insurance provisions in favor of the State. The right-of-entry will remain in place until the issuance of the easement, which cannot be finalized until the concurrent resolution from the Legislature is secured at the end of the 2016 or 2017 legislative session.

Staff consulted with the Office of Conservation and Coastal Lands (OCCL) on the this matter. OCCL provided a copy of its letter dated November 2, 2015 to Applicant's consultant indicating that OCCL supports a disposition from the Board for the encroaching seawall. See **Exhibit D**.

RECOMMENDATION:

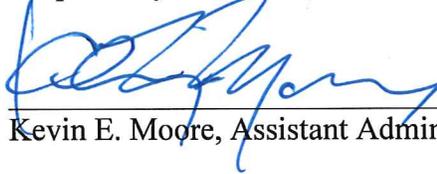
That the Land Board amend its prior action of August 10, 1990, under agenda item F-7, with respect to the easement area seaward of Parcel 7, by:

1. Declaring 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. Changing the Applicant as to Parcel 7 from Charles E. Hickman Trust and Virginia S. Hickman Trust to Garry A. Weber, tenant in severalty;
3. Changing the term of the easement from perpetual to 65-years, commencing August 10, 1990, subject to the following:
 - A. The standard terms and conditions of the most current term shoreline encroachment easement document form, as may be amended from time to time;
 - B. The easement shall run with the land and shall inure to the benefit of the real property described as Tax Map Key: (2) 3-9-11: 7, 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 any interest in 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 cited above, which are by this reference

incorporated herein, or as may be prescribed by the Chairperson to best serve the interests of the State;

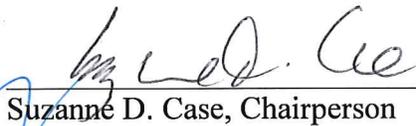
4. Including requirements that the Applicant: (a) provide an amended survey map covering the easement area seaward of Parcel 7, and (b) obtain a concurrent resolution from the Legislature pursuant to Section 171-53(c), HRS;
5. Authorizing the issuance of a right-of-entry permit to the Applicant covering the subject area for seawall purposes under the terms and conditions cited above, which are by this reference incorporated herein and further subject to the following:
 - A. The standard terms and conditions of the most current right-of-entry permit document form, as may be amended from time to time; and
 - B. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State; and
6. Except as amended hereby and by the Board's prior action of May 8, 2015, item D-8, all terms and conditions listed in its August 10, 1990 approval to remain the same.

Respectfully Submitted,



Kevin E. Moore, Assistant Administrator

APPROVED FOR SUBMITTAL:



Suzanne D. Case, Chairperson

EXEMPTION NOTIFICATION

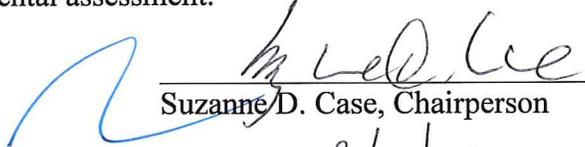
Regarding the preparation of an environmental assessment pursuant to Chapter 343, HRS and Chapter 11-200, HAR

Project Title: Issuance of Term, Non-Exclusive Easement for Seawall Purposes
Project / Reference No.: PSF 14MD-206
Project Location: Waiohuli-Keokea (Kihei), Wailuku, Maui, TMK (2) 3-9-11:07 seaward.
Project Description: Issuance of term, non-exclusive easement to resolve encroachment.
Chap. 343 Trigger(s): Use of State Land
Consulted Parties: Office of Conservation and Coastal Lands

Exemption Class No.: In accordance with Hawaii Administrative Rule Sections 11-200-8 and the Exemption List for the Department of Land and Natural Resources approved by the Environmental Council and dated June 5, 2015, the subject request is exempt from the preparation of an environmental assessment pursuant to Exemption Class No. 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" and Item No. 46, that states "Creation of termination of easement, covenants, or other rights in structures or land."

The Board initially approved the issuance of the easement in 1990. However, the easement was not finalized. Staff is amending the prior Board approval, and including this exemption notification as part of the Board action. Staff believes that the request involves negligible or no expansion or change in use of the subject area beyond that previously existing.

