

**MINUTES FOR THE
MEETING OF THE
BOARD OF LAND AND NATURAL RESOURCES**

DATE: THURSDAY, JUNE 9, 2011
TIME: 9:00 A.M.
PLACE: KALANIMOKU BUILDING
LAND BOARD CONFERENCE ROOM 132
1151 PUNCHBOWL STREET
HONOLULU, HI 96813

Chairperson William Aila called the meeting of the Board of Land and Natural Resources to order at 9:06 a.m. The following were in attendance:

MEMBERS

William Aila, Jr.
Jerry Edlao
John Morgan

David Goode
Ron Agor
Dr. Sam Gon

STAFF

Russell Tsuji/LAND
Dan Quinn/PARKS

Francis Oishi/DAR
Dickie Lee/ENG

OTHERS

Bill Wynhoff, Deputy Attorney General
Julie China, Deputy Attorney General
Dan Nakamura, D-10
Lori Wong, D-10
Ross Smith, M-1, M-2
Yuklin Aluli, D-9
Tom McConnell, D-8
Carl Meyer, F-1 to F-4
Dr. Charles Littnan, F-4
Ilysa Igelsias, F-8

Pam Matsukawa, Deputy Attorney General

Howard Killian, D-10
Jandine Urasaki, M-1, M-2
Keola Lindsey, M-2
Gregory Kugler, D-8
Pauli Gracie, D-8
Megan Donahue, F-3
Eva Schemmel, F-5
Greta Aeby, F-7

{Note: language for deletion is [bracketed], new/added is underlined}

Item A-1 April 21, 2011 Minutes

Item A-2 May 13, 2011 Minutes

Item A-3 May 27, 2011 Minutes

Were not ready for this Board meeting.

Item D-10 Issuance of Right-of-Entry to U.S. Army of Corps of Engineers on State Unencumbered Submerged Lands for the Ordnance Reef Technology Demonstration Recovery and Demilitarization Project at Ordnance Reef (HI-06) off Waianae Coast, Oahu, Tax Map Key: (1) 8-5-002:Seaward of 044.

Russell Tsuji representing Land Division said he had a supplement amendment to this item which he described that the Attorney General's Office (AG) had some concerns with the reference to the 3.3 in the Board submittal which was based on a Federal law where staff has to either comply with Hawaii Chapter 343 or whether or not there is an exemption. This is an exemption because it is a demonstration.

Dan Nakamura representing the Army Corp of Engineers testified that this project has been a long time in planning and would to see this project through hoping the start will be at the end of July.

Member Edlao asked who the demonstration was for. Mr. Nakamura said it is on behalf of the Department of the Army.

Howard Killian representing the previous Assistant Secretary of the Army testified that the purpose is to do a technology demonstration of several different systems that will give the Army military capability to respond to underwater military munitions that present a hazard to human health and safety. The current system is to put human divers in the water and physically remove munitions which put them at great risk as well as the public that the munitions has to be transported on land to somewhere and destroyed. This capability will allow all of that to happen off shore with no risk to human health or safety because we are using robotics technology and there is no hazardous waste generated from the destruction of the material at the end. Mr. Killian explained that it was similar to how the gulf oil spill. The same company that built those robots will be the ones they built for the system this time around. It's about the size of a bobcat tethered to a barge will an individual has been training for several months on how to operate it.

Member Edlao asked whether this robot contacts the floor of the ocean. Mr. Killian said it doesn't that it stays off the floor using two arms to manipulate. Member Edlao asked whether this was used any place else where Mr. Killian said this is the first time for this application.

Member Gon asked what the geographic scope of the test area was. Mr. Killian said from Pokai Bay to the sewer outfall approximately 93 acres. There will be three separate work areas.

Member Goode pointed out Division of Aquatic Resources (DAR) staff comments which Mr. Killian confirmed he did read and had provided written responses to those comments. Lori Wong, Project Manager from the Army Corp of Engineers distributed to the Board members the original comments made by DLNR, the POH responses and the follow-up discussions with them. Francis Oishi representing DAR said they can work out the differences.

Unanimously approved as amended (Morgan, Gon)

**Item M-1 Amendment to Prior Board Action of January 13, 2011, Item M-5,
Issuance of a Direct Lease to Sky-Med, Inc. dba Pacific International
Skydiving Center Dillingham Airfield, Waiialua, Hawaii**

Jardine Urasaki, Deputy Director for the Department of Transportation (DOT) introduced Ross Smith representing DOT-Airports Property Management who presented Item M-1 that when they first issued the original submission it was thought the area specified was the only area available, but further research showed that the tenant's original request for this area was available and staff asked the Board to amend that area to allow that larger area to be included.

Unanimously approved as submitted (Morgan, Goode)

**Item M-2 Recision of Prior LB Action Under Item D-13, October 28, 2010,
Authorize the Transfer of the Land to the DOT Without a
Requirement for Compensation and Direct the Land Division to
Expediently Seek Issuance of a Governor's Executive Order to
Accomplish the Transfer, Waiakea, South Hilo, Island of Hawaii.**

Mr. Smith reported that this deals with land in Hilo at Kanoelehua across the street from Hilo International Airport which impacts one of the runways. He reminded the Board that at the October 28, 2010 BLNR meeting the Board authorized Land Division to go ahead with the DOT purchase and should the Legislature not provide funds for that purchase then Land Division would go ahead with an auction. DOT was concerned that it would shorten the runway which would affect the maintenance of the main runway. DOT asked for a recision for that purchase so DOT could go ahead and make other arrangements with DLNR and they have met with each other on this matter. Mr. Smith anticipates they will be swapping some land with Land Division to make the transfer.

Member Goode said the submittals doesn't mention this possible other transfer and asked would he be amiable to amending the recommendation to add some language that there will be some type of transfer happening. Mr. Smith said he certainly would.

Member Goode asked the second purchase included 20% compensation to OHA and wasn't sure whether OHA had looked at this or will they be a party to this other transaction. Mr. Smith said he wasn't sure whether OHA was involved in the original submittal since that was a Land Division submittal.

Keola Lindsey representing OHA arrived and the Chair explained what this item was. Mr. Lindsey thanked the Chair and said the State is aware of its responsibilities to ceded lands. Chair Aila said that staff will communicate with OHA on the lands to be exchanged.

Member Goode amended staff's recommendation that DOT work with Land Division to identify lands that would be transferred from DOT to DLNR to make transactions equitable to the original October 28, 2010 that the Board approved. Member Gon seconded it. All voted in favor.

Unanimously approved as amended (Goode, Gon)

Item D-10 Issuance of Right-of-Entry to U.S. Army of Corps of Engineers on State Unencumbered Submerged Lands for the Ordnance Reef Technology Demonstration Recovery and Demilitarization Project at Ordnance Reef (HI-06) off Waianae Coast, Oahu, Tax Map Key: (1) 8-5-002:Seaward of 044.

Mr. Tsuji explained he wanted to amend the recommendation section and as he understands it we haven't adjourned for the day and they could do that which is to insert a new section A in the Recommendation section saying that "the Board declare that after considering the potential affects of the proposed disposition as provided by Chapter 343, HRS and Chapter 11-200, HAR this project will probably have minimal or no significant affect on the environment and is therefore exempt on the preparation of an environmental assessment." And renumber the rest of the Recommendation section.

Bill Wynhoff, Deputy Attorney General said that wouldn't be a problem from the AG's point of view.

Member Morgan made a motion to approve as submitted. Member Gon seconded that. All voted in favor.

The Board:

APPROVED AND AMENDED as follows

Attaching the EA exemption notification as Exhibit E of the submittal.

Insert the following as Section A of Recommendation Section "That the Board 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."

Renumber the current Recommendation Section as Section B.

Unanimously approved as amended (Morgan, Gon)

Item D-9 Grant of Two (2) Perpetual, Non-Exclusive Easements to Olomana Estates, LLC for Access and Utility Purposes; Possible Executive Session with Deputy Attorney General on Legal Issues and Litigation; Waimanalo, Koolaupoko, Oahu, Tax Map Key: (1) 4-1-15:por. 16.

Written testimony from Yuklin Aluli was distributed to the Board.

Mr. Tsuji said this request was the result of a lawsuit that Deputy Attorney General Pam Matsukawa who was counsel on the lawsuit was here and as a result staff is coming before the Board to ask for an easement for access and utility purposes for this particular kuleana lot which happens to be landlocked. Staff is going to recommend granting the easement, but the law requires us to charge a monthly by appraisal. He had the Deputy Attorney General look into whether vehicular access was included and she thought that was fine where the access portion will not be charged. Mr. Tsuji said he read the written testimony and what Ms. Aluli is arguing about is a standard for an easement document for the State and he doesn't know of any case that has come down that with respect to kuleana rights and the State is obligated to provide an easement that it is also obligated to provide that easement without the due protections of an otherwise proven landowner require - insurance, indemnity, repair and maintenance.

