May 16, 1994

Director
Office of Environmental Quality Control
220 S. King Street, 4th Floor
Honolulu, Hawaii 96813

Dear Sir:

CHAPTER 343, HRS
Environmental Assessment/Determination
Negative Declaration

Owner/Applicant : Malia, Ltd.
Location : 44-325 Kaneohe Bay Drive - Kaneohe, Oahu
Tax Map Key : 4-4-07: 22
Request : Shoreline Setback Variance
Proposal : After-the-Fact Seawall, Boat Ramp Paving,
Deck Safety Railing, and Pier Within the
Shoreline Setback
Determination : A Negative Declaration Is Issued

Attached and incorporated by reference is the Environmental
Assessment prepared by the applicant for the project. Based on the
significance criteria outlined in Chapter 200, State Administrative
Rules, we have determined that preparation of an Environmental
Impact Statement is not required.

Very truly yours,

DONALD A. CLEGG
Director of Land Utilization

DAC:ak
Enclosures

94/SV-001(UT)
1994-06-08-DA-FEA-Malia After-the-Fact
Seawall & Improvements

*93 FEB 8 PM 3 50
DEPT OF LAND UTILIZATION
CITY & COUNTY OF HONOLULU

SHORELINE SETBACK VARIANCE APPLICATION

TAX MAP KEY: 4-4-07: 22
KANEHOE, OAHU, HAWAII

PREPARED FOR AND BY:
MALIA, LTD.
JANUARY 1993
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WRITTEN INFORMATION
CITY AND COUNTY OF HONOLULU
DEPARTMENT OF LAND UTILIZATION
650 South King Street, 7th Floor
Honolulu, Hawaii 96813

DLU MASTER APPLICATION FORM

Additional data, drawing/plans, and fee requirements are listed on a separate sheet titled "Instructions for Filing."
PLEASE ASK FOR THESE INSTRUCTIONS.

All specified materials and fees must accompany this form; incomplete applications could delay processing. You
are encouraged to consult with department staff in completing the application. Please call the appropriate phone
number given in the "Instructions for Filing" sheet.
Please print legibly or type the required information.

PERMIT REQUESTED (Check one or more as appropriate):

Clusters:
☐ Agricultural Cluster
☐ Park Dedication
☐ Special Management Area Permit/Assessment
☐ Country Cluster
☐ Plan Review Use
☐ State Special Use Permit
☐ Planned Development-Housing
☐ Sunlight Reflection
☐ Shoreline Setback Variance
☐ Variance from LUO Sec(s):
☐ Type 1
☐ Special District:
☐ Type 2
☐ Site Plan Review
☐ Waiver (public uses/utilities)
☐ Existing Use
☐ Site Development Plan
☐ Zero Lot Line
☐ Flood Hazard Variance
☐ Zone Change, From ___________ to ___________

☐ Special District:

TAX MAP KEYS: 1 - 4 - 4 - 07 : 22
LOT AREA: ____________________ Acres
ZONING DISTRICT: R-10
STATE LAND USE DISTRICT: Urban District
STREET ADDRESS/LOCATION OF PROPERTY: 44-325 Kaneohe Bay Drive
Kaneohe, Hawaii 96744

RECORDED FEE OWNER:
Name Malia, Ltd.
Mailing Address 970 N. Kailua Ave, Suite A100
Kailua, Hawaii 96734
Phone Number 808-254-3320
Signature

APPLICANT:
Name Malia, Ltd.
Mailing Address 970 N. Kailua Ave, A100
Kailua, Hawaii 96734
Phone Number 808-254-3320
Signature

PRESENT USE OF PROPERTY/BUILDING:
Three (3) Single Family Home

PROJECT NAME (if any): None

PROJECT PROPOSAL (Briefly describe the proposed activity or project): The construction of a lava rock
seawall, wood dock, boat ramp and wood deck.

PROJECT PERMIT: (Check one)
☐ Building Permit
☐ Building Permits
☐ Tree Permit
☐ Tree Permit
☐ Other Permit

AUTHORIZED AGENT/CONTACT PERSON:
Name
Mailing Address
Phone Number
Signature

FOR DEPARTMENT USE ONLY
Submitted Fee Amount: $__________
Date Application Accepted: ____________
Accepted By: ____________
Date of Public Hearing:
☐ Approved
☐ Exempt project
☐ Approved with conditions indicated below.
☐ Denied for reason(s) given below.