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



Suzanne D. Case, Chairperson
Date 3/31/16

EXHIBIT A

JOHN WAIHEE
GOVERNOR OF HAWAII



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
DIVISION OF LAND MANAGEMENT
P. O. BOX 621
HONOLULU, HAWAII 96809

AQUACULTURE DEVELOPMENT PROGRAM
AQUATIC RESOURCES CONSERVATION AND ENVIRONMENTAL AFFAIRS
CONSERVATION AND RESOURCES ENFORCEMENT
CONVEYANCES
FORESTRY AND WILDLIFE LAND MANAGEMENT
STATE PARKS
WATER AND LAND DEVELOPMENT

Alison - Per Frank

August 10, 1990

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

MAUI

Subject: Direct Sale of a Term, Non-Exclusive Easement for Repair and Maintenance of Existing Seawall Seaward of and Fronting Tax Map Key: (2) 3-9-11:7 and 8; Waiohuli-Keokea Homesteads and Beach Lots, Waiohuli-Keokea (Kihei), Wailuku, Maui, Hawaii

STATUTE: Section 171-13 and other applicable sections, Hawaii Revised Statutes, as amended.

APPLICANT: CHARLES E. HICKMAN TRUST and VIRGINIA S. HICKMAN TRUST, as Tenants in Common
Tecumseh, MI 49286

FOR: Term, non-exclusive easement for repair and maintenance of existing seawall, over and across Government Beach Reserve seaward of and fronting applicants' property identified by Tax Map Key: 2nd Division, 3-9-11:7 and 8 situate at Waiohuli-Keokea Homesteads and Beach Lots, Waiohuli-Keokea (Kihei), Wailuku, Maui, Hawaii, as shown delineated in red on maps labeled Land Board Exhibits "A" and "B," appended to the basic file.

AREA: 900 sq. ft., more or less; exact area and its configuration to be determined by applicants, same subject to review and confirmation by Survey Division, Department of Accounting and General Services.

STATUS OF LAND TITLE: Subsection 5(b) lands of the Statehood Admission Act.

STATUS: Unencumbered; however, applicants' seawall encroaches onto subject area (Government Beach Reserve).

ITEM F-7

EXHIBIT B

ZONING: State Land Use Commission: Urban District
County of Maui: Urban-R3

PURPOSE: To repair and maintain existing seawall.

TERM: Sixty-five (65) years, commencing as of date of Board approval.

CONSIDERATION: To be determined by an independent appraisal based on one (1) lump sum payment covering the full fair market rental value of the easement, same subject to review and approval by the Chairperson.

REMARKS: Waiohuli-Keokea Homesteads and Beach Lots were developed and subdivided by the Territory of Hawaii in 1950. The development of this subdivision consisted of beach lots and a strip of Government Beach Reserve lands between the shoreline and the described seaward boundaries of these lots.

The applicants are the owners of Parcels 7 and 8 of Tax Map Key No. (2) 3-9-11 and portion of the entire existing seawall is within their property and the remaining portion is within Government Beach Reserve lands.

Mr. and Mrs. Hickman purchased their beach lots on March 1, 1977 (second owners since the subdivision was developed in 1950) and only recently became aware that a portion of their seawall was encroaching upon the State-owned beach reserve lands. This encroachment problem was brought to light in connection with a shoreline certification request submitted by the applicants on May 2, 1990.

Land Management staff has investigated this matter and have ascertained that the seawall was constructed after 1982/1983 storms caused extensive wave erosion of the State-owned beach reserve lands and the applicants' seaward lands. As a permanent solution to continuing wave erosion and to prevent further damage to their beach lot, Mr. and Mrs. Hickman had the seawall constructed without proper State authorization.

Further, Survey Division, Department of Accounting and General Services, has advised the Division of Land Management that there are probably a number of similar seawalls constructed in the same manner in order to protect abutting shoreline properties.

A subsequent investigation by Land Management staff confirms that similar seawalls were constructed and are encroaching onto the extensively eroded Government Beach Reserve in the Waiohuli-Keokea area without proper State authorization.

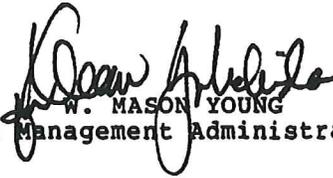
Further requests for direct sale of term, non-exclusive easements are anticipated after the extent of all seawall encroachments are ascertained.

RECOMMENDATION: That the Board:

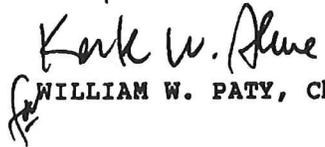
- Permitted*
- A. Authorize the assessment of a \$500.00 fine against the applicants for constructing/placing a portion of their seawall within the State-owned beach reserve without proper State authorization.
 - B. Authorize the direct sale of a sixty-five (65)-year term, non-exclusive easement to the applicants covering the subject State land, subject to the terms and conditions previously-listed, which are by reference incorporated herein, including the following additional terms and conditions:
 - 1. Lump sum payment of \$500.00 fine assessed against the applicants described above in Item "A";
 - 2. The applicants shall at all times keep the existing seawall in good repair and maintained in a safe condition without any cost or expense to the State;
 - 3. Repairs to the existing seawall shall not extend seaward of the exterior face of same;
 - 4. No other structures, except the existing wall, shall be placed upon or within the easement area;
 - 5. No expansion of the existing seawall shall be permitted;
 - 6. The applicants shall comply with all applicable laws, ordinances, rules and regulations of the Federal, State and County governments relative to the use, maintenance and repair of the easement area;