Deputy Attorney General Pam Matsukawa said this is a Quiet Title lawsuit and there is a court order...rather vague, but basically granting the easement however the terms and conditions including the vocation are to be set by this Board. She doesn't want to address Ms. Aluli's comments at this time but Ms. Matsukawa has some suggested language based upon her testimony. She asked whether the Board would like that now or to have the testifiers speak. The Chair suggested on the allowing the testifiers to speak.

Yuklin Aluli, Attorney for the applicant testified from her written testimony that Olomana Estates LLC is the successor in interest to two pieces of property conveyed to it in 1999. They paid money to the United States of America (USA) who acquired the property from Waimanalo Sugar Company by a 1942 condemnation. This property is part of a number of kuleanas that were in the ahupua'a of Waimanalo and appeared that those properties were sold in the late 1990s. My client was the purchaser. In 1990 the USA conveyed to the State of Hawaii of what is identified now as parcel 16 which contains the Kahawai sewage pump referring to their map Exhibit 3A and 3B in our written testimony. The Kahawai Sewage Treatment Plant is operated by the City and County of Honolulu, but situated on State of Hawaii land. Adjacent to the sewage treatment plant and running in between the Waimanalo Shopping Center and to the

Bellows Air Force Station is a road called Hughes Road which is reserved to the USA. It is 48.4 feet wide throughout the State of Hawaii's land and through her client's land its 44 feet wide. As in pictures shown in Exhibit 4 these are improved roadways with two sidewalks. In Exhibit 5 is a City public waste map showing where the water and sewer lines lie along Hughes Road on her client's property and the State of Hawaii property to Kalaniana'ole Highway. Hughes Road was placed there by the USA which goes to a back gate of Bellows and in that context her client does take issue with certain components of the State's standard grant of easement form. It is their property that it is a kuleana parcel. There are only 38,000 kuleana lands in the 4 million acres of the State of Hawaii. The rights of those who received allodia title to kuleana properties have conferred and have been since the time of private property ownership in what is now called Section 7-1, Hawaii Revised Statutes (HRS). When we filed our complaint at the First Circuit Court conceptually it was that this was a kuleana land that was land locked and they have an affidavit supporting that position submitted by Ryan Suzuki, a licensed professional surveyor with RM Towill. That same surveyor prepared the descriptions in the deed by which both the State of Hawaii and her client took title and those deeds are attached as Exhibits 1 and 2. Our position is that I have concern about the required State standard form attached as Exhibit 7. It says for non-use your easement will be terminated. It is under our position under 7-1 the right-of-way is statutorily conferred and that there is substantial case law to the effect it is inalienable and cannot be extinguished. We rely upon Reppun versus Board of Water Supply which is a case regarding riparian rights that were given under 7-1, Damian versus Tsutsui and she will provide the citations at a later date to Ms. Matsukawa. Also, Malama versus Sheehan, Rodgers versus Pedro, Bremmer versus Weeks...Member Morgan asked on those cases was there legal leaps and bonds easements that were subject to the rulings or were they general access to kuleanas. Ms. Aluli said no. In the instance of the Reppun case it was the right to water which is one of the statutory rights conferred under HRS 7-1. Under Damian versus Tsutsui it had to do with fishing rights that were conferred under 7-1. Member Morgan said it was his understanding that says you can't get to the kuleana it doesn't confirm a leaps and bonds description with vehicular access. Ms. Aluli explained Malama versus Sheehan is a very old case and they have recognized the modernity in terms of the exercise of both 7-1, 1-1 and Article 12, Section 7 that they are making Hawaiians go barefoot and walk on the old trail. You understand they have cars, they wear shoes and we drive cars so vehicular access is sufficient which is allowed and certainly with other land owners citing the example of Kamehameha Schools, James Campbell Estate and there are many land owners that understand this. That is not the problem. We provided the leaps and bonds description prepared by Mr. Suzuki - it is an exhibit and this is what we attached to our motion for summary judgment and we are asking to have an access easement as described which is the very same road right-of-way that the USA reserved unto itself and which the USA fully improved. We are not asking for something other than that. We just want to be able to legitimately drive over the road. There is a shopping center driving onto this road. There is no easement of record that Ms. Aluli is aware of for them, but we come into this with a clean slate and would just to observe the protocols of it all that she proposed some language and hope we can work it out to have the easement be subject to as we pointed out in paragraph 10 of Exhibit 7 that the applicant agreed to termination of its easement rights to non-use, we would object to having that language imposed upon

my client and we suggest that the following be inserted at the beginning of paragraph 10 and that is "Accept as otherwise afforded by Hawaii Revised Statutes 7-1" and by doing that we aren't giving up something that we consider to be inalienable and we believe the Hawaii Supreme Court has. Certainly we hope the State of Hawaii would support and affirm those fundamental rights provided to the owners of 38,000 acres of land lying within the State of Hawaii that were awarded at the time of the Great Mahele. The other term we had a problem with is paragraph 16. It requires that there be a consent to mortgage obtained by our client from the State of Hawaii and I believe and I have proposed if you delete the term premises in that paragraph it would then only mean we can't mortgage the easement and leave parcel 17 which is my client's parcel out of this picture because in order for the State of Hawaii to require that an owner of a landlocked piece of kuleana lands because it has judicially obtained it's right-of-way under 7-1 that they would have to then go run over here to get a consent every time you want to do something and getting a mortgage on the land is really problematic. We just ask that one word be stricken. If you want a consent for the easement, that's fine because that is not what mortgage lenders look at in any event.

Ms. Aluli said the third thing is the appraisal of a utility easement under Hughes Road. Presently, the USA has located under Hughes road running both through my client's property and the State of Hawaii's property a sewer line and a water line. Although there is a moratorium on sewer hook-ups at this time and area in question it was Ms. Aluli's understanding that the County doesn't want a proliferation of lines running all over the place and they themselves are very careful and we would therefore more likely than not run our own water line under Hughes Road and hook up to the sewer line that is already is within our own property and would not have to cross over the State of Hawaii's land. For that reason I am concerned that the appraisal of an easement – I don't know what kind of formula it just seems to me here we have a fully improved 44 wide road way under which there are a water line and sewer line and we are just going to do the same thing. How do you appraise that? How do you value pavement that the State of Hawaii is not going to be able to do anything with because it's subject to this highway going through it and it's a waste of public resources. You want to levy an \$1100 administration fee for something like that, but to go through an appraisal it's a costly process. We could spend thousands of the dollars on this. I'm just asking the DLNR to reconsider its position. Ms. Aluli pointed out that the report contends that they are seeking out an easement over Hughes Road and as we have shown in our photograph there presently are utility lines along the side of Hughes Road and the electric and telephone companies would want us to hook-up there. They are not going to put new poles there and how do you appraise what is already there that you don't own – it's non-seneschal. I don't even know if they are going to put in another wire. How do you determine the value of the burden of a wire that may or may not be placed on poles that are already there? Ms. Aluli asked the DLNR to reconsider its position that they want a lump sum administrative fee and I think that would be better.

Ms. Aluli said the last thing is there is a hazardous material provision in the grant of easement and we would like to not be responsible or liable for what happens on Hughes Road in light of its current use by the USA that there are trucks or whatever that goes on

that road and we can't control it and neither can the State of Hawaii. We would like to have that language included in the grant of easement to exclude the use of Hughes Road by the USA from any obligation as to hazardous materials.

Member Goode asked whether the client's property receives utilities. Ms. Aluli said that it can receive electrical service and telephone service at present because there are poles running on our property that were put there by the telephone company. The water line is currently on our property, but it cannot be tapped in to so we would have to run our own water line out to Kalaniana'ole Hwy. The sewer line runs through our property and it cannot be connect to at this time because of the County moratorium. I have asked the City can we have our own waste treatment plant. I don't know what the genesis of this moratorium is and that is something we can work out with the City, but we need to have an easement of record and our proposal is to just have the easement of record under Hughes Road as does USA. The USA has easements for utilities under both pieces of property and they have exercised them and to the extent that we can hook up within our own property lines, we will and that's our proposal. Not to go outside of it. The terrain is not good. We propose to use Hughes Road as it is currently being used and that is what is in their description which they submitted to the court.