FILE NO. ____________

THIS COPY, WHEN SIGNED BELOW, IS NOTIFICATION OF THE ACTION TAKEN.

__________________________________________ __________________________
__________________________________________ __________________________
Signature Date

The above approval does not constitute approval of any other required permits, such as building permits.
ENVIRONMENTAL ASSESSMENT
FOR
SHORELINE SETBACK VARIANCE APPLICATION
TMK 4-4-07: 22

I. GENERAL INFORMATION

a. Applicant: Malia, Ltd.
970 N. Kalaheo Avenue
Suite A100
Kailua, Hawaii 96734
Telephone: 808-254-3320

b. Recorded Fee Owner: Malia, Ltd.
970 N. Kalaheo Avenue
Suite A100
Kailua, Hawaii 96734
Telephone: 808-254-3320

c. Agent: None

d. Tax Map Key: 4-4-07: 22

e. Lot Area: .917 acres

f. Agencies Consulted in Making Assessment:
Department of Land Utilization
650 South King Street
7th Floor
Honolulu, Hawaii 96813
II. DESCRIPTION OF PROPOSED ACTION

A. General Description: In August 1988, Malia, Ltd. purchased the above property at 44-325 Kaneohe Bay Drive (See Exhibit A) from Norberto Duarte with no knowledge of the building code violations stated in Violation No. BV-90-11-53 and Violation No. BV-90-11-54 (See Exhibits B & C). The violations entail a lava rock seawall (See Exhibit D), a wood dock extending from the lava rock seawall (See Exhibit E), a concrete boat ramp with a short rock wall bordering each side (See Exhibit F), and a wood deck added to a boat house (See Exhibit G) which were already erected in their completed form at the time of purchase.

The lava rock seawall is presumed to be erected after 1981 as stated by Col. Joseph G. Clemons, Jr., prior owner of the adjacent property (See Exhibit H). Since its conception in 1981, the wall has shown no signs of any break down or deterioration from its original status in 1981. The seawall begins at the southwestern point of the property line extending 149 feet to the north. At a point 89 feet to the north, the seawall extends due west 8.5 feet forming two steps (See Exhibit I). (Outlined in yellow on Exhibit N depicts the lava rock seawall's location on the property).

The wood dock appears to have been constructed at the same time the lava rock seawall was erected. The wood dock begins at the steps of the lava rock seawall and wraps around a boat house. This dock is constructed of wotmanized lumber. To maintain the dock in its present condition, Malia, Ltd. has performed minor repairs/maintenance since purchasing the property (See Exhibit E). (Outlined in red on Exhibit N depicts the dock's location on the property).

The boat ramp and the adjacent seawalls were constructed in approximately 1955-1956 as stated by Mr. Robert T. Leary, former owner of subject property (See Exhibit J). Col. Joseph G. Clemons, Jr. also indicates in his statement that the boat ramp was paved with approximately six inches of reinforced concrete around 1981 (See Exhibit H). The concrete extends down approximately to the waterline at low tide and up into the property approximately 29 feet (See Exhibit F). (Outlined in green on Exhibit N depicts the boat ramp's location on the property).

In addition to addressing the boat ramp, Mr. Robert T. Leary indicates, "the deck at the boat house was built in the mid 1960's, approximately 1965" (See Exhibit J). To date, the deck is in excellent condition and has not needed any repairs by Malia, Ltd. to maintain it in this condition but has been both stained and painted as preventive maintenance (See Exhibit G). (Outlined in blue on Exhibit N depicts the wood deck's location on the property).
The lava rock seawall and wood dock are considered one unit constructed together at the same time. Under Rule 14.1 Protection of Property of the Shoreline Setback Rules and Regulations, these structures are necessary to protect the property from erosion due to wave run-up. Due to the boat house's close proximity to the shoreline, even the smallest amount of erosion would result in the boat house "falling" into Kaneohe Bay (See Exhibit E). The deck and gravel boat ramp existed prior to the adoption of the Shoreline Setback Rules and Regulations, dating back to the mid 1950's, and were therefore, Nonconforming Structures under Rule 14.3 of the new Shoreline Setback Rules and Regulations. The paving of the boat ramp constituted expansions of the nonconformity under Rule 14.4 of the Shoreline Setback Rules and Regulations, and apparently occurred after adoption of the new rules and regulations, thus requiring a Shoreline Setback Variance. The seawall, wood dock, boat ramp and wood deck are each in its entirety within the Shoreline Setback. This application is for an after-the-fact Shoreline Setback Variance for the lava rock seawall, wood dock, boat ramp, and wood deck.