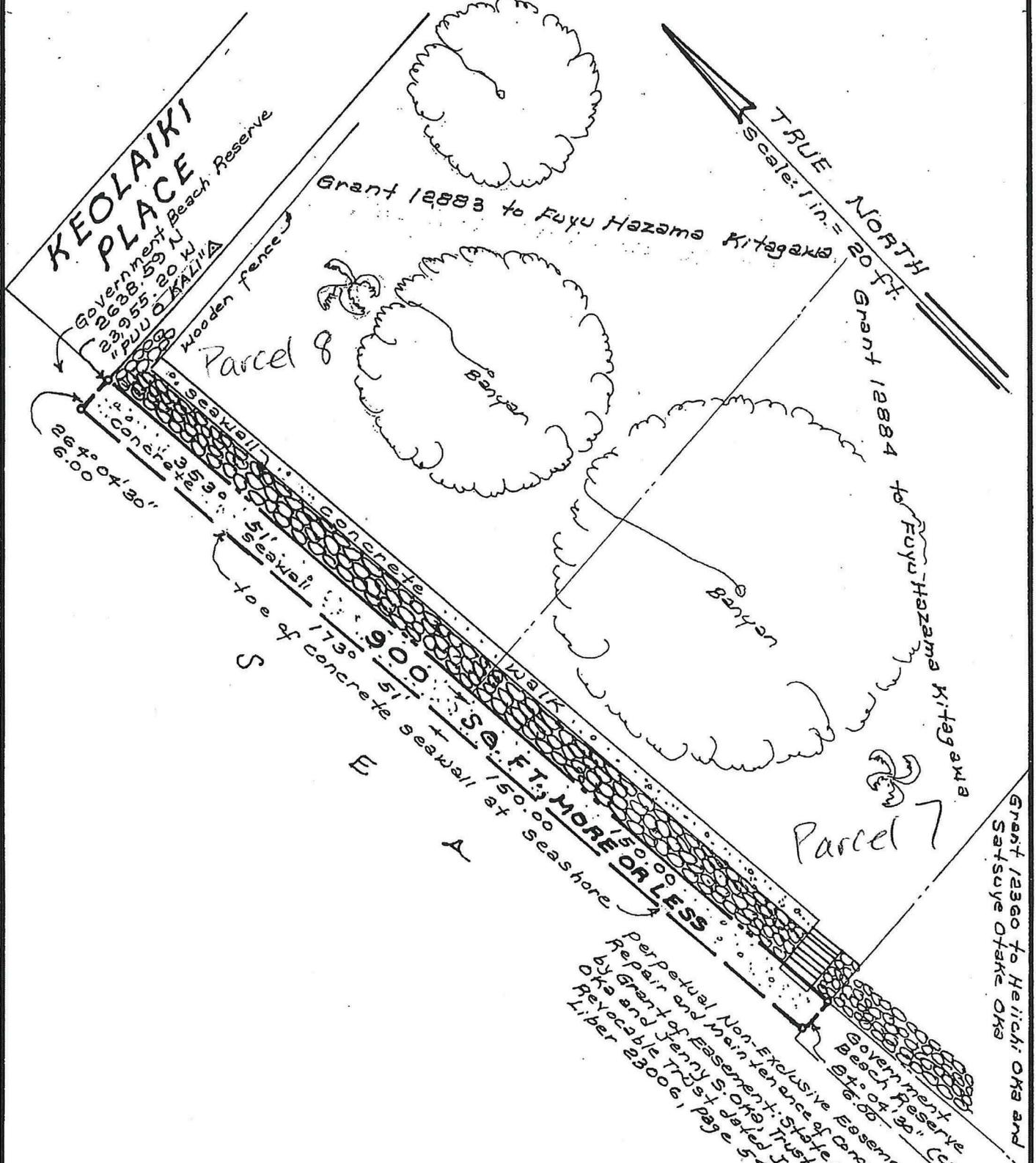
7. The applicants shall obtain a public liability insurance policy covering the easement area and naming the State of Hawaii as an additional insured. Insurance amount to be determined by the Chairperson;
8. The applicants, their successors and assigns shall defend, indemnify and hold the State of Hawaii harmless against any loss, liability, claim or demand for property damage, personal injury or death arising out of any act or omission of the applicants, their successors, assigns, officers, employees, contractors and agents under this grant of easement;
9. Other standard terms and conditions covering easements of this nature; and
10. Such other terms and conditions as maybe prescribed by the Chairperson.