Deputy Attorney General Pam Matsukawa clarified we haven't been contesting a kuleana right access and there was precedence set by the court showing that the court has allowed vehicular access under our rights of kuleana access so we haven't been contesting that. Now the Land Division is not opposed to vehicular access a utility access but what we do contend on the utility access is that it is not a kuleana right. Those kuleana rights are embodied in Hawaii Revised Statutes (HRS), Section 7-1 and it is not a kuleana right. Therefore, although the Land Division is not opposed to the Board granting a utility easement, under the law the easement would have to be paid for by appraised value. Technically, I don't know how the appraisal would go, but we would need to obtain an appraisal for the utility easement. I understand from Land Division that the utility easement area need not be as wide as a vehicular access area and we could reduce the cost by eliminating the area of the utility easement. As to the grant of non-exclusive easement standard for...any automatic termination of the access easement I did some research and I couldn't find a case directly in point, but to avoid the issue we could add to the paragraph on that automatic termination "except as maybe provided by HRS, Section 7-1. There was some discussion about the "maybe" and the Chair said it sounds like it could be worked out and all agreed.

Ms. Matsukawa said because we are not clear on the issue right now I would prefer the "maybe." If it does prove the law does not allow for any automatic termination then they are covered by this language. For the indemnity for the release of hazardous materials and asked if she (Ms. Aluli) has a copy of that because paragraph on page 5, provision 13 really applies to just the action of the grantee. We understand your concern that this paved area is being used by the Air Force, but the Air Force would have to be accountable for what it does and the grantee needs to be accountable for what the grantee does. In terms of the indemnity paragraph which is the second paragraph in order to ensure the grantee we are talking about their responsibility for their actions. We could

include language to that paragraph to read "The grantee agrees to indemnify the ___ and hold grantor harmless from any damages and claims resulting from the release of hazardous materials by grantee or persons acting under grantee on the easement area occurring while grantee is in possession or elsewhere caused by grantee or persons acting under grantee." That would make it very clear that we are only talking about the grantee admission. Ms. Aluli said maybe you have to use more precise words like agent because "under" can connote a person who is exercising an easement right as the USA. We don't want to be liable for their activities on that roadway. I would prefer to use more specific terminology such as agents, employees because that would eliminate...Member Goode said we as the Board is not here to submit this. See if we can get some general agreeing here because you guys are going to have to work it out. Ms. Matsukawa said that was fine.

Mr. Tsuji said that was his suggestion to pass to the Chair because we do have an adequate provision in 3.d. that says "such other terms and conditions as described by the Chairman to best serve the interest of the State. The best way to resolve this is for counsel to work it out and bring it to the Chair with a recommendation.

Ms. Matsukawa said as far as a consent for a mortgage those easements will run with her property. The mortgage on her property will also include the easement. I don't think we were looking at an easement that's separate from the premises. If there was going to be a mortgage on the premises and attached to the premises running with the land will be this easement.

Member Goode asked whether they have to come to the Board to get a mortgage for the owner or new owner. Ms. Matsukawa said the Chairperson does the approval. Ms. Aluli asked earlier for language that such approval shall not be unreasonably withheld and we don't have any objections to that. That is standard.

Member Morgan said it sounds like we are in agreement to everything except the value of the easement and I hear what you're saying that it would be a bad precedent to take this one case and exempt it from valuation because if not this one then you would have to look at every single one and exempt it. Is that correct? Mr. Tsuji asked whether the Board has that discretion. Ms. Matsukawa said that is part of it in terms of setting precedence, but actually because we aren't saying this is not provided by HRS 7-1, it's just an easement issue under our easement statute that there has to be an appraisal.

Member Goode asked there is no discretion of the Board saying these make sense to us and suggest an administrative fee under the statute we have to do an appraisal. Ms. Matsukawa confirmed that. Chair Aila asked what criteria under which the easement will be appraised. Given the fact the sewer and water pipes run under the road. Is there criteria by which that appraisal appears? Mr. Tsuji said no. We just do it by standard appraised monthly value. The appraiser is going to be valuing these access easements do take into account the size of the State property, what we are using it for, what are we granting a non-exclusive easement action. As a practical matter it isn't going to cost a whole lot of money. And, yes, as Ms. Aluli says the cost of an appraisal sometimes

exceeds the value we receive anyway and that happens across the board on all of our stuff, kuleana or not. The law is in for certain reasons and in this case to avoid the Legislature in the Territory days made certain requirements when the Board of Land and Natural Resources disposes of lands which was at that time the majority of the lands of the State of Hawaii to follow certain procedures and processes. Otherwise, what is the alternative? Discretion and making deals and sometimes if you are really looking at long term which is okay, but sometimes we have too much discretion and it can be abused in the wrong hands.

Member Goode asked our recommendation before the Board in 3.a. which he read would they change that to add the language that this particular one is the most current special easement form, but it will be amended to recognize kuleana rights, chapter 7-1, HRS or ...Ms. Matsukawa said I guess what we are asking is you say subject to the standard easement form with proposed amendments by the Department of the Attorney General. Member Goode said item C here already says review and approval by the Department of the Attorney General and D, other terms and conditions as prescribed by the Chair that serve the interest of the State. My question is the recommendation currently written adequate enough coupled with the minutes of our discussion here leave as is or need to be changed? Ms. Matsukawa said he is correct and could be left as is and the final language would be subject to the Chair's approval. Chair Aila said and further discussion and word smithing between the two. Ms. Matsukawa said that was right.

Ms. Aluli asked for clarification noticing that there was in the State's submission a need to obtain an approval from the City and County of Honolulu. It was not in the final recommendation, but was in previous language applicant requirements which she read and wanted clarification that is not a condition of this DLNR's grant of easement and they will go deal with the County separately. Ms. Matsukawa said a right-of-access under HRS 7-1 does not exempt them from laws that are applicable to establishing the easement. Whatever they need to do, whatever approvals they need to get from the County they need to get. If they need a permit to install this waterline they need a permit. I don't know what the required easements are and I understand from Land Division that there is a requirement for designation of easements. It is standard for all your conveyances. We have the applicant be in compliance with all the laws and that is what we are saying that they have to do be in compliance with any County requirements in order to establish the easement on the ground.

Ms. Aluli said they are going to have a judicially determined easement. It's going to be in the order signed by Judge Orber. It's not conditioned. I have gotten a mile and a half long easements to a kuleana and I didn't have to run over to the City and County to get some kind of...there is no building. I understand there is a distinction between holding a permit and a judicially determined grant-of-easement. What I don't want to do is to get to the point where until we go and get some piece of paper from Department of Planning and Permitting that we can't have our final order because it's in here and I just don't want it to be a condition of your grant-of-easement. I assume this is just dicta or rhetoric that was placed in here. Ms. Matsukawa said no, it's a part of the recommendation. Ms. Aluli said we ask we not be required and I did speak with the Department of Planning

(Mario) and they said they are not making it a condition. They were given a letter from DLNR that was for comment. They have their standard response which is all easements follow under sub-division laws, blah, blah promulgated in 1978 and we'll get there when we get there. Chair Aila said it sounds like you are going to run over to the City's easement and tell you there is no need for it then you'll comply. Ms. Aluli said I spoke to him, Mario and told him I am going to quote you and I quoted him. I sent it to Winston Wong and said I just would like to know since I had seen the letter that you had a response to what exactly were you asked? Is there some piece of paper that you have to stamp for the State of Hawaii to grant an easement? Ms. Matsukawa said the recommendation is for the Board to grant that easement. The issuance of the document will be contingent upon them complying with any County requirements if any. Maybe there isn't any. I don't know at this point. Ms. Aluli asked why assume in number 3. Ms. Matsukawa said there was a comment of designation of easement. I haven't personally investigated that matter. I think it is your responsibility and Land Division is looking into that also. We are not saying not to grant the easement. We are saying grant the easement and the actual document shall be issued upon the County indicating that they have no requirements.

Member Goode asked wouldn't the County say we would like the easement be right here, 10 feet wide on this alignment and that alignment has to be in the final easement document, right? It seems to me that the County has got to be involved here just knowing exactly where it is and agreeing to that. Ms Matsukawa said that is a valid point. Ms. Aluli said that is why we asked the Federal Government has in it's reservation to itself, it asked that it be placed under the easement are which is described. What the State of Hawaii is asking is a lot of County involvement before we are even there. But, they won't grant this easement. There are many times when you want a right-of-access to pasture land that you could build a house on it in some future point in time you are still entitled to your easement to get up there and all of that without having to pull that permit that is going to make the City and County lock and load. What is happening here is the State of Hawaii is requiring an approval, listening to what Ms. Matsukawa said, of this grant of easement from the City and County of Honolulu before you ever want to look at it because they only get into it only when they issue a building permit. For everybody's edification what is being required is much more than what I have been required by other large property owners such as Kamehameha Schools, James Campbell Estate, McCandless Ranch and I'm just going whatever, but it's a little bit onerous to function like this. Especially when the State took its property from the USA subject to this massive reservation in favor of the USA and they pumped all this stuff this road and the State doesn't even have clear title. They got same title from the same party.