B. Technical Characteristics:

(1) Use Characteristics: This property and all the surrounding lots are used for single family residence.

(2) Physical Characteristics: The layout drawing, lot size, certified shoreline, shoreline setback line, reference datum, ground elevations and existing structures can all be viewed in Exhibit N & O.

(3) Construction Characteristics: Each of the structures addressed in this report are existing structures therefore no demolition, removal or modifications, clearing, grubbing, grading or filling will take place. The height and design of each structure may be referred to in Exhibit N. No additional construction is proposed at the present time.

(4) Other Pertinent Information: The property has municipal water, electric and rubbish disposal service. Individual waste water disposal systems conforming to the State of Hawaii Department of Health Standards are currently being used. Upon installation of the City and County sewer at a future date (Estimated January 1995), connection to the City and County sewer collection is
planned. The easement for the sewer does not affect the lava rock seawall, wood
dock, concrete boat ramp, or the wood deck. (Refer to Exhibit O depicting the
sewer line easement and its relationship to the existing structures on the lot).
Access to the site is via Kaneohe Bay Drive.

C. Shore Protection Structures:

(1) Affected Shoreline: The lava rock seawall, wood dock, boat ramp,
and wood deck are located on the southeastern shore of Kaneohe Bay. With each
structure in its current location and condition, none of the adverse factors affecting
the shoreline such as the beach profile, offshore depths, foreshore, and
backshore areas, littoral transport, cyclical and abnormal changes of beach form,
changes to water level, wave run-up or changes of sand now exist. However, it
should be emphasized that if demolition of the lava rock seawall, wood dock, boat
ramp and wood deck should be required, erosion due to tidal action and run-off of
pollutants, including lawn fertilizers will be a continuous threat to Kaneohe Bay,
wildlife, fisheries and its users, possibly causing irreversible consequences.

(2) Structure Description: The structural stability, toe protection,
foundation and flank protection of each structure can be reviewed in Exhibit N. The
life expectancy of each structure, assuming normal maintenance is adhered to and no
unusual or unavoidable natural or other occurrences take place, is approximately 30
years. As each structure is already erected, sufficient time has shown there to be no
ill effects on the shoreline.

III. Affected Environment: The site is located on the southeastern shore of
Kaneohe Bay, approximately one mile north of Kaneohe Bay Yacht Club (See Exhibit
A). The present State Land Use classification of the property is Urban and the
present county zoning is R-10. The Federal Flood Insurance Rate Map designates
the property as Zone D, areas in which flood hazards are undetermined (See Exhibit
K). There are no other geologically hazardous land conditions to which the property
is subjected. The coastal views of the structures are shown on Exhibit L and do not
significantly affect the views of residences living to the north or south of the site.
The site provides no public access points to the shoreline, beach parks or recreation
areas. Currently no danger to endangered species, wildlife, fisheries or other natural
resources exist.
IV. **Impacts and Alternatives Considered:** Allowing the existing lava rock seawall, wood dock, concrete boat ramp, and wood deck to remain in its current location, as constructed, will not affect the existing physical, natural, social or economic environmental characteristics of the site. Conversely, if demolition is requested the impact on the shoreline and water quality due to erosion and chemical run off would undoubtedly have adverse affects. In addition the process of removing these items would disrupt the peaceful living habitat of wildlife currently living in and around these structures using them as a source of food and protection. The alternatives investigated have included removing the seawall, wood dock, boat ramp, and wood deck. Also considered was allowing the existing seawall, wood dock, boat ramp, and wood deck to remain in place as the No-Action Alternative. We are proposing the No-Action Alternative.