Respectfully submitted,


W. MASON YOUNG
Land Management Administrator

APPROVED FOR SUBMITTAL: *ya*


WILLIAM W. PATY, Chairperson



PERPETUAL NON-EXCLUSIVE EASEMENT FOR SEAWALL PURPOSES

Keokea, Wailuku, Maui, Hawaii

Scale: 1 inch = 20 feet

EXHIBIT C

DAVID Y. IGE
GOVERNOR OF HAWAII



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
OFFICE OF CONSERVATION AND COASTAL LANDS

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

SUZANNE D. CASE
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

KEKOA KALUHIWA
FIRST DEPUTY

JEFFREY T. PEARSON
DEPUTY DIRECTOR - WATER

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

REF:DLNR:SL

MA
Re: Encroachment: ~~OA~~-15-7

NOV - 2 2015

Mr. Satish Gholkar, P.E.

Wailuku, Hawaii 96793

Dear Mr. Gholkar,

SUBJECT: Request to Resolve State Land Encroachment at Kihei,
Maui; Seaward of Tax Map Key (2) 3-9-011:007 (owner: Garry A. Weber)

The Department of Land and Natural Resources (DLNR), Office of Conservation and Coastal Lands (OCCL) is writing in response to your October 18, 2015 request to provide further consideration of the shoreline encroachments at Tax Map Key (2) 3-9-011:007 based on newly available information. According to information and maps contained with your original request (September 30, 2014), you have identified approximately 982 square feet of encroachment (concrete seawall) fronting the subject property onto State land.

OCCL's evaluation of the encroachment in a May 4, 2015 letter to you (DLNR Ref. Re: Encroachment OA-15-7) did not support a disposition request being processed for the subject shoreline encroachments at that time. Following our letter, OCCL learned that the DLNR Land Division has recommended that the Board of Land and Natural Resources (BLNR, Ref: PSF No.:03MD-359A) grant an easement for a seawall on the adjoining property (TMK (2) 3-9-011:008). Land Division's recommendation is based in part on a 1990 BLNR approval for an easement that was never fully executed. The 1990 BLNR approval included the subject property and the adjoining property to the north (parcels 007 and 008). Further, it appears that the seawall on parcels 007 and 008 is the same continuous structure, established prior to a property subdivision. In addition, the adjoining property to the south (parcel 006) has an easement for a similar seawall that was granted in 1981.

It has been a general policy and practice of OCCL to support disposition requests that have no discernible effect on beach and recreational resources, and do not act as a detriment to public access. In line with the DLNR policy we have opposed the issuance of easements that might be detrimental to resources. Shoreline hardening at Halama Street has contributed to loss of public

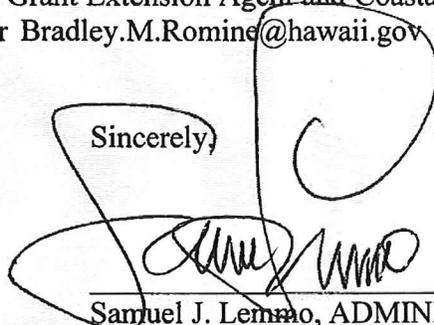
EXHIBIT D

beach resources and shoreline access. In cases where the encroachment serves as primary erosion control for potentially threatened structures, impacts to the adjacent and upland developments must also be considered. An immediate threat to a habitable structure at the subject property was not identified by the Applicant. However, removal of the seawall at the subject property would provide no substantial improvement to beach resources or alongshore public access since legal seawalls exist on the north and south side. Removal may also destabilize the seawalls at the neighboring properties.

Upon review and careful consideration of this new information detailed in this letter, OCCL has determined that the requirements stated in HRS § 205A, HRS § 183C, and in OCCL's evaluation criteria would support a disposition request being processed for the subject shoreline encroachments.

Please feel free to contact Brad Romine, Sea Grant Extension Agent and Coastal Lands Program Coordinator at OCCL, at (808) 587-0049 or Bradley.M.Romine@hawaii.gov should you have any questions pertaining to this letter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Samuel J. Lemmo', is written over a horizontal line. The signature is stylized and somewhat cursive.

Samuel J. Lemmo, ADMINISTRATOR
Office of Conservation and Coastal Lands

cc: Land Division Maui, Attn: Larry Pacheco