Chair Aila asked the applicant requirements #3 that is the standard required for everybody including large landowners which he read "...at the applicants own cost." Is that something we do for everyone? Mr. Tsuji said it is standard conditions. I don't know about Ms. Aluli's comment about putting a sewer line under a paved road. I think if you have the opportunity to put it on the right-of-way that is where it goes. Ms. Matsukawa said all we're asking are all the details be worked out in coordination with the City. Like what Member Goode said what if they wanted it a certain place. Why do I

have to go to a certain place and that is when the utility easement should be set. Ms. Aluli said but the City has a lawyer on this case through Corp. Counsel. They have been a party on this lawsuit and who is doing whose job here? Ms. Matsukawa said I don't think Mr. Wong has been involved in these issues. Ms. Aluli said he was the one who gave us the map that showed where the water lines are and the sewer lines.

Chair Aila said it sounds like you are concerned about what might be versus what will happen is if you already have DPP folks saying there isn't a issue here then there is no issue, but this is standard. Ms. Aluli said I don't want to be required to obtain an approval from the City and County of Honolulu for designation of the easement in order to get the grant of easement because we are not at that point to having to interface with the City and County of Honolulu and if the City and County of Honolulu felt that way they would require it in our stipulation that we are working out with him and this has never been part of that stipulation. I am just kind of shocked that now this is a condition. Of course we are going to comply that is why we named them as a party. We are absolutely intent upon complying. The City is a party. Let's just move on. Ms. Matsukawa said I am not sure Mr. Wong who is a Deputy Corporation Counsel is even aware of this issue. You know we are not opposing this. We just want things done properly and we are trying to do it in accordance to how other easements are granted. We only raised this because we received some comments from the City on the designation of easement. I think it does need to be clarified and we are just asking it be clarified before the easement document is issued.

Member Morgan asked whether there is a time specific requirement on these applicant requirements because I don't see that. Your (Ms. Aluli) concern is what comes first. Ms. Aluli said it has been pending since 2009. I have 10 days to prepare this order. Member Morgan said it looks like you are saying it doesn't have to be done now. You just have to agree to do this. Ms. Matsukawa said I think the order will say what we are generally agreeing to and the details can be worked out later. Ms. Aluli said the grant of easement will be signed by the DLNR without us getting this easement. Ms. Matsukawa said I don't think the Judge is going to wait for the easement document. Ms. Aluli said no, he is not that he is going to create an easement document with or without you guys signing it. Ms. Matsukawa said but the terms and conditions are set by this Board. And this is what we'll argue before the court if you want to take this matter before the court, but the order is to include terms and conditions set by the Board. We can work out language for the purposes of the order with the details to be worked. Plus the language has to be worked out that is something we can finalize later. Mr. Tsuji said to his knowledge whatever the Board grants today to the extent Ms. Aluli is dissatisfied she has an every opportunity contest it.

Member Agor said we have heard enough.

Member Morgan made a motion to allow the Chairperson to...Mr. Tsuji said #3.d. has that language. Member Morgan asked is that cover everything we talked about. Mr. Tsuji said and just a suggestion by the Board for counsel to work out the language. Member Morgan said it may not be part of the motion, but I heard there was

acknowledgement to work together on 10 which is except provided by 7-1 otherwise provided by section 13, the hazardous waste. There is a movement on that one. Consent to mortgage that will not be unreasonably withheld. And, the only one we are going to stand firm on is the easement. Whether we are not going to compromise on that and it is part of the statute and what we have to do. If that is all understood then I will make a motion to accept that recommendation. Member Goode seconded it. All voted in favor.

Unanimously approved as submitted (Morgan, Goode)

Item D-3 Consent to Assign General Lease No. S-3601, William T. White, III Charitable Remainder Unitrust, Assignor, to BCI Coca Cola Bottling Company of Los Angeles, Assignee; Waiakea, South Hilo, Hawaii, Tax Map Key: 3rd/2-3-49:07.

Mr. Tsuji pointed out that references to the TMK was one digit off in the title of the submittal that instead of a 3 should be a 2 and he thought it would be appropriate to amend the title before the action. Mr. Wynhoff said he didn't think he needed to amend the agenda. The question is whether under the Sunshine Law adequately gives notice of the agenda item and I don't think amending it will matter, but I do think given that we have a pretty complete description. We have the lease, the person and all the details about it I don't think the transposition of the TMK means any interested member of the public has been deprived their opportunity to come. He didn't think it was necessary to amend the title or to take any action and to just proceed. There could be members of the public interested and have been given adequate notice that this is before the Board. Mr. Tsuji said he had nothing else to add and that counsel was here.

Steven Lim representing the William T. white, III Charitable Remainder Unitrust described the parcel and that this is the last five years of the 24 year lease.

Member Gon asked if there were any problems. Mr. Lim said not at all and asked for the Board's support.

Unanimously approved as submitted (Edlao, Morgan)

Discussion was had regarding adequacy of the agenda item title which contained an error in the tax map key number. However, within the text of the submittal and exhibits the tax map key number was correct. Deputy AG opined that the title did not need to be corrected/amended.

Item D-8 Request to Cancel Grant of Term, Non-Exclusive Easement to TLM Partners Ltd. for Seawall, Lanai and Landscaping Purposes, and Request for Refund of Consideration and Fees Paid, situated at Niu, Honolulu, Oahu, Tax Map Key (1) 3-7-002:seaward of 009.

Mr. Tsuji said he didn't have any changes to his submittal that he did receive a legal brief from TLM's counsel and the opening sentence says "This is not a violation" and I agree 100% that this is a land disposition matter. The encroachments are for the sea wall and

filled land area that the gist of the request is to cancel the land disposition and that is the way he sees it. TLM's counsel is here. Mr. Tsuji described the area in Niu kai, Diamond Head of the fish pond. The issue here and based on staff's research, including Office of Conservation and Coastal Land's crew whom he named, went out and looked at the site. The wall is six feet tall and the land behind was roughly five feet above the submerged land outside the wall which was explained in the submittal. TLM came forward seeking to legitimize what was believed to be an encroachment involving a sea wall and filled land referring to Exhibits 1 and 2. After staff evaluated whether this was appropriate for the area and it was found this can be legitimized staff recommended taking this to the Land Board who approved the easement and part of the standard conditions. The applicant would pay for the appraisal, the value will be determined by appraisal and you provide survey maps that TLM did both paying Land Division the money. Mr. Tsuji explained the process involved that changes were requested. Those changes went over to TLM in January 2010, but said they wanted to cancel and wanted their money back. Staff is going before the Board to cancel a land disposition that was solely for the purpose of legitimizing from what we know to be an encroachment. Sea wall and filled land - all of it on State land. Not sure the Board is going to do that, but TLM insisted we bring this matter to the Board and here we are today. Staff took a lot of time on this. The money from this goes into the Beach Fund after 20% to OHA and restoration of Waikiki Beach. Mr. Tsuji read the opposition and TLM counsel is here.

Member Morgan referred to Exhibit 10 comparing the appraisal amounts. Mr. Tsuji said he couldn't answer that question and explained that the appraisal is an opinion. Often times there are different methodologies and they comply using a staff appraiser to review for technical and substance. Each time it comes back and if there is a discrepancy it's whether it complies with the law. He didn't know why there is a discrepancy and described TLM's case if they wanted to dispute it and what the process is. Because it's referenced as a GL number they agreed to execute an easement document.

Member Goode asked referring to Member Morgan's question these easements have the same terms and Mr. Tsuji said it is always the same that this is a non-exclusive easement. The Board and Mr. Tsuji discussed the property.

Member Agor asked when the Board grants easements after-the-fact are we holding the property owner responsible for the improvements that were done. Mr. Tsuji said Mr. Kugler alluded to something like that in his ending paragraph. He and Mr. Wynhoff have taken this issue up and went through trial. This is the position of the Department to the extent that it is State land. If someone places an improvement on their sea wall it doesn't necessarily make the wall State property. It's an encroachment; rectify it by an agreement or removing it. Staff looked at whether to remove it and found it is in the appropriate area and thought it could stay. We do not agree with Mr. Kugler saying that it's on State land, it's the State's responsibility and that is not the case.

Gregory Kugler, Attorney representing TLM Partners introduce Tom McConnell who is the general partner of TLM testified that TLM is a family partnership that holds title to this single family residence in Niu. Also, Lynn McConnell, Tom's wife is present. They

did sent a letter with exhibits thanking staff for accommodating their schedules. Mr. Kugler agreed this is not a violation case. This house was built in 1934. Mr. McConnell bought it in 2002 and no one knows when or who built the sea wall which he described referring to a 1949 aerial photograph, exhibit 8. He explained that his clients wanted to rebuild their house and the process for a certified shoreline questioned the sea wall and staff decided to go the easement path. Staff told the TLM consultant that this is State land and there is a wall on it and the need for the easement. Mr. Kugler said there was the use of the word "fill" and you have to pay to see the easement documents. His clients wrote a \$135,000 check and the easement document was sent to them. After some disputes the easement document couldn't be resolved. The McConnells requested return of the money and were told to come to the Land Board. Mr. Kugler said staff said that this easement was needed to deal with fill. There is no evidence that the land mauka of the sea wall was fill. The Department did a study of another property three doors down and the report read that "Staff reviewed the available evidence suggests that the encroachment area in question may have been an accretion area in existence before October 1, 1964. Thus, staff cannot substantially prove that any portion of the encroachment area was ever located in the conservation district." In 2002, staff was saying for the property three doors down that they couldn't prove that this was fill, placed on the shoreline on submerged land or was this accretion. Their records say it's probably accretion.

Member Goode asked what the context of that evaluation was and Mr. Kugler said that was one of the properties listed on Exhibit 10, the Gallagher property. An easement was not issued. Mr. Kugler went to the State's historical shoreline data and he presented to the Board color hand outs and an aerial map describing each giving some history. A Dr. Fletcher measured and there are photographs that the seawall was out makai of where it is today. Mr. Kugler addressed the evidence that the Department suggests that this is fill and therefore they say has to be removed or legitimized. He referred to Exhibit 8 photograph that the coconut trees are in the yard and are still there today. Compare that with Exhibit 2, 1954 and 1961 photograph showing palms trees right up to the sea wall. The appraisal report shows this too. No one backfilled the sea wall. There is also an elevation change due to erosion by his experience with other sea wall cases. Mr. Kugler noted Dr. Fletcher's study describing post sea wall, the accretion and erosion of sand in front of these properties at these transects attributed to the Niu Stream depositing sand and sediment over time up to the sea wall. Mr. McConnell had asked the Department to refund his money because he no longer needed the easement and he was told he had to remove the encroachment, but he asked what is the encroachment. Staff means the lanai and the sea wall, but you cannot remove the sea wall. They could only remove the lanai. The sea wall may not be theirs. The McConnell's have never been cited for a violation and tried to do the right thing and they just want their money returned. Let the next owner of this property deal with this issue.

Tom McConnell testified relating some history and background on the property that it's not suitable for them since their son is in a wheelchair and the property has several levels. He explained the process they undertook to re-build this house following the advice of a consultant and reiterating previous testimonies. His family suffered from the down turn

in the economy and family members are experiencing health issues. They decided not to proceed with re-building the house and instead patched up the old place with walk ramps, etc. and appreciated all that staff did. They would like their money back that it has been a year and a half since they requested it. The family needs the money. Have the next owner deal with this property.

Mr. Kugler said they acknowledge that with the return of the money there has been some administrative expense incurred by DLNR that we don't know what that is because DLNR takes the position that you don't get any money back. We are willing to compensate them for any reasonable expenses incurred.

Member Agor asked he was looking for an exhibit that displaced the property line from the sea wall and to clarify that? Mr. Kugler asked the distance and Member Agor acknowledged that. His client's property line. Mr. Kugler said the leaps and bounds that show up on the survey in Exhibit 1 which is attached to the letter. Exhibit 2 is much better showing the lanai. The distance is about 40 feet from the base of the sea wall to the leaps and bounds property line at the rear of the McConnell's property. The question why there has been discussion whether this is accretion or is this fill is an issue with the Department if people are filling submerged lands. But also it is clear in 2010 in the Hawaii Intermediate Court of Appeals, Hawaii Supreme Court case of Maunalua Bay which was the case that ruled in part the law unconstitutional that says accretion no longer belongs to the shoreline property owner, but now always belongs to the State unless you can prove erosion. That's important because in Hawaii accretion belongs to the property owner and doesn't belong to the State. There is a registration process which is not what this Board does but that is common law in Hawaii and the Legislature in 2003 with Act 73 tried to change those rules it was slapped and the Intermediate Court of Appeals ruled. The Hawaii Supreme Court did not overturn that ruling that the attempt to take prior accretions is unconstitutional and taking property that has to be paid to property owners. In that context is why we are talking about accretion versus fill. Regardless of where the property line on a leaps and bounds goes and all the deeds say makikai going a very long time to the sea this whole ahupua'a to the sea wherever it ends up. We believe since that grant in the 1800s that land accreted and ultimately somebody put the sea wall out there, but the land behind the sea wall accreted that they believe came from the stream mouth.

Member Morgan asked Mr. Tsuji mentioned the disputes that you had in the easement originally couldn't be resolved. The maintenance of the wall and certified shoreline, in other words they didn't acknowledge the property ended at the seawall. Is that correct? Mr. Kugler confirmed that was correct that they had asked additional language be put in to clarify our right to maintain the seawall into the future that it says that in the grant, but in the language of the easement it takes away, questions or undermines that. It was not nearly as explicit as one would think in reading what is to be granted. Member Morgan said can I assume then that you would imagine that analytical planning consultants had the wrong premise from the beginning that they didn't really need this easement even no matter what. Mr. Kugler acknowledged that he thinks that is correct.

Member Agor said if a person on the shoreline wants to develop his property and the State finds that there is an encroachment on the State property the idea that who built that encroachment really doesn't play a factor. You want to develop your property and in this case you got a retaining wall that nobody knows who built it. But, by obtaining the easement you get the benefit and value of the area from your property line to that wall. I understand the client's position that he doesn't want to go through it. Mr. Kugler said you are right, but you are wrong in a sense that this is a non-exclusive easement. Mr. McConnell would get the right to use that roughly 40 feet of dry land including the public, it's a non-exclusive easement. For \$135,000 he would have the right to allow the public to stand an arm touch of his house in the back yard. As Mr. Tsuji clarified that this is a non-exclusive easement which is different from a fee simple ownership where you have the right to call it your own and keep people from walking in there. Maybe as a practical matter that doesn't happen or won't happen, but these are public documents there is just no telling what people will do and they have a right to stand in the McConnell's backyard inches from their home referring to Exhibit 2. Mr. Kugler spoke of what he thought the value of easements were.

Member Agor asked if he analyzed the benefits of having the easement for the sea wall in terms of your set back proposed development back then. Mr. Kugler pointed out that the house was built in 1934 before there was ever such thing as a shoreline set back area, only a zoning code. This might qualify as historic status. His clients were told to get an easement to maintain the sea wall which would determine the base of your property for measuring that set back area and it hadn't gotten to that point.

Mr. Tsuji said Mr. Lemmo was here to answer questions and looked at the recent exhibit. If you read the brief and the shoreline certification process and what the County requires. The shoreline certification rules, as cited in his footnote, is not going to proceed until you resolve that easement until the Board and staff believes it can be legitimized through an easement or removal. The easement process to legitimize what was known to be an encroachment and once that's done you can proceed with the shoreline certification process. The survey adds in where is the shoreline. The map will be done with where the shoreline is, staff okays it, processes it, goes to the Chair for signature and IE shoreline certification and take that to the County for your permit. The easement document is something separate. To add provisions in there to guarantee something on what is to happen and the next step is something staff could not do. Mr. Tsuji referred to staffer Timmy Chee's e-mail regarding the easement. If you have your record boundary, you have 2000 feet of what they believe is fill they are going to legitimize it and he apologized for this. It was never intended to be all inclusive and he wasn't speaking for the Department.

There was question on what Member Agor brought up earlier regarding encroachments. Mr. Tsuji said it was correct.

Deputy Attorney General Bill Wynhoff said Mr. Kugler handled himself very professionally done a real good job with his client which he appreciated which made it easier for everyone to present to you what we know about this case. Mr. Kugler showed

you the exhibits and relied on Dr. Fletcher's representations on where the shoreline might have been in 1927. It's Mr. Wynhoff's belief and the Department's belief that they have the best possible evidence of all on where the shoreline was in 1927 and that's the leaps and bounds description in 1927. Because this property was subdivided in 1927 as is common with shoreline subdivisions as Mr. Kugler points out the ownership line at that time went to makikai, to the sea, but as common with shoreline divisions what it says in describing shoreline boundaries at the time it's "to the ocean." The present asthmidz and distances of which are as follows in 1927 and Mr. Kugler acknowledged that in foot note 1 where he says gives the leaps and bounds of the then existing shoreline and that is how we know where the shoreline was in 1927 and that is the area in question. How did this area between where the shoreline was in 1927 and the wall get there? It is our belief it is filled for the reasons we discussed and it was Mr. Kugler's belief it was accredited for the reasons he discussed, but I do think that the issue of where the shoreline was in 1927 is put to bed.

Mr. Tsuji said I don't think we are saying the wall was built out in the ocean. We are saying the wall was built on the beach and it was not built on the IE, the shoreline as the law defines that and was probably backfilled. There is no question here that the sea wall was built beyond the recorded boundary. The Department's position is shorelines move which can accrete or erode like streams always meandering. Staff doesn't have a problem if you build a shoreline protection structure within your recorded boundary. He gave the example that it could accrete 5 feet one year and come back the next. There was a process the Statute provides for that he believed it was there for a certain amount of years it was 20. Mr. Wynhoff said not until 1985. Mr. Tsuji said that there is some court process to say it is formally accredited and it is yours but you got to show evidence that it's been that way for 20 years. The problem here is the 20 years didn't run.

Member Morgan said living in 1949 that law wasn't in existence and case law going back to 1894 because we had similar issues held that accredited land as the abutting property owner's land. The property owner(s) at the time look at that with all the knowledge they have up to that point legitimizes the building of a wall to stabilize its property. According to everything up to that point because they don't know anything about the future everything is legitimate it is their property. Is that correct or not? Mr. Tsuji said maybe at that time, but current case law I don't believe is a 100% correct. On the accretion and shoreline cases that all cases involving Sotomor said up the shoreline, seaward of the shoreline. Shoreline is defined as upper of the high tide mark and it can move. It is Government Public Trust Access, beach access. I don't think there is any case in Hawaii to address when you have a hardened shore and in this case a sea wall. Mr. Tsuji talked about the Gold Coast litigation where the issue is erosion and the IE going into the private property and issue is whether the shoreline is there and the State owns the land. Yes. The Ninth Circuit said what was previously on private property is now government land which is trespass and you have to remove it at the private owners cost. Member Morgan said that was consistent with what the old law of the land was. If it accretes it's yours, if it erodes you're out of luck. Mr. Wynhoff said if it's consistent the question is what happens if you arrested the erosion by hardening it. It's a possibility as to what might happen here and I don't think there is any question in this case if that

wall were to be taken out. There would be substantial erosion and the point is if the Ninth Circuit law applied the ownership line would be considerably further back and that is an open question why there is no case law. People assume the 205 shoreline is the makai facing wall and many people assume the ownership line is the same as the 205 shoreline and that maybe right or it might not be since there is no case law.

Member Goode asked this Board adopted a policy in 1999 which is cited in the staff report when granting easements which the Board has followed and we deal with these cases where individual property owners who want to redevelop their property or do something requires a certified shoreline and go through this process. We deal with it as it's brought to us by request. Your office handles these? Mr. Lemmo acknowledged that saying yes. Mr. Wynhoff said maybe I didn't understand your question correctly and apologized, but it is also possible that matters or potential violations could come up other than by the owners seeking to get a shoreline certification. Member Goode said lets not get into that. Generally, we deal with these as they are brought to our attention. OCCL is not sending out staff up and down the shoreline and it's obvious a whole bunch of these don't have easements yet. You aren't sending DOCARE officers out. We are not actively requesting easements of folks or we believe they should be having them. Mr. Lemmo said we are dealing with them as they come up. Mr. Tsuji said we don't have the man power, but that doesn't mean enforcement cases don't come on its own to do a shoreline notification. Member Goode said we all agree this isn't an enforcement issue.

Member Goode said related to Chip Fletcher's work and based on his experience on Maui if you want to know if there is accretion over the years or not one would not follow these general reports based on very general photographic data taken at a certain time at a certain day and one would hire a coastal engineer or coastal geologist to thoroughly investigate this particular parcel and try to make the determination at the best of their ability on whether there was accretion or not. Is that correct? Mr. Lemmo said no. That currently these maps are not being used by the City or the State, but they are being used on Maui and Kauai to calculate shoreline set back. The intent of these maps generally is to help provide a standard or formula to establish a shoreline set back. He gave the example for erosion rate, accretion and scientific should be a specific survey. Member Goode asked then if you wanted more detail whether it was accretion of fill that would require a site specific study and Mr. Lemmo confirmed that saying that this is all averaged out over a hundred years that these photographs are taken over time and there maybe 6 or 7 photos taken over time which the accretion rate is based on. The Board members and Mr. Lemmo had more discussions about accretion and erosion.

Member Morgan said he thinks they should approve the request because the applicant had a legitimate goal to re-build the house and went to somebody for advice which may have not been good advice. This is not the body to determine accretion law and there are questions about it. The whole pay to play thing is a concern. The client had to pay a lot of money to look at the document and when they did the applicant had less rights than when they started with which didn't sit well with Member Morgan. The issues with his wife and all they should go back to what they began with.

Member Edlao asked when someone comes in for an easement what triggers it to be exclusive or non-exclusive. Mr. Tsuji said it has been the policy from the Department at least with shoreline encroachment easements to be non-exclusive. Anyone walking there now would assume this was private property. Mr. Wynhoff said as long as he has been here they have always done non-exclusive and part of the reason for that is an exclusive easement might be considered a subdivision and that raises some other problems. He is not aware of doing exclusive easements and he has been here 10 years. All of Kaneohe Bay was given as an example by Mr. Tsuji.

Member Edlao asked how far back from their property to the structure. Mr. Wynhoff said its 40 feet makai from their leaps and bounds property line where to the Board looked at the map/photo(s).

Member Agor asked what criteria was used to determine the fee amount for the easement. Mr. Tsuji said it was a typical appraisal for a non-exclusive sea wall encroachment. Often times what they do for a shoreline encroachment is the appraisal will go through various methodologies where one common one is first appraise a particular private property then look at the total area and come in with a discount where he described in detail pertaining to this property where a lot of times it's a 70% discount based on opinion which is driven by the value of the home.

Chair Aila asked what is the result of rolling back this process to legitimize perceived violation where Mr. Tsuji said it will be up to the Department whether it wants to pursue a violation from staff's perspective reiterating this came as an application as a land disposition acknowledging the role of the consultant. It depends on the Department's resources.

Chair Aila asked the landowner that you are requesting us to roll back the previous decision made and may result the Department making a determination that you are in violation and proceeding along those lines. Mr. McConnell said right now it's ambiguous and I think nobody knows and we made our assumption its accredited land and even the DLNR staff in 2002 stated they thought it was accredited land. DLNR put on case point that it is filled land, but nobody knows. I would prefer if DLNR wants to research it more that's fine, but because nobody knows if it's accredited or filled and not knowing who or when the wall was built there and I would like to move on in getting our money back in some point later in time we could talk about it.

Mr. Tsuji said that the neighborhood could affect every single easement. Every single encroachment easement we've granted statewide to the extent that we don't have the scientific evidence to support it we would start turning back the money and cancelling easements it could bankrupt my Division.

There were discussions about Exhibits 10 and 11 and Member Morgan asked what was the genesis of all these things. Mr. Lemmo said they wanted to resolve the encroachment. Member Morgan said if he had a lot down there and didn't want to do

anything I wouldn't come up to you and say can I pay you money to live the way I'm living. Mr. Wynhoff said most likely if they wanted the shoreline certification.

Member Edlao asked if staff worked with the client to look at alternative arrangements. Mr. Wynhoff said what staff is talking about is resolving the violation.

11:30 AM Member Gon departed.

Mr. Tsuji said if a scientific evidence would help they could see what the results are. Mr. Kugler is not entitled to a contested case, but thinking statewide all the encroachments...Member Morgan said that is not what we are talking about. If we accept the applicants request and find out if it's filled land that is a whole another case. Isn't that correct? Mr. Tsuji confirmed that. Member Morgan said we are not going to resolve accretion at this point.

Paulie Gracie testified she is from Nanakuli related frequenting from Kahala to Aina Haina walking those coastlines picking up limu, opae and crab. At that time the owner had built the wall after the 1946 tsunami where they had to go through the water and not on the land.

Member Morgan made a recommendation that the Land Board approve the request of the applicant which is not in accordance with the staff recommendation. The applicant requested for their money back. Member Edlao said you want to deny the staff recommendation to return the money. Member Goode seconded that.

Member Edlao said here we have an applicant coming in to do the right thing and they are slapped on the hand. It's a difficult situation. I understand the implications later on from the Department. The applicant is amendable to give back some money for whatever and we can talk about that. Whatever is fair to the Department has spent out there as far as administrative costs and maybe come to an agreement with that. If that is added to the recommendation I would support that. Member Goode said he would second that.

Member Agor said he would have a hard time supporting that because the applicant went through a process and now they want to negate what they participated in and if we do there is going to be a violation out there. One of the reasons why we give easements is to address issues like this young lady presented to us. Those types of easements protect the State against the claims of access.

Member Edlao said the applicant knows what is going to happen and they will have to deal with the violation that could surpass what they are asking for. I still support the motion as submitted.

Member Goode said he supports the motion and hearing from the applicant helps a lot. There were changes that happened globally, nationally and personally and decided not to do what they wanted to do. Some day somebody on that property will come back to us and go through this easement process. I think he has a right to get his money back and

we ought to tell him he'll get it in 30 days. Right now make it \$130,000 divided by staff time without itemizing and just cut to the chase and get it over with. If you are going to do an enforcement action then let's do them all along this stretch because this is not the only one. Let's look at the whole thing and not single out somebody. It's brought to our attention it needs to get resolved. Chair Aila asked for clarification. Member Goode said to release the money. As for the enforcement side those are his thoughts that he doesn't want to tie it to this one action, to this one person.

Chair Aila said the Chair's information is not to support the motion because of the potential impacts it's going to have on the Department where he took the vote:

Aye: Board members Morgan, Goode and Edlao.

Nay: Member Agor and Chair Aila

There was some discussion and Mr. Wynhoff said that there needs to be a majority of the Board not just majority of quorum.

There was some discussion on deferring with a full Board.
Member Goode deferred to the next meeting. Member Morgan seconded it.

There were some discussions about the next Board meeting. Mr. Wynhoff said it's possible that we talked about borings and maybe given what we heard today go back and do some more homework to get more evidence for the Board. My suggestion is to defer to Mr. McConnell, but leave it to us to decide.

There were discussions between Mr. McConnell, Mr. Kugler, Mr. Wynhoff and the Board.

The Board and the Board secretary discussed which members will be missing upcoming meetings.

Member Edlao and Mr. Tsuji talked about the removal of the violation by the applicant and the affects of the neighboring shoreline getting OCCL involved which is the reason for legitimizing it. And that removal of the encroachment you will get your money back, but that is not before the Board which would come back if we took that route.

Member Edlao said he wants something definite next time – either removal, violation or accept the easement or whatever because he doesn't want to haggle. Mr. Tsuji said they will try to resolve it. Member Edlao said to clarify the alternatives and come to a final decision. Mr. Wynhoff said I don't think you will be able to clarify the alternatives. The alternative is going to be a violation. Member Edlao said it doesn't say that here when you come back have a definite one. Say removal of violation. It could be a lot of things.

There were more discussions between the Board and Mr. Tsuji that this is a significant case. Member Morgan suggested saying non-refundable when the applicant did it. He sympathizes with the precedent situation with the State and with what is right.

Member Agor said he supports the deferment with a full Board which the applicant deserves.

Member Goode said he would second it. He asked the applicant what is his 5-10 years plan for this property. Mr. McConnell said by 5 years they will probably not have this home and be on the mainland. Member Goode asked would he be amendable to having the money returned and a lien placed on the property for the same amount of money so that when the property is transacted or if we put a sunset on that when proceeds from the sale the State gets a \$130,000 that way we can protect the easement get some of your money back and deferred to a time when the property is sold. Mr. Wynhoff said I think you could legally do it. Mr. Kugler said something like that has some ramifications if his client has an existing mortgage or tries to get a mortgage the presence of liens could put him into violation of mortgage and who knows what other consequences are. Somebody else will be before you having to deal with the same problem and our preference is to get the money back. This is a regional if not larger problem for the State. Member Goode said it was just an idea and he asked he look at that more closely. Mr. McConnell said the house is not in good shape that it may need to be bulldozed. Mr. Kugler said they would like a date certain. There were discussions about end of July. The Board secretary said July 22nd. One Board member said he wasn't going to be there and a couple Board members were out at the first July meeting. Member Sam Gon is out on June 23 and July.

Member Goode made a motion to defer this item until there six Board members and to work with the applicant. Member Morgan seconded it.

Deferred (Agor, Goode)

12:05 PM RECESS

12:13 PM RECONVENED

Item E-2 Request for Approval for Sale of Eighteen (18) Leases (up to 20 years) at Public Auction for Recreational Residence Purposes, Waimea and Koke'e State Parks, (Kona), Kaua'i.

Dan Quinn representing State Parks reminded that the Board made the decision some years ago to auction off all of the recreational residences. The Legislature subsequently passed a bill requiring negotiating with the existing lease holders which were ultimately consummated. Part of Act 223 which is part of the submittal required that any of the cabins that were either people who chose not to renew or negotiate or were vacant at the time be auctioned off in a three tier auction. First available to residents of Kauai and should there be any leftover after that auction out to residents of the State of Hawaii and if any leftover after that, in a general auction. This is a request to put the 18 cabins out to that three tiered auction. The Department was using two cabins for problematic purposes and the previous Chair decided the Department would retain one cabin. Staff is proposing use of a different cabin than had been used before by the Department. We are

asking to be allowed to use the appraisal from the original negotiations of the leases - \$3500 up to \$6000 a year. The cabins are not allowed to be used for more than a 180 days per year which is for recreational residence purposes and not full time residences.

Member Agor asked what the qualifications are for bidders. Mr. Quinn said staff will work with the AG's Office to set up standards to be sure that they are bonafide residents of Kauai and then statewide. Mr. Wynhoff said at one time we were contemplating doing new leases at Kahana Valley where bidders were going to be restricted to residents of the valley and there were various different situations. Some are or are not and there will be some that are not clear.

Member Agor asked the people have to be there in person to bid. Mr. Quinn said they will do an on-site process unless advised otherwise. Mr. Wynhoff said there are other things to be qualified, financially where they will be advised by Land Division but there will be too much difficulty to get qualified and will follow whatever language the statute says.

Member Edlao asked this auction will be held on Kauai and for someone on the Big Island. Mr. Quinn acknowledged that it will all be held on Kauai. A third tier maybe not held there.

Unanimously approved as submitted (Agor, Morgan)

Item E-1 Sale of Two Concession Leases by Means of a Sealed Bid Auction for Business and/or Commercial Purposes, Wailua River State Park, Wailua, Kauai, Tax Map Key: (4) 3-9-004:010

Mr. Quinn requested a withdrawal of this item to be re-submitted later.

Withdrawn (Agor, Morgan)

Item F-1 Request for Authorization and Approval to Issue a Papahanaumokuakea Marine National Monument Research Permit to Dr. Carl Meyer, University of Hawaii, Hawaii Institute of Marine Biology, for Access to State Waters to Conduct Top Predator Feeding Habits and Movement Research Activities

Francis Oishi representing Division of Aquatic Resources (DAR) gave some background on this item and that staff was here for questions.

Unanimously approved as submitted (Morgan, Agor)

Item F-2 Request for Authorization and Approval to Issue a Papahanaumokuakea Marine National Monument Research Permit to Dr. Brian Bowen, University of Hawaii, Hawaii Institute of Marine

Biology, for Access to State Waters to Conduct Genetic Survey Activities

Mr. Oishi explained that this is continuation of previous work where the applicant will be adding a few more plant species and the applicant's representative is here.

Member Edlao asked why you decided not to use clove oil. Dr. Carl Meyer representing UH – HIMB explained clove oil is potentially a hazardous substance that was not considered for Papahānaumokuākea. It was considered safe to use in Great Barrier Reef. They decided for safety to withdraw that application.

The Chair asked what was being used instead. Dr. Meyer said they will try to capture by nets and pole spear, mechanical means. They tried earlier and have not been successful. Chair Aila asked why would people be hesitant in using clove oil. Dr. Meyer said he believes uninformed by his opinion. He distributed a hand out of a study and explained that it was the survivorship of the corals and reef and no detrimental affects left after that.

It was asked by Member Edlao how long it precipitates. A lady in the audience said if its 10 millimeters or less there is no affect.

They will be collecting black corals as questioned by Member Edlao.

Member Edlao asked wasn't there a moratorium on the taking of corals. Mr. Oishi said it was the Department's decision not to process these types of applications whether they are special activities permits or northwestern permits because there was a question with the environmental review laws and the interpretation at the time. It was a policy call. Not a moratorium. Member Edlao said he jus wanted clarification.

Unanimously approved as submitted (Morgan, Goode)

12:28 pm Bill Wynhoff departed. Julie China took his place as Deputy Attorney General.

Item F-3 Request for Authorization and Approval to Issue a Papahānaumokuākea Marine National Monument Research Permit to Megan Donahue, University of Hawaii, Hawaii Institute of Marine Biology, for Access to State Waters to Conduct Bioerosion Study Activities

Mr. Oishi related the background of this item.

Megan Donahue representing DAR described bioerosion is all the little organisms that settle on that calcium carbonate skeleton typically on the dead part. They make a living boring little holes and filter feeding little bits in the water. It's important to the reef because at the rate in which they erode that structure determines the accretion/erosion balance. Also, changes with the change in the environment.

Member Edlao said ensure you will be careful with mercuric chloride. Ms. Donahue said they will and explained how it will be used.

Unanimously approved as submitted (Morgan, Agor)

Item F-4 Request for Authorization and Approval to Issue a Papahānaumokuākea Marine National Monument Research Permit to Dr. Charles Littnan, National Marine Fisheries Service, Pacific Islands Fisheries Science Center, for Access to State Waters to Conduct Juvenile Hawaiian Monk Seal Survival-Enhancement Activities

Mr. Oishi conveyed some background on this agenda item.

Dr. Charles Littnan testified reminding the Board this was first presented last year and related how monk seals carry a lot of parasites that this is an application to test the affects of de-worming drugs. They targeted particular individuals at Laysan and it was successful. It involves analyzing and they are prepared to do it. There are second captive care short pens. Kure has a problem with aggression and it's a place to recover. There are emaciated pups where they help to feed them allowing these pups free movement. If there is a need to transport it will be in the short pens, but there is not a lot of money which is used for emergencies.

Member Edlao asked where the seals are held at. Dr. Littnan said at Waikiki Aquarium, Kaneohe Marine Base, Ford Island or the Marine Mammal facility at NELHA. Member Edlao asked how long are they held for. Dr. Littnan said it varies on the case. Undernourished ones take about one or two months to fatten them up.

Member Edlao asked whether after feeding the seals for many months would they be trained to be feed by humans and how are you going to reintroduce them. Dr. Littnan said that is a concern and why there are a limited number of people up there. There are disease tests and make sure they are acclimating. If a seal is rehabbed back to the wild and aren't doing well they could supplementally feed them. You can mitigate those adverse things.

Member Agor asked if there was no mankind would the monk seals disappear. Dr. Littnan said that would be total conjecture, but he is guessing they would be fine. They are doing well in the Main Hawaiian Islands (MHI), but not so well in the Northwest Hawaiian Islands (NWHI). The species has recovered before. He described the current pups in the Mains. If pups are born here they tend to stay here – Molokai pups tend to stay in the Maui County area. Member Agor asked they do well with the assistance of man. Dr. Littnan said in an indirect fashion which he described as better food.

Unanimously approved as submitted (Morgan, Edlao)

Item F-5 Request for Approval of Special Activity Permit 2011-76 for Ms. Eva Schemmel, University of Hawaii at Manoa, Zoology Department, to Use Clove Oil to Take Non-regulated Goby on Oahu

Mr. Oishi reported what this item was for.

Eva Schemmel, University of Hawaii – Manoa, Zoology Department testified answering Member Edlao's question why are you using clove oil and it's because gobys are notoriously hard to catch that she didn't believe there will be anything left in the water. She related that she is taking all precautions to minimize any hazards by using 1 mm or less that this amount slows the goby down comparing to three glasses of wine. The waves will disperse the clove oil. The gobys wedge themselves in the cracks and it makes it hard to get them out. This has been done before in the 1980s. Ms. Schemmel had distributed a study done in 2007 testing clove oil in the field and had no affect on coral.

Chair Aila asked you will be going after gobys where there is no coral and Ms. Schemmel confirmed that they prefer areas away from coral. The reason they are using this species is because it was used before and there is historical data.

Member Edlao asked whether this is exempt and Mr. Oishi acknowledged that they provided a determination of exemption which falls under basic research.

Member Edlao asked if she tried other methods. Ms. Schemmel said they did and it was not feasible.

Unanimously approved as submitted (Morgan, Goode)

Item D-7 Issuance of Revocable Permit to International Catering Concepts, Inc. for Beach Activities Purposes to be held from June 28 to July 1, 2011 at Unencumbered State Lands, Kahala, Honolulu, Oahu, Tax Map Key: (1) 3-5-023:seaward of 041.

Mr. Tsuji said he had nothing to add to this submittal nor did the applicant.

Unanimously approved as submitted (Morgan, Agor)

Item F-8 Request for Approval of Special Activity Permit 2011-81 for Ms. Ilysa Igelsias, University of Hawaii at Manoa, Zoology Department, to Conduct Research on State Regulated Aholehole on Oahu

Mr. Oishi presented some background on this item.

Member Edlao asked whether this was only on Oahu and it is per Ilysa Igelsias.

Unanimously approved as submitted (Morgan, Edlao)

Item F-6 Request for Approval of Special Activity Permit 2011-67 for Ms. Mareike Sudek, Victoria University of Wellington, to Conduct Research on State Regulated Stony Corals on Oahu

Mr. Oishi conveyed the background on this item.

Unanimously approved as submitted (Morgan, Agor)

Item F-7 Request for Approval of Special Activity Permit 2011-71 for Dr. Greta Aeby, University of Hawaii at Manoa, Hawaii Institute of Marine Biology, to Conduct Research on State Regulated Stony Corals on Oahu

Mr. Oishi related the background on this item.

Chair asked what is the benefit of this study on the coral reef. Greta Aeby explained the coral disease giving the example at the Florida Keys where they are looking at the coral in Hawaii to make sure they didn't follow suit. She gave details on the disease and reported the first outbreaks at Ahihi Kinau, Maui in January 2010. March 2010 there was an outbreak in Kaneohe Bay which killed that colony within a year. There was an outbreak in Hanalei Bay. If we can understand them before the outbreaks they could control them. The problem was the sewage spills during the winter and they are looking at temperature, fertilizer, etc. and how transmitted between colonies. Over 30% loss of rice coral in Ahihi Kinau now. Kahekili also.

Unanimously approved as submitted (Morgan, Goode)

Item D-2 Forfeiture of General Lease No. S-3606, Hilo Kala, Inc., Lessee, Waiakea, South Hilo, Hawaii, Tax Map Key:3rd/2-2-50:96.

Mr. Tsuji said to withdraw this item since the Lessee paid in full.

Withdrawn (Agor, Morgan)

Item D-6 Support the County of Maui's Resolution Concerning Section of Road Known as Piihola Road Located Adjacent to State Lands in Makawao, Maui, Tax Map Keys: (2) 2-4-13:53, 54,173 and 2-4-15:6, 12, 27.

Mr. Tsuji related that these are public roads in dispute between the State and County which runs through the Forest Reserve under Act 264. He thanked the Maui Land Board members to get county funding for maintenance of the road and staff supports that. The appreciate that.

Unanimously approved as submitted (Edlao, Agor)

- Item D-1** Set Aside of Naval Air Station (NAS) Swimming Pool Site to County of Hawaii for Park and Community Purposes; Issuance of Immediate Management and Construction Right-of-Entry, Waiakea, South Hilo, Hawaii, Tax Map Key: 3rd/ 2-1-12: Portion of 149.
- Item D-4** Consent to Assign General Lease No. S-5128, Rochelle A. Arquette, as Personal Representative of the Estate of Walter Hulama Paulo, (a.k.a. Walter H. Paulo, a.k.a. Walter Paulo), Deceased, P. No. 10-1-0266, in the Circuit Court of the Third Circuit, State of Hawaii, Assignor, to Rochelle A. Arquette, Assignee, Lot 1, Phase II, Milolii-Hoopuloa, South Kona, Hawaii, Tax Map Key: 3rd/ 8-9-014:014.
- Item D-5** Amend Prior Board Actions of October 28, 2005, Item D-9 and Prior Board Action of May 27, 2005, Item D-3, for a Grant of Perpetual, Non-Exclusive Easement to Oceanic Time Warner Cable for Utility Purposes, Kamaole, Kula, Maui, Tax Map Key: (2) 2-2-1:Portion 051 and 068.

Mr. Tsuji said there were no changes.

Unanimously approved as submitted (Agor, Edlao)

- Item L-1** Appointment of Waiakea Soil and Water Conservation District Director
- Item L-2** Approval for Additional Funds to Construction Contract No. 58117, Job No. F46C732C, Kokee/Waimea Canyon State Park Water System Improvements, Makaha Ridge to Puu Ka Pele, Kauai, Hawaii
- Item L-3** Approval to Execute Supplemental Contract No. 1 to Contract No. 57712 for Professional Services, Ala Wai Small Boat Harbor, 700 Row Improvements Honolulu, Oahu, Hawaii
- Item L-4** Application for a DLNR Dam Safety Construction/Alteration Permit, Permit No. 51 - Aahoaka Reservoir (KA-0063) DAM Alteration and Removal, Wailua, Kauai, Hawaii
- Item L-5** Certification of Election of East Kauai Soil and Water Conservation District Director

Dickie Lee representing Engineering Division conveyed that there were no changes to the above items.

Unanimously approved as submitted (Morgan, Goode)

Adjourned (Goode, Morgan)

There being no further business, Chairperson Aila adjourned the meeting at 1:03 p.m. Recordings of the meeting and all written testimony submitted at the meeting are filed in the Chairperson's Office and are available for review. Certain items on the agenda were taken out of sequence to accommodate applicants or interested parties present.

Respectfully submitted,



Adaline Cummings
Land Board Secretary

Approved for submittal:



William J. Aila, Jr.
Chairperson
Department of Land and Natural Resources