V. **Mitigation Measures:** Because the No-Action Alternative is being proposed, the lack of significant potential adverse environmental impacts negates the need for mitigation measures. Normal maintenance of structures will ensure limited environmental impact in the future.
SUPPLEMENTAL INFORMATION

1. Section of Shoreline Setback Rules and Regulations from Which a Variance is Sought: Rules 13.32, 14.1, 14.3, 14.4

The applicants have considered removing the lava rock seawall, wood dock, boat ramp and wood deck, however, this alternative is impracticable, because it would be inordinantly expensive, without conferring any corresponding benefit on the environment. In fact, the environment would be degraded by the required demolition activity, and it is unlikely that the present owners could obtain reimbursement from the responsible parties without expensive litigation. Furthermore, such demolition itself would be illegal under Federal law, because it would involve work in navigable waters of the United States prohibited under 10 U.S.C. 403 unless specifically permitted by the Army Corps of Engineers. For the reasons set out in the Environmental Assessment, it is unlikely such a permit could be found to be in the public interest and issued, even if it were applied for. As a matter of policy, the Federal Government does not normally pursue enforcement actions against activities that were completed more than five years prior to discovery, even in cases where the violator still owns the property (see Regulatory guidance letter No. 88-4, Exhibit B). In cases where the land has been sold by the violator, enforcement is even more problematic (see, for example, Tull v. United States, 481 U.S. 412, 1987). Requiring removal of the now well-established lava rock seawall, wood dock, boat ramp, and wood deck would inevitably cause extensive and complex litigation, probably involving the present owners, the State of Hawaii, the City and County of Honolulu, the United States, intervening owners, various real estate brokers and title insurance companies, and the parties originally responsible for the unpermitted construction, all mainly in Federal District Court. Being involved in such complex litigation, with the resulting cloud on the title to the land underlying their homes, would cause extreme hardship on the Applicants and would be unconscionably inequitable to them, because none of them had any knowledge or reason to know of any violation before they bought their respective homes. The hardship could rise to the level of an uncompensated permanent or temporary taking of private property for public use, which is prohibited by the Fifth and Fourteenth Amendments to the U.S. Constitution, requiring compensation by one of the governments involved, particularly if similar riparian properties along Kaneohe Bay are not being treated equally.
**NOTICE OF VIOLATION**

TO: Mails, Ltd.
    WITH: Mary Jane Stoner, President

Mailing Address: 970 N. Kaalakeo Ave., 6A-203, Kailua, HI 96734

RE: Building Code Violation

ADDRESS: 6A-325 Kaneohe Bay Dr., Kaneohe, HI 96744

TAX MAP KEY: 4-4-7:22

PERMIT NO.: None

I have inspected the above-described structure and/or premises and have found the following violations of City and County of Honolulu’s laws and regulations governing same:

<table>
<thead>
<tr>
<th>Codes and/or Ordinance(s) and Section(s)</th>
<th>Violation(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>ROH, Sec. 18-3-1, Permit Required</td>
<td>A building permit is required for the construction of a deck, boat ramp and seawalls at rear of property.</td>
</tr>
<tr>
<td>Sec. 18-6.2(d), Building permit fees</td>
<td>Because work was done before the building permit was obtained, the fees specified shall be doubled.</td>
</tr>
</tbody>
</table>

**NOTE:** IF BUILDING PERMIT CANNOT BE OBTAINED, ALL CONSTRUCTION WORK DONE MUST BE REMOVED.

☐ **STOP WORK!** You are hereby ordered to stop work! Please contact the undersigned as soon as possible but no later than ____________________________

☐ Please notify the undersigned when corrections are made. If no action is taken within ___ thirty _____ days to make corrections:

1. This matter will be referred to the Prosecuting Attorney and/or Corporation Counsel for appropriate action;
   and/or

2. This matter will be referred to the Department of Land Utilization for CIVIL FINES for violations of the Land Use Ordinance; and/or

3. A Notice of Order will be issued by the Building Department imposing CIVIL FINES for the specified violations.

☐ **IMMEDIATE REFERRAL - RECURRING VIOLATION - HAZARDOUS CONDITION.**

☐ If work is not completed within ___ __________ calendar days after the date of this notice and diligently prosecuted to completion without interruption, the work will be done by the City and the cost thereof shall be charged to the owner.

Inspector: CHLINTON CHING

Ph. 523-4777

VIOLATION CORRECTED:

DATE

Remarks:

NOTICE OF ORDER ISSUED BY BUILDING DEPT:

DATE

ORDER NO.

REFERRED TO:

AGENCY

DATE

CORR. NO.
NOTICE OF VIOLATION

TO:          E. Dls, et al.

Mail Address:  City & Water Ave., 6-330, Pailin, Hi 96734

RE:          Shoreline Setback Violation

ADDRESS:  14-325 Kamehameha Hwy., Kaneohe, Hi 96744

TAX MAP KEY:  6-4-7:22

PERMIT NO.:  

I have inspected the above described structure and/or premises and have found the following violations of City and County of Honolulu's laws and regulations governing same:

<table>
<thead>
<tr>
<th>Codes and/or Ordinance(s) and Section(s)</th>
<th>Violation(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Shoreline Setback Rules &amp; Regulations of the City &amp; County of Honolulu, Rule 12, Section 3</td>
<td>The construction of a boat ramp and seawalls and deck within the 40'-0&quot; shoreline setback area is not permitted.</td>
</tr>
</tbody>
</table>

☐ STOP WORK! You are hereby ordered to stop work! Please contact the undersigned as soon as possible but no later than

☐ Please notify the undersigned when corrections are made. If no action is taken within thirty days to make corrections:
  1. This matter will be referred to the Prosecuting Attorney and/or Corporation Counsel for appropriate action;
     and/or
  2. This matter will be referred to the Department of Land Utilization for CIVIL FINES for violations of the Land Use Ordinance; and/or
  3. A Notice of Order will be issued by the Building Department imposing CIVIL FINES for the specified violations.

☐ IMMEDIATE REFERRAL - RECURRING VIOLATION - HAZARDOUS CONDITION.

☐ If work is not completed within ( ) calendar days after the date of this notice and diligently prosecuted to completion without interruption, the work will be done by the City and the cost thereof shall be charged to the owner.

Inspector:  CLINTON CHING  Ph. 523-6277

VIOLATION CORRECTED:  

Remarks:

NOTICE OF ORDER ISSUED BY BUILDING DEPT.:  

REFERRED TO:  

EXHIBIT C
March 3, 1992

Dear Gayle,

After digging through the files again, I found documents indicating we bought the property in 1971 and constructed the present wall in 1981. The concrete boat ramp was put in by Norbe Duarte a little after the wall was built. He developed the property to the south to include putting in the rock wall where there had been homes before. The Dronbaugh's did the same on the other side. As I remember, Norbe got into trouble because the wall deviated from his boundary.

I have made corrections to the affidavit. I have also talked to a lawyer and he advised me to keep the affidavit brief. I'm not sure what you need an affidavit but I don't think you should have to pay a fine.

Basically, we had the rock wall put in where the old hollow-tile wall was. The only exception would be where
boat shed erected. It was not a
boat house. There was a little slip to
accommodate a 12 ft. motor boat with
hoists to lift it out of the water and
a roof (no sides or walls) over it. We
killed that in. So the wall did not follow
its original lines, but we're talking about
a minimum change.

I'm enclosing the affidavit with
changes. I hope this helps you.

P.S. You should
make the affidavit
for both Child and
my signatures since
we owned it in joint
tenancy.

Sincerely,

Joe Clemens
Mr. Art Challenger
City and County of Honolulu
Department of Land Utilization
650 S. King Street, 7th Floor
Honolulu, Hi. 96813

RE: 44-321 Kaneohe Bay Drive, Kaneohe
     44-325 Kaneohe Bay Drive, Kaneohe

Dear Mr. Challenger,

Please be advised that I owned the property and built the home at 44-325 Kaneohe Bay Drive in 1952. As a result of this, I'm very familiar with the construction activities of the above two properties.

The boat ramp and adjacent seawalls in question were both built in the mid 1950's, approximately 1955-1956. The dock at the "boat house" was built in the mid 1960's, approximately 1965.

I hope this will clarify the status and enable the existing problem to be rectified.

Please feel free to contact me if I can be of further assistance in this matter.

Very truly yours,

Robert T. Leary

EXHIBIT J
Boundary follows the seaward face of seawall at highwater mark at seashore as of January 11, 1993.

SHORELINE SURVEY
ALONG PARCEL 22 (Tax Map Key 4-4-07) OF THE RECLAIMED (FILLED) LAND OF KANEHOE BAY
At Malae, Kanehoe, Koolaupoko, Oahu, Hawaii
January 20, 1993

EXHIBIT